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A

General Abridgment

OF

LAW and EQUITY

Alphabetically digeſted under proper TITLES

WITH

NOTES and REFERENCES

to the WHOLE.

By CHARLES VINER, *Eſq;*

Favente Deo.

ALDERSHOT *in* Hampſhire *near* Farnham *in* Surry:

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A

General Abridgment

OF

LAW and EQUITY

FH
MVSEVM
BRITANNICVM

TO THE HONOURABLE

JAMES REYNOLDS, Esq;

ONE OF THE

Barons of the EXCHEQUER.

THIS Book (being Part of A General Abridgment of Law and Equity &c.) is most humbly dedicated by

Your most Oblig'd

and Obedient Servant,

Charles Viner.

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[Given before, & inserted a second time here by a mistake to the prejudice of some Mss. copy. T. H.]

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Return thereof; Good or not. O. a
Joinder in Waſte.
Who; and what ſhall be recovered; and How. P. a

A TABLE of the ſeveral TITLES, &c.

Voluntary or negligent. What. And of what. Q. a

Equity.
- Injunction granted. In what Caſes. R. a
- Relief. S. a

Watch and Ward. A

Water-Courſes.
- The Original of them; and in what Caſes they may be diverted. A
- Action. What Action lies of a Water-Courſe, or for ſtopping or diverting it. B
- Declaration and Pleadings. Good or not. C

Waver.
- How it may be. A
- By whom Waver may be. And of what. B
- Plea. What ſhall be ſaid a Waver in Pleadings. C
- Of Pleadings. In what Caſes a Man may waive the Plea or Iſſue and plead another, or the General Iſſue after Plea entered. D

Weights and Meaſures. A

Windfalls. A

Woods. A

Wreck.
- Goods caſt overboard or wreck'd, how to be ordered, and to whom they belong. A
- Pleadings. B

Writ.
- Neceſſary. In what Caſes. And what muſt be done by Writ, or may be done by Bill, Commiſſion, &c. A
- The ſeveral Sorts of Writs. And what an original or a judicial Writ.
- Altered. The Effect thereof.
- Special or general. In what Caſes. And in what Caſes the Writ ſhall be general and the Count ſpecial. D
- Variance between the Writ and the Regiſter. E

Year, Day, and Waſte. A

UNIVERSITY.

(A) Univerſity. *Power and Privileges before the Charter* of 14 H. 8. and *by it*, and *ſince*.

1. THE Univerſities have a Charter to *impriſon for Incontinency*; but this their Charter is void. They have alſo an Act of Parliament to enable them to do this, viz. 32 *H.* 8. 10. and this is the Reaſon that the Proctors in Oxford and Cambridge may impriſon for Incontinency; Per Coke Ch. J. 3 Bulſt. 110. Mich. 13 Jac. The King v. the Univerſity of Cambridge.

2. In the 8th of H. 4. a Charter was granted to both the Univerſities of Oxford and Cambridge, to enable them in their Proceedings. They, by Force of their Charter, did proceed in temporal Cauſes in a Civil Manner, their Power being firſt by this Charter. Afterwards, by the means of the Earl of Leiceſter, they in 13 *El.* obtained a *Confirmation* from the Queen by Act of Parliament, by which their Charters were confirm'd, and that they might proceed by Force of their Charter, as before they had done, their Proceedings before by their Charter being againſt the Law of the Land. Popham was very much, and ſtrongly againſt this; but afterwards, when he ſaw that the Act of Parliament was paſs'd for them, then he wiſh'd that they would prove honeſt Men in their Proceedings. Per Coke Ch. Juſt. 3 Bulſt. 212. Trin. 14 Jac. Anon.

This Patent was void. Jenk. 97. pl. 88.—Gibb. 155.—Jenk. 117. 33.—By the Grant of 8 H. 4. they were to hold Plea of all Cauſes ariſing within the Univerſities, according to the *Courſe of the Civil Law*. And all the Judges of England were then of Opinion that that Grant was not good, becauſe the King could not by his Grant alter the Law of the Land. With this Caſe agrees 37 H. 6. 26. 2 E. 4. 16. and 7 H. 7. But now by ſpecial Act of Parliament made 13 *Eliz.* (not printed) the Univerſities have Power to proceed and judge according to the Civil Law; Per Coke Ch. J. Godb. 201. pl. 287. in Caſe of Archbiſhop of York v. Sedgwick.—Caſes of *Maihem*, *Life* and *Freehold*, are *excepted* in the ſaid Act. Jenk. 117. pl. 33.

The Univerſity had an old Charter, which they *ſurrender'd, and took a new Charter inconſiſtent in ſome Parts with the old one*; ſo that the Act of Parliament which confirm'd the Charter, went only to ſo much as conſiſted with the new-granted Charter; for it could not be a Confirmation of a Repugnancy. Gibb. 295. Trin. 5 Geo. 2. C. B. Chapman v. Wiſh.

3. A Prohibition was mov'd for to a *Suit in the Vice-Chancellor's Court againſt* certain *Brewers*, *for ſelling ill Beer and falſe Meaſure*; and the particular Exceſs of Juriſdiction alleged was, the *exacting juratory Caution*; and inſiſted, that tho' they have the Aſſiſe of Bread and Beer by Charter, yet a Power to puniſh by Fine, and to proceed according to the Civil Law, cannot be by Charter. Holt Ch. J. ſaid that before the 14 H. 8. the Univerſity had the *Juriſdiction of a Leet*, and exerciſed it in the Vice-Chancellor's Court; but the Charter of the 14 H. 8. grants them *Power of Treſpaſſes*, and that *over all Perſons* whatſoever, *if a Scholar be Party*. Adjornatur. Salk. 343. pl. 2. Trin. 1 Ann. B. R. Ruſh v. The Chancellor and Scholars of Oxford.

(A. 2) *Chancellor* of the Univerſity. *How conſider'd.*

1. IN Treſpaſs, two *ſeveral Grants* were *pleaded from two ſeveral Kings, to J. S. Chancellor of the Univerſity of Oxford, and his Succeſſors*; and admitted for good. And therefore it ſeems that the Chancellor is *incorporated.* But quære inde; for *it ſeems to be only an Office* &c. Br. Corporations, pl. 25. cites 8 H. 6. 18. 19.

(B) *Power and Privileges of* the *Vice-Chancellor's Court,* as to Suits there; and of certifying &c. the ſame.

1. THE *Chancellors* of the Univerſities of Oxford and Cambridge *may certify Excommunication*; for they do it by the King's Charter. 8 Rep. 68. b. in Trollop's Caſe, cites F. N. B. 64. (C)

2. The Defendant pray'd his Privilege, and produc'd a *Certificate from the Chancellor, that he was a Commoner of Exeter College, as appear'd to him by a Certificate of P. Rector of that College.* This Certificate, was objected to, as not being poſitive. Afterwards the Chancellor certified *that he is now a Commoner of Exeter College*, but did *not ſay* that *at the Time of the Action brought he was.* But the Privilege was allow'd. Godb. 404. pl. 485. Paſch. 3 Car. B. R. Fryer v. Dew.

Litt. Rep. 40. S. C.— Het. 27. (bis) S. C——

* S P. Per Lord Keeper North, Vern. 212. pl. 209. Hill 35 & 36 Car. 2. Stephens v. Doctor Berry.—— Or where the Freehold may come in Queſtion, as in Treſpaſs Quare Clauſum fregit, & Domum intravit &c. Litt. R. 252. Paſch. 5 Car. C. B. Criſp v. Webb.—Nor to Replevin. Gibb. 153. Mich. 4 Geo. 2. 294. Trin. 5 Geo. 2. C. B. Chapman v. Wiſh.

3. By the Charters granted to the Univerſity of O. they *may inquire of all Treſpaſſes, Injuries, and of all Pleas and Quarrels &c.* (*except of Franktenement) *where a Scholar &c. is one of the Parties &c.* W. a Scholar, call'd the Wife of B. (Principal of a Hall there) Old Bawd, and call'd his Daughter Scurvy Whore and Jade; for which they ſued him in the Vice-Chancellor's Court. W. pray'd a Prohibition; but the Court agreed that the Privilege of the Univerſity, as to Conuſance of Pleas, extends to Caſes where *Una pars eſt Scholaris*; and tho' the Defendant, who was the Scholaris, did not deſire that Privilege, but would oppoſe it, and pray'd the Prohibition, yet the Cauſe was remanded. Cro. C. 73. pl. 1. Trin. 3 Car. C. B. Wilcocks v. Bradell.

Litt. Rep. 296. S. C. in totidem verbis.

4. The Univerſity of Cambridge *claim'd* by their Charter *to be Clerks of the Market, and that they had Power by their Office to make Orders, and to execute them*; and they made an Order that no Chandler ſhould ſell Candles for more than 4 d. Halfpenny the Pound; and becauſe one R. ſold for 5 d. the Pound, they impriſon'd him. A Prohibition was granted; for that they could not *impriſon* without Courſe of Law, and as Clerks of the Market they had nothing to do but with Victuals, which Candles are not. Het. 145. Trin. 5 Car. C. B. The Univerſity of Cambridge's Caſe.

5. Bill *in Chancery* to be reliev'd againſt a *Bond* of the Penalty of 100 l. given by the Plaintiff's Father to the Defendant, who *pleaded his Privilege* that he is a Doctor in Divinity, Scholar, and Reſidentiary Student in the Univerſity of Oxford, and that he ought not to be ſued but before the Chancellor of the ſaid Univerſity, or his Deputy or Commiſſary

miſſary for the Time being; but the Plea, on Debate, was over-rul'd. Fin. R. 45. Mich. 25 Car. 2. Williams v. Roberts.

6. Bill to have a *Bond delivered up* of 100 l. Penalty, the Money being paid. Defendant *pleaded that he is a privileg'd Perſon* of the Univerſity of Oxford, viz. a Doctor of Laws, and Reſident there; which the Chancellor *certified, and demanded Conuſance* of the Matter in Queſtion, as determinable before him, or before the Vice-Chancellor, his Deputy or Commiſſary, and not elſewhere. The Court diſmiſs'd the Bill, and allow'd the Plea. Fin. Rep. 162. Mich. 26 Car. 2. Busby v. Croſs.

7. Bill by Adminiſtrator for an *Account* of Inteſtate's Eſtate, which Defendants had got into their Poſſeſſion on Pretence of ſome Debts due to them from the Inteſtate. Defendants *pleaded they are privileged* Perſons, and Members of the Univerſity of Oxford, and there Reſident; which the Chancellor *certified, and demanded Conuſance*, as examinable before him, his Vice-Chancellor, Deputy, or Commiſſary, and not elſewhere. Plea allow'd. Fin. Rep. 292. Paſch. 29 Car. 2. Powell v. Hine and Adams.

8. A Bill was brought, ſetting forth a Contract under Seal with the Defendant, for making a Leaſe of certain Lands in Middleſex, and to have Execution of the Agreement. The Defendant pleaded the Privileges of the Univerſity, to proceed in all Quarrels in Law and Equity, except concerning Freehold; and concluded to the Juriſdiction of the Court. But Ld Keeper Guilford over-rul'd the Plea, becauſe in this Caſe they cannot ſequeſter Lands in Middleſex, and ſo can give no Remedy; and becauſe the Charter of the Univerſity of Oxford, impowering them to proceed in all Pleas and Quarrels in Law and Equity &c. ought properly to be extended *to Matters at Common Law only, or to Proceedings in Equity that might ariſe in ſuch Caſes*, and *not to meer Matters of Equity*, which are originally ſuch, as to execute Agreements in Specie. 2 Vent. 362. Hill. 35 & 36 Car. 2. Draper v. Crowther.

9. Upon a *Motion for a Prohibition* to the Univerſity of Cambridge, in a Suit there in the Vice-Chancellor's Court, for *keeping a Tavern*, it was ſaid that the *Charter* of the Univerſity (tho' it be enacted is not confirm'd) and it *does not extend to ſue there for the Penalty of an Act of Parliament*; but this Suit ought to be in the King's Court, and a Recovery or Judgment there is not pleadable in Bar in the Courts here. After, in Hill. Term 9 W. 3. there having been a Prohibition granted to the Univerſity in a Proceeding againſt P. for keeping a Tavern, and a Prohibition executed, it was now mov'd for a Superſedeas to the Prohibition, or a Conſultation; but the Court ſaid that they *ought to declare, and plead their Privilege*, as was done in **Fletcher's Caſe** in the Exchequer; for it *being a Caſe not yet reſolv'd*, they would have their Privilege ſhewn; *but when it has been pleaded*, then *they would take Notice of it upon a Motion*; and it being ſaid that they had not declared, the Court ſaid that they ought to appear and demand a Declaration. And Rule was given, that they declare in a Week. Skin. 665. Mich. 8 W. 3. B. R. Univerſity of Cambridge v. Price.

(C) Privileges of the Univerſities *favour'd.*

1. THE *Privilege* of the Univerſity of Cambridge ought to be *maintain'd*, and not infring'd by this Court; Per Cur. Chan. Rep. 86. 10 Car. 1. Byat v. Pickering.

2. A *Painter* that had *dwelt long in Oxford, and* had been for many Years *of the Corporation, was choſen into an Office in the Corporation*; but he refuſing to hold, Debt was brought againſt him for the Penalty. It was mov'd to allow him the Privilege of the Univerſity, and a *Certificate* was produc'd *from the Chancellor, that he was matriculated* and regiſter'd in the Univerſity, *and a Servant to Dr. Iriſh.* But it appearing to the Court that he was *regiſter'd but two Days before his Election*, and that he was no Servant attending Dr. Iriſh, but *had his Dwelling-houſe, and kept Shop, in the Town*, and that his getting himſelf admitted was to hinder the Remedy the Town had againſt him for [not] holding his Office; the Privilege was denied by the whole Court. 2 Vent. 106. Mich. 1 W. & M. in C. B. The City of Oxford's Caſe.

(D) *Privilege. To preſent to* the *Livings of* Popiſh *Recuſants*, and whom.

If one *grants a next Avoidance* of an Advowſon, *and afterwards becomes Recuſant, and is convicted*, the Grant is void, and the Univerſity ſhall have the Preſentation; for the Act has a Retroſpect to the Commencement of the Seſſions of the Parliament 10 Rep. 53. b. 55. a. 56. Trin. 11 Jac. Chancellor of Oxford-Univerſity's Caſe.——And it ſhall not be preſum'd in Law, unleſs it be expreſsly averr'd that his becoming Recuſant afterwards was by Covin, to avoid his Grant; nor will the Court adjudge the Grant to have been made to any other Intent, than is found by the Jury. Ibid. 56. a. 57. b. ——S. C. cited by Hutton J. Winch. 97. in Caſe of Woodley v. the Biſhop of Exeter and Mannering. —— And cited per eundem Jo 26. in the Caſe of Standen v. the Univerſity of Oxford and Whitton.

1. 3 *Jac.* 1. *cap.* 5. ENacts, That *every Popiſh Recuſant convict, during the Time that he ſhall remain a Recuſant convict, ſhall from and after the End of this preſent Seſſion of Parliament, be diſabled to preſent to any Benefice or Eccleſiaſtical Living, or to nominate to any Free School, Hoſpital, or Donative; and ſhall likewiſe be diſabled to grant any Avoidance to any Benefice.*

S. 19. *The Chancellor and Scholars of the Univerſity of* Oxford, *ſhall have the Preſentation &c. to every ſuch Benefice, School, Hoſpital, and Donative,* in the Counties of Oxford, Kent, Middleſex, Suſſex, Surry, Hampſhire, Berkſhire, Buckinghamſhire, Glouceſterſhire, Worceſterſhire, Staffordſhire, Warwickſhire, Wiltſhire, Somerſetſhire, Devonſhire, Cornwall, Dorſetſhire, Herefordſhire, Northamptonſhire, Pembrokeſhire, Carmarthenſhire, Brecknockſhire, Monmouthſhire, Cardiganſhire, Montgomeryſhire, the City of London; and in every City and Town, being a County of itſelf, within the Limits of the Counties aforeſaid.

S. 20. *The Chancellor and Scholars of the Univerſity of* Cambridge, *ſhall have the Preſentation &c. to every ſuch Benefice, School, Hoſpital, and Donative, in the Counties of* Hertfordſhire, Cambridgeſhire, Huntingtonſhire, Suffolk, Norfolk, Lincolnſhire, Rutlandſhire, Leiceſterſhire, Derbyſhire, Nottinghamſhire, Shropſhire, Cheſhire, Lancaſhire, Yorkſhire,

ſhire, Durham, Northumberland, Cumberland, Weſtmorland, Radnorſhire, Denbyſhire, Flintſhire, Carnarvonſhire, Angleſey, Merioneth, Glamorganſhire; and in every City and Town, being a County of itſelf, lying within the Limits of the Counties laſt mentioned.

S. 21. *Provided that neither of the Univerſities ſhall preſent to any Benefice any ſuch Perſon as ſhall then have any other Benefice with Cure of Souls; and ſuch Preſentation ſhall be void.*

Cawley's Laws of Recuſants 233. ſays, that a Sine Cura is a Benefice, and yet the Univerſity may preſent or nominate one that has a Sine Cura; That a Donative of the King's may be Cum cura animarum. And ſo is the Church of the Tower of London. Cro. [C. 337. 361] Mich. 9 Car. **Mackallar v. Todderick.** And the Univerſity cannot preſent or nominate him that hath ſuch a Donative Notwithſtanding what is ſaid by Sir Edw. Coke, 3 Inſt. 355. it ſeems that a Deanry, Archdeaconry, Prebend &c. are not Benefices with Cure of Souls; nor had they been comprehended under the Name of Benefices with Cure of Souls, within the Statute of 21 H. 8. Pluralities, altho' the ſpecial Proviſo in that Act had been omitted; for that Proviſo is ex abundanti, and there is no ſuch to except them out of the Statute of 13 Eliz. cap 12. of reading the Articles; and yet if a Dean, Archdeacon, or Prebendary, read not the Articles within the Time limited by 13 Eliz. his Promotion is not void by that Statute; and the Reaſon is, becauſe it is a Benefice with Cure of Souls. The Opinion of Juſtice Tirrel at Lincoln Aſſiſes, in Lent 1668, who in the Caſe of Dr. **Sanderſon** denied the Archdeacon of Lincoln to be lawful Archdeacon, for that he had not read the Articles within the Time ſo limited; and affirm'd an Archdeaconry to be a Benefice with Cure within 13 Eliz. being contrary to Law, and to the received Meaning of that Statute. And as for a Prebend, the Reaſon given for the Opinion in **Bland and Paddor's** Caſe, B. R. Mich. 29 & 30 Eliz. is expreſsly againſt what is ſaid by Sir Ed. Coke; for it was there agreed, that a Layman may be preſented to a Prebend Quia non habet curam animarum. Cro. Eliz. 79. And for the ſame Reaſon a Dean, Archdeacon, Prebendary &c. may be, in this Caſe, preſented or nominated by the Univerſity; for their Promotion is not a Benefice with Cure of Souls.

2. The Univerſities ſhall *preſent to the Livings of Popiſh* Recuſants Convict; but ſhall not preſent a Perſon already beneficed Per 3 Jac. 1. 5. See the Pleadings on this in 2 Lutw. 1100. Ld. Petre v. the Univerſity of Cambridge and Woodroffe.

3 Lev. 332. Trin 4 W. & M. in C. B. S. C.

(E) Privilege to preſent to the Livings of Recuſants. *Prevented by what.*

1. IN Quare Impedit by the Univerſity of C. againſt P. and W. & al' the Plaintiff counted that P. had an Advowſon, and was convicted 2 Jac. of Recuſancy; after which the Church became void, and that thereupon it belong'd to the Plaintiffs to preſent by the Statute 3 Jac. cap. 5. W. *pleaded that the Advowſon was appendant to the Manor, and that 2 Parts of the Manor were ſeiſed into the King's Hands* by Proceſs out of the Exchequer, according to the Statute 28 Eliz. *and that the King granted the 2 Parts to W. cum Pertinentiis, and alſo all Hereditaments; but without any ſpecial Words of Advowſons*; and that thereby the Preſentation belong'd to him. But all the Court contra, for want of the Word Advowſons, or of Adeo plene & integre, & in tam amplo Modo & Forma prout &c. as P. had the ſame Manor; and ſo Writ to the Biſhop was awarded for the King. Mo. 872. pl. 1214. Trin. 14 Jac. C. B. The Chancellor &c. of Cambringe v. the Biſhop of Norwich &c.

Hob. 126. pl. 158 S. C. by Name of **The Chancellor &c. of Cambridge v. Malgrave**, that tho' in the Inquiſition and Seiſure no Mention is made of the Advowſon ſpecially, yet 2 Parts of the Advowſon will follow 2 Parts of the Manor, and then the King will preſent alone; but becauſe the Want of Words in the King's Grant was not ſufficient to carry the Advowſon from him to W. but ſerv'd only to prove the King's Title againſt the Defendant, the Court would not award a Writ to the Biſhop for the King (he being no Party to the Action) except his Title were clear againſt all the Parties to the Action; whereupon the Plaintiffs were demanded why a Writ to the Biſhop ſhould not go for the King, upon his Title appearing by the Defendant's Plea, who now confeſs'd the ſame, and diſclaim'd their Title ſet forth in their Declaration; and thereupon Judgment was given for the King, and a Writ awarded to the

the Biſhop, that notwithſtanding the Reclamation of the Defendants, he ſhould remove the Incumbent, and admit idoneam Perſonam ad præſentationem Domini Regis.

But Ibid. 26. S. C. Per Hutton J. If a Patron makes a Leaſe for Years of an Advowſon, and afterwards becomes a Recuſant, the Univerſity ſhall have the Preſentation as a future Intereſt given to them.——So if it be by *Covin*, the Univerſity ſhall have it. Arg. 10 Rep. 56. a. in Chancellor of Oxford's Caſe.—So Grant *for Years in Truſt*, the Court inclin'd that it was void. 4 Le. 245. Anon.——Godb. 216. pl. 309.

2. If Patron Recuſant *grants the Patronage in Fee* to another, in ſuch Caſe the Univerſity ſhall not have the Preſentment. And in the ſame Manner, if he grants it *in Tail for Life or Years*, during the Continuance of this Grant, he is not Patron in Poſſeſſion; and therefore the Univerſity ſhall not preſent by the Words of the Statute of 3 Jac. 5. Per Jones J. Jo. 19. Hill. 20 Jac. C. B. in Caſe of Standen v. the Univerſity of Oxford and Whitton.

3. If a Patron *acknowledges a Statute Merchant, and after becomes Recuſant* Convict, and then the Statute is *extended*, the Univerſity notwithſtanding, ſhall have the Preſentment; Per Hutton J. Jo. 26. in Caſe of Standen v. Oxford-Univerſity and Whitton.

(F) Privilege to preſent to the Livings of Recuſants, *Prevented* by *Truſts*; *and How* to be *diſcovered.*

1. *By the 1 W. & M. cap. 26. S. 2. Every Perſon refuſing to make, or to appear for the making, the Declaration againſt Tranſubſtantiation, and whoſe Name ſhall be recorded at the Quarter-Seſſions, is diſabled to make any Preſentation, Donation, or Grant of Avoidance of any Eccleſiaſtical Living, as fully as if he were a Popiſh Recuſant Convict, and the Chancellor &c. of the Univerſities ſhall have the Preſentation in the reſpective Limits mention'd in the Act 3 Jac. 1. cap. 5.*

S. 3. Truſtees of Recuſants are diſabled to preſent or grant any Avoidance of any Eccleſiaſtical Living, Free School, or Hoſpital, and the reſpective Univerſities are to have the Preſentations.

And if any Truſtee, Mortgagee, or Grantee of any Avoidance, ſhall preſent &c. to any ſuch Eccleſiaſtical Living &c. where the Truſt ſhall be for any Recuſant Convict, or diſabled without giving Notice of the Avoidance in Writing to the Vice-Chancellor of the Univerſity, to whom the Preſentation ſhall belong, within three Months after the Avoidance, he ſhall forfeit 500 l. to the Univerſity to which the Preſentation &c. ſhall belong, to be recover'd in any of their Majeſties Courts of Record, by Action of Debt &c.

S. 7. Perſons making the Declaration, and taking the Oaths before the Juſtices at the Quarter-Seſſions, where their Names were recorded, ſhall be diſcharged of the Diſability.

* See the Preamble.

2. 12 *Ann. Stat. 2 cap. 14. S. 1. Papiſts and their Children, under the Age of 21 Years, not being Proteſtants, * tho' not convicted, to loſe their Preſentations, and their Truſtees diſabled to preſent; but the reſpective Univerſity ſhall.*

S. 2. Preſentor to be examined by the Ordinary, whether he be a Papiſt or a Truſtee for ſuch.

S. 3. Preſentee to be examined upon Oath by the Ordinary, if he knows or believes the Preſentor to be a Papiſt, or a Truſtee for a Papiſt, or for the Children of ſuch, or any other Perſon; and if he anſwers not directly, the Preſentation to be void.

S. 4.

S. 4. Universities and their Presentees may bring a Bill in Chancery for Discovery, and upon neglecting to answer, the Bill to be taken Pro Confesso.

Provided that all Persons having fully answered, and not knowing any thing of such Trusts, shall be intitled to Costs.

S. 5. Patrons and their Clerks contesting the Right of the University in Quare Impedit, may be examined in Court, or by Commission or Affidavit, as the Court shall think proper, as to secret Trusts; and if, upon Discovery who is the Cesty que Trust, he shall, upon a Rule made for him to come into Court, or before Commissioners, to make the Declaration against Transubstantiation, neglect so to do, he shall be esteem'd Convict in respect to his Presentation.

In Quare Impedit, it was mov'd that the Plaintiff claiming the Right of Patronage, might be examined upon Oath touching secret Trusts for Papists, pursuant to Stat. 12 Ann. cap. 14. and a *Commission* for such Examination was order'd to issue, *directed to the 3 Prothonotaries, or any 2 of them.* Barnes's Notes in C. B. 2. Trin. 11 & 12 Geo. 2. King v. the Bishop of Carlisle, and the Master and Scholars of the University of Cambridge.

S. 6. And the Answer of such Patrons, and the Persons for whom they are intrusted, and his and their Clerks, and their Examinations and Affidavits taken as aforesaid, by Order of any Court, or by the Ordinary, shall be allow'd as Evidence against such Patron so presenting, and his Clerk.

S. 7. Provided that no Bill, or any Discovery made by the Answer thereto, or to any such Examination, shall subject the Person making such Discovery, or not answering, to any other Penalty than the Loss of the Presentation.

S. 8. No Lapse shall incur, nor Plenarty be a Bar, till three Months after the Answer put in, or the Bill taken Pro Confesso, or the Prosecution deserted, provided such Bill be exhibited before any Lapse incur'd.

S. 10. Upon Confession or Discovery of Trust, Deeds may be inforc'd to be produc'd.

3. 11 Geo. 2. *cap.* 17. *S.* 5. Enacts, That *every Grant of any Advowson of any Ecclesiastical Living, School, Hospital, or Donative, and every Grant of any Avoidance thereof, by any Papist, or Person making Profession of the Popish Religion, or any Mortgagee or Person intrusted for any Papist &c. shall be void, unless such Grant shall be made Bona fide, and for a full Consideration, to a Protestant Purchaser, and only for the Benefit of Protestants; and such Grantee shall be deem'd a Trustee for a Papist, and they and their Presentees shall be compell'd to make such Discovery relating to such Grants and Presentations, as by the Act* 12 *Ann. Stat.* 2. *cap.* 14. *is directed. And every Devise to be made by any Papist of any such Advowson &c. with Intent to secure the Benefit thereof to the Heirs or Family of such Papist, shall be void; and such Devisees, and Persons claiming under such Devisees and their Presentees, shall be compell'd to discover whether such Devises were not made with the said Intent.*

(G) Privilege to present to Livings of Recusants. *Devested.*

1. WHEN once the *Presentation* hac vice is *vested* in the University, tho' the Recusant conforms himself afterwards or dies, yet the University shall present. 10 Rep. 58. a. Trin. 11 Jac. in the Chancellor &c. of Oxford-University's Case.

2. If *Recusant* is *attaint* of Felony or Præmunire, the Interest of the University shall not be devested; Per Hutton J. Jo. 26. in Case of Standen v. the University of Oxford and Whitton.

3. If

But by Statute of 12 Ann. cap. 14. Papiſts not convicted, or not in ſuch manner as directed by the former Statutes, are to loſe their Preſentations. See the Preamble of the ſaid Statute.

3. If A. be a *Popiſh Recuſant Convict*, and by Pardon that Conviction *is pardon'd* (as it has been held it may be) *and then the Church becomes void*, Dr. Watſon ſays, Watſ. Comp. Inc. 8vo. 169. cap. 11. that he conceives that the Univerſity ſhall not have this Preſentation, for that the Patron was no Recuſant Convict at the Time the Preſentation became void, his former Conviction being taken away by the Pardon; for the Pardon hath not only pardon'd the Conviction, but alſo reſtor'd the Party to his Ability, notwithſtanding that he do not conform; for the Word *Convict is to be underſtood throughout the whole Statute*, altho' it be left out in the Middle of the Sentence in the ſaid Statute, which enacts that every Perſon who ſhall be a Recuſant Convict during the Time that he ſhall remain a Recuſant (and ſays not Convict) ſhall be diſabled to preſent to any Church &c. and cites Trin. 4 W. & M. C. B. The Lord Petre v. the Univerſity of Cambridge and Woodroffe. 3 Lev. 332. And ſays, indeed, no Perſon, ſtrictly ſpeaking, can properly be ſaid to be a Recuſant, before he be convicted of it; for it is the Conviction which in Law is the Proof and Evidence of his Recuſancy.

(H) Preſentation to Livings of Recuſants. Avoided.

1. 1 *W. & M. Seſſ.* 1. 26. ENacts, That *the Benefice to which Perſons are preſented by the Univerſities for the Recuſancy of the Patron, ſhall become void in Caſe of Abſence from the ſame above the Space of* 60 *Days in any one Year.*

(I) *Pleadings.* As to Preſentments to Livings of Recuſants.

1. IF a Quare Impedit be brought upon the Statute 3 Jac. 1. cap. 5. by either of the Univerſities, it muſt be *alleg'd* in the Count *that the Patron was a Recuſant Convict at the Time of the Avoidance*; for without that they do not enable themſelves to take Benefit of the ſaid Act; but they need not aver that he yet continues Recuſant. 10 Rep. 53. b. 57. b. 58. a. Trin. 11 Jac. The Chancellor &c. of Oxford Univerſity's Caſe.

2. Quare Impedit to preſent to the Church of H. The Univerſity pleaded the Statute 23 Eliz. cap. 1. of Forfeiture of 20l. a Month for not coming to Church; and alſo another Statute 28 Eliz. cap. 6. which enacts, that when an Indictment is found againſt him, Proclamation ſhall be made that he render himſelf before the next Aſſiſes; which, if he do not, that Neglect ſhall be a ſufficient Conviction, as if it had been by Verdict that all this was done, but that he did not render himſelf to the Sheriff at the next Seſſions, and ſo was convicted, then they plead the Statute 3 Jac. 5. that a Popiſh Recuſant Convict ſhall be diſabled to preſent to a Benefice, but that the Chancellor &c. of both Univerſities ſhall preſent within the reſpective Counties limited by that Act; and *that the Plaintiff being a Popiſh Recuſant Convict, the Church became void by the Death of the Incumbent; per quod the Defendants preſented W. who pleaded* in Abatement *the ſame Statute &c. but did not conclude this*

Plea

Plea with the Record of the Conviction hic in Curia prolat' &c. The *Plaintiff replied the general Pardon* of Jac. 2. *as to the Plea of the Univerſity, and demurr'd to the Plea of W.* And upon arguing the Demurrer, this *Plea was held ill, becauſe the Statute* 28 *Eliz.* was miſrecited, that being *that the Perſon ſhall render himſelf to the Sheriff before the next Aſſiſes*; and *the Plea is, that he did not appear at the next Aſſiſes*; beſides, he did *not ſhew any Record of Conviction by the Words hic in Curia prolat'*. And that was held a good Cauſe of Demurrer. 3 Lev. 332. Trin. 4 & 5 W. & M. C. B. Lord Petre v. Cambridge Univerſity.

(K) *Juriſdiction claim'd and allow'd.* And Pleadings.

1. THE Clerks of Oxford *preſcrib'd to have Principalities of Hoſtels before any other*, where Clerks have been before, *and to hold thereof Plea*; and the other purchas'd Prohibition and Attachment thereupon, and the Clerks obtain'd Conſultation. And it was held in a Manner (that becauſe they *did not claim to hold this Plea as of Franktenement, but as Occupiers for the Time*) that therefore the Prohibition does not lie; and this was of Plea held thereof before the Chancellor of Oxford, by their Privilege. Quære. Br. Attachment ſur Prohibition, pl. 2. cites 40 E. 3. 17. Br. Preſcription, pl. 8. cites S. C.—Br. Juriſdiction, pl. 4. cites S. C.

2. *Treſpaſs* againſt T. C. *of Goods carried away in O.* T. C. *defended the Tort and Force*, and demanded Judgment if the Court would take Conuſance; for *King H.* 4. *granted to A. B. Chancellor of Oxford, and his Succeſſors, that they ſhould not be impleaded by any Action of Things which they did, by reaſon of their Office, which they have us'd to do in Oxford*; and it has been us'd, that *every one who has a Houſe there, ſhould make the Pavements before his Houſe to the Kennel*, when it is ruinous; *and if he will not*, that *the Chancellor ſhall warn him to do it* by a certain Day, *which, if he does not do, the Chancellor ſhall do it, and then diſtrain him, and retain the Diſtreſs till* the Party has made Gree thereof; and the Plaintiff is remaining in Oxford, and the Pavement before his Houſe was ruinous, and T. C. Chancellor warn'd him to do it by a Day, and he did not do it; by which the Chancellor did it at his own Coſts, and diſtrain'd him by the ſame Goods; Judgment if the Court will take Conuſance. Per Cott. Juſt. *You have juſtified*, therefore have affirm'd the Juriſdiction of the Court; for *you ought to have pleaded the Grant, which is, that you ſhall not be impleaded* &c. and demanded Judgment ſi Curia cognoſcere velit; and yet upon ſuch Plea it is not good, becauſe the King ſhall do a Tort to none; for a Grant, that a Man ſhall not be impleaded, is void. And after Rolf waiv'd the Plea to the Juriſdiction, becauſe the Opinion of the Court was againſt him. Br. Juriſdiction, pl. 39. cites 8 H. 6. 18.

3. William Lowgher appear'd and anſwer'd, but Robert Lowgher claim'd the Privilege of the Univerſity of Oxford; but becauſe the ſaid Doctor Lowgher was *join'd with* William Lowgher in the Bill, who was *not ſubject to the ſame Juriſdiction*, therefore ordered Proceſs to be awarded againſt him, to ſhew other Cauſe why he ſhould not anſwer. Cary's Rep. 79. cites 18 & 19 Eliz. White v. Robert Lowgher Dr. of Divinity, and W. Lowgher.

If an Action be brought *againſt a Scholar, and another who is not one*, in this Caſe the Scholar (another being join'd with him) ſhall not have the Privilege or Benefit of the Charter. Arg. Het. 28. (bis) in Wilcock's Caſe, cites 14 H. 4. 21.——Litt. Rep. 41. cites S. C. accordingly.

Nelſ. Abr. Tit. Privilege 1299. (F) pl. 2. cites Same Book; and ſays it was adjudg'd on Demurrer that he was not capable. Brownl. has only the Word (Seem'd) as here.

4. In Debt on Bond made at C. in the County of Surry, the Defendant pleaded the Privilege of the Univerſity of Cambridge granted by Queen Eliz. for Scholars &c. and their Servants upon *Contracts made within the Univerſity*; and ſhews that the Bond was made in Cambridge, and that he was a *Servant* of the Scholars, viz. *Bailiff of King's College* in that Univerſity, and inhabiting within the Town of Cambridge, and Precincts of that Univerſity; and therefore a privileg'd Perſon of the ſame: And upon reading the Record, it ſeem'd that the Defendant being a Bailiff of the College, is not capable of the ſaid Privilege. Brownl. 74. Trin. 13 Jac. Carrell v. Paske.

5. In Treſpaſs for an *Aſſault and Battery at B. in Com. Hartford*, the Defendant *pleads that he was Servant to a Scholar of St. John's College in Cambridge; that they are to have Conuſance there, and not to be drawn out of the Univerſity*; and ſhew'd their Charter for Cambridge and for Oxford, and the Act of 13 Eliz. for Confirmation of the Charter for Oxon and for Cambridge. The Plaintiff demurs, becauſe the Defendant takes no Traverſe, which he ought to have done with an *Abſque hoc, that he was culpable in any Place extra Univerſitatem Cantabrigiæ*, that ſo they might have taken Iſſue. The whole Court clear of Opinion, that the Defendant here ought to have concluded his Plea with a Traverſe; and ſo by the Rule of the Court, Judgment was given for the Plaintiff. 3 Bulſt. 282. 14 Jac. Payn v. Worth.

6. In *Ejectment for a Houſe in Oxford*, the Defendant pleaded the Privilege of the Univerſity, and that he ought to be ſu'd before the Vice-Chancellor, according to their Courſe of Proceedings there; and ſet forth their Charter, whereby they had Conuſance of all Suits, Contracts, Covenants, Quarrels (except concerning Freehold) and that this being a perſonal Action, they ought to have Conuſance thereof. But all the Court held, that the Vice-Chancellor had no Juriſdiction in this Caſe, becauſe in this Action he ſhall recover Poſſeſſion, and have an Hab. fac. Poſſeſſionem, and ſo he that has a Freehold may be put out of Poſſeſſion; But in an Action of *Covenant*, where the Plaintiff ſhould recover Damages only, it ſeems it would have been otherwiſe. Cro. Car. 87. pl. 9. Mich. 3 Car. B. R. Halley's Caſe.

S. C. cited by Hale Ch. B. Hard. 507. in Paſch. 21 Car. 2. in Caſe of Caſtle v. Litchfield, and ſaid that this Caſe of Wilkins was no Precedent for that Caſe of Caſtle v. Litchfield, as it was cited by the Counſel to be, becauſe he ſaid it was declar'd that the Conuſance was not allow'd, both becauſe of the *Laches of the Defendant*, and upon a particular Reaſon of *Copartnerſhip*.

7. On a *Bill* in Equity *in the Exchequer, as Debtor and Accountant, againſt J. S. who had the Privilege of the Univerſity* of O. he pleaded his Privilege, and ſet forth their * Charter of Exemption &c. Hale Ch. B. ſaid, that the general Privilege of a Perſon, as Member of the Univerſity, does not toll the particular Privilege of this Court, and that an Accountant has a more particular Intereſt in his Privilege than a Debtor, becauſe *by* 1 *R.* 3. *cap.* 13. *an Accountant is not ſuable elſewhere*, and that here the *Privilege of the Univerſity has not theſe Words, Licet tangat nos*; and ſo the Privilege was diſallow'd. Hard. 188. pl. 15. Paſch. 13 Car. 2. Wilkins v. Shalcroft.

* See the Caſe of Caſtle v. Litchfield at pl. 9.

8. The *Vice-Chancellor*, and not the Chancellor, *demanded Conuſance*, and yet the Conuſance was allow'd; for the Court here is to ſuperſede upon Notice of the Patent. Hard. 504. 510. Paſch. 22 Car. 2. in the Exchequer, Caſtle v. Litchfield.

9. *Aſſumpſit* was brought in the Exchequer *by Quo Minus*. The Univerſity of Oxford demanded Conuſance by *Charter* of 14 H. 8. and confirm'd by Parliament 13 Eliz. which *gives them Conuſance of all Suits ariſing*

ariſing any where againſt any Scholar, Servant, or Miniſter of the Univerſity depending before the Juſtices of B. R. C. B. and others there mention'd, and before any other Judge, tho' the Matter concerns the King; but the Court of *Exchequer is not mention'd in that Clauſe; but in the Clauſe which gives them all Fines impos'd upon them in any Court, there the Court of Exchequer is nam'd.* Hale Ch. B. held, that the Privilege extends to a Quo Minus; for the Privilege of a Debtor only intitles himſelf to the Court, but is no Bar to any other Privilege; and that it alſo extends to the Court of Exchequer, becauſe the Grant begins with Superior Courts, as B. R. &c. and then deſcends to other Inferior Courts &c. and theſe Words are ſufficient to comprehend the Court of Exchequer, which is not ſuperior to B. R. or C. B. And Conuſance was allow'd accordingly. Hard. 504. Paſch. 21 Car. 2. in Scacc. Caſtle v. Litchfield.

10. An *Indebitatus Aſſumpſit* was brought *againſt the Preſident* &c. *of a College* in Oxford, for 60 *l. due for Butter and Cheeſe* ſold to them. The Chancellor demanded Conuſance, by reaſon of its being a perſonal Action where Scholars are concern'd; and the Demand was allow'd. Mod. 163. pl. 2. Mich. 25 Car. 2. C. B. Magdalen College's Caſe.

11. A *Bill* was brought *againſt a Tutor* in Oxford, *for an Account of Monies received on Account of his Pupil.* The Chancellor, by Inſtrument in Writing, ſet forth the Privilege of the Univerſity Charters, and Confirmation &c. by Act of Parliament; and that the Defendant was a Scholar, and that they had a Court of Equity, and pray'd that Defendant be diſmiſs'd. The Lord Keeper did not allow the Claim, and ſaid that *Cognizance of Pleas in Equity* could not be granted, tho' Precedents were ſhewn of the ſame Claim allow'd in Q. Elizabeth's Time. He ask'd if any could be ſhewn in Lord Elſemere's or Coventry's Time; but none could be ſhewn; and ſo diſallow'd the Claim, ſaying it *muſt be put in by way of Plea*; but declar'd it ſhould be *ſufficient to aver the Defendant to be a Scholar Reſident* &c. *without Oath.* Chan. Caſes 237. Mich. 26 Car. 2. Prat v. Taylor.

In *Treſpaſs for* Aſſault and *Falſe Impriſonment againſt the Vice-Chancellor* of Oxford, the Chancellor *claim'd Conuſance by Attorney*, and *ſet forth the Privileges* of the Univerſity, confirm'd by

Act of Parliament, *which directed it to be allow'd upon any Notification or Signification* of ſuch their Privilege; but the Court rejected it, becauſe he *had no Warrant of Attorney in Latin, under the Seal of the Chancellor*; for it ought to be claim'd either in Perſon, or by Attorney, or otherwiſe there is no Party in Court to claim it. Show. 352. Trin. 4 W. & M. Parker v. Edwards & al'.

12. Caſe was brought againſt the Defendant, a Member of the Univerſity, inhabiting within their Juriſdiction. The *Bill was of Eaſter-Term* 11 Ann. and the Defendant had an *Imparlance till the firſt Day of Trinity-Term* following; after which, and before Plea pleaded, the Univerſity of Cambridge, by their Attorney, demanded Conuſance, and ſet out the Letters Patent, and Act of Parliament of Queen Elizabeth before mention'd; and the Claim was diſallow'd, becauſe it was not made the firſt Day. Cited 2 Ld. Raym. 1339. in Caſe of the King v. Cambridge Univerſity, alias Dr. Bentley's Caſe, as ſo held Hill. 11 Ann. B. R. Perne v. Manners.

10 Mod 125. S. C. by the Name of The Univerſity of Cambridge, held accordingly per tot. Cur. and that the Act of Parliament is wholly ſilent

as to the Time and Manner of claiming, and therefore is to be govern'd by the Rules of Law; and that there is no Reaſon why the Rules of Law ſhould not govern the Time of Pleading, as make it neceſſary to be pleaded at all.——No Claim can be by the Univerſity after Imparlance; Per Holt Ch. J. Show. 352. Trin. 4 W. & M. in Caſe of Parker v. Edwards & al'.——S. P. Per Cur. Barnard. Rep. in B. R. 66. Trin. 2 Geo. 2. in Caſe of Boot v. Graham.——But notwithſtanding ſuch Objection, the Privilege was allow'd Per Curiam. Godb. 1404. pl. 485. Paſch. 3 Car. B. R. Fryer v. Dew.

13. A Bill being brought in this Court, for a *Diſcovery of* the *Perſonal Eſtate* of Dr. Aldridge deceaſed, and an Injunction granted thereupon, *the Univerſity of Oxford claim'd Conuſance* of the Cauſe, *for that both Plaintiff and Defendant were Scholars of the Univerſity.* Upon hearing Counſel

ſel ſeveral Times, and View of Charters, and the Statute of Eliz. and Precedents, Harcourt C. order'd the Bill to be diſmiſs'd, *and allow'd* an excluſive Conuſance in Equity, *touching Chattels*, to the Univerſity; Per Harcourt Chanc. MS. Rep. Trin. 12 Ann. in Canc. Alderidge v. Stratford.

Ibid. 65. Trin. 2 Geo. 2. the Court ſeem'd of Opinion that the Affidavit was neceſſary; but this Matter went off, by Reaſon of Exception taken by Page J. viz.

14. Exception was taken to the Manner of the Chancellor's Claim of Conuſance, the Defendant's *Reſidence* being only *certified* by the Chancellor, *and not verified by Affidavit*. The Court ſeem'd to be of Opinion that this Exception had a good deal of Weight in it; for they ſaid a Judge cannot certify a Matter of Fact of this Sort, which will be final, but only Matters appearing upon Record; and they ſaid that the *bare being upon the Matriculation Roll* will not be enough in this Caſe, but it is equally *neceſſary that ſuch Perſon ſhould be reſident* in the Univerſity. So upon this Exception it ſtood over to another Day. Barnard. Rep. in B. R. 49. Paſch. 1 Geo. 2. Boot v. Graham.

that the *Demand* of Conuſance *ought to have been entered on the Roll before they came to apply to have it allow'd.* And all the Court were of that Opinion, and that it ought not to be allow'd to be enter'd Nunc pro tunc; for Bars to the Juriſdiction ought to be ſtrictly purſued; and this, they ſaid, is the Reaſon why you cannot make ſuch an Application as this after Imparlance.

For more of Univerſity in general, See other Proper Titles.

(A) Void or Voidable.

Br. Baron and Feme, pl. 43. cites S. C.

1. BOND of a *Feme Covert*, *Monk*, *and Infant*, are void; and where *ſuch Perſon and another is bound* the other ſhall be ſued alone, and the Writ ſhall not abate. Br. Obligation, pl. 26. cites 14 H. 4. 30. and 33.

2. Things void, or determin'd, cannot be made good, but muſt have a new Creation. Br. Bar, pl. 27. cites 21 H. 6. 24.

But if an *Act be made void by Act of Parliament*, it ſhall avail to no Intent or Purpoſe at all; As a Simoniacal Preſentation does not ſo much as amount to a Claim. Arg. Hard. 47. in Caſe of Jones v. Clerk, cites Co. Litt. 120.

3. *Void Things are good to ſome Purpoſe.* Fin. Law 8vo. 62.

4. *Leaſe by the Husband of the Wife's Land*; the Husband dies, the Leaſe is not void, but voidable by the Wife's Entry. Arg. 3 Bulſt. 272. cites Pl. C. 65. Browning v. Beeſton.

Poph. 37. S. P. Per Cur. in Stocks's Caſe, S. C.

5. *Preſentation*, *Inſtitution*, *and Induction of a Layman*, is not void, but only voidable; Per Popham. Cro. E. 315. Hill. 36 Eliz. B. R. in Caſe of Pratt v. Stocke.

6. That which is void *as a Statute*, cannot be good *as a Bond.* Cro. E. 319. Fullhaw v. Aſcue.——Contra Ibid. Hollingworth v. Aſcue.

7. A *Feoffment* once effectual, cannot be made void by any Words in it, without Entry; and it is not like a *Bargain of Goods*, or a *Bond*, or a *Leaſe for Years*, which by Words in it (as that it ſhall be void and of no Effect) may be diſſolv'd and made of no Effect, becauſe that as by the

the ſealing a bare Contract, it may be made perfect and effectual without other Circumſtances, ſo may it be defeated by ſuch bare Means, without other Circumſtance. But it is not ſo in Caſe of an Inheritance or Freehold, which can't be effectual by the bare Delivery of a Deed, unleſs Livery be made thereupon; Per Popham Ch. J. and Fenner J. Poph. 100. Mich. 37 & 38 Eliz. in Caſe of Goodale v. Wyat.

8. *Bond void in Part by a Statute Law*, is void in toto; but at *Common Law* 'tis good as to the legal Part, and void as to the illegal. 3 Rep. 82. b. 83. a. in Twine's Caſe, cites 38 Eliz. C. B. Lee v. Colſhill.

9. A *fraudulent Gift* of Goods is not void by the Statute 13 *Eliz.* againſt all, but only againſt his Creditor; but remains good againſt himſelf; Per Anderſon. Cro. E. 445. in Caſe of Upton v. Baſſet.

10. *Feoffment upon Maintenance* or *Champerty* is not void againſt the Feoffor, but againſt him that hath Right; Per Beamond J. Cro. E. 445. in Caſe of Upton v. Baſſet.

11. Of a void Act or Deed every *Stranger may take Advantage*, but not of a voidable one; As if there are 2 Jointenants within Age, and one makes a Leaſe for Years, and dies, the other ſhall avoid it, becauſe the Leaſe is utterly void; but if the one leaſes for Life, and makes Livery in Perſon, and dies, the other ſhall not avoid it. Per Wray Ch. J. 2 Le. 218. in Humphreſton's Caſe.

12. *Adminiſtration by the inferior Ordinary*, where there are *Bona Notabilia*, is void. Noy 96. in Caſe of Croſsman v. Hume.

13. *Infant makes a Feoffment or a* * *Leaſe*, and delivers it with his Hand, it is only voidable; but if it be executed *by Letter of Attorney*, it is a Diſſeiſin to him. 2 Brownl. 248. in Caſe of Plomer v. Hockhead.

* 2 Le. 216. in Humfreſton's Caſe; Per Gawdy J. that if he reſerve a *trifling Rent*, as 1 d. where the Land is worth 100 l. per Annum. it is void. —— His ſaying, when of Age, to Leſſee, God give you Joy of it, is an *Affirmance*; Per Mead J. 4 Le. 4 pl. 15.

14. Where the Statute of Weſtm. 2. 13 E. 1. cap. 1. ſays that *Finis ipſo Jure ſit nullus*, it is not void againſt the Party nor his Iſſue, nor him in Reverſion; but the Iſſue and he in Reverſion have Remedy to avoid it. Arg. Roll. Rep. 158. 159. in Caſe of Warren v. Smith, alias Magdalen College's Caſe.

15. So where the Statute of Additions ordains, that *if any be outlaw'd without Addition, the Outlawry ſhall be clearly void, and of no Effect*; yet it ſhall not be void without Writ of Error. Arg. Roll. Rep. 159. in Caſe of Smith v. Warren.

16. Void Things cannot be *confirm'd*, but ſuch Confirmation is void. Arg. Litt. Rep. 213.

17. Void Things are as *no* Things; as a void Award is as no Award. See Hard. 12. and 41 Arg.

Void Cuſtom, and no Cuſtom at all, are both alike. Hard. 41. Arg. —— Arg. Litt. Rep. 233.

18. A Thing may be ſaid to be *void in ſeveral Degrees*. 1ſt. Void ſo as if never done *to all Purpoſes*, ſo as all Perſons may take Advantage thereof. 2dly. Void *to ſome Purpoſe only*. 3dly. So void by Operation of Law, that he that will have the Benefit of it *may make it good*. Cart. 19. in Caſe of Keite v. Clopton.

19. *Conſent* of the Heir makes good a void *Deviſe*. Chan. Caſes 209. Trin. 23 Car. 2. Lord Cornbury v. Middleton.

20. *Deviſe void* by Miſnoſmer of Corporation was *ſupplied in Equity*, as a good Appointment of a charitable Uſe. Chan. Caſes 267. Mich. 27 Car. 2. Anon.

21. A *Parol Promiſe* was made *by an Executor* on certain Terms, to *pay a Debt of Teſtator's, and alſo a Debt of his own*. But adjudg'd for Defendant; for the Promiſe as to the one Part, viz. the Teſtator's Debt being

void by the Statute of Frauds being not in Writing, it cannot ſtand good for the other; for it *is an intire Agreement*, and the Action is brought for both the Sums, and indeed could not be otherwiſe without Variance from the Promiſe. 2 Vent. 223. Mich. 2 W. & M. in C. B. Lord Lexington v. Clerk & uxor.

And by the Iſſue's Acceptance of the Rent, is made good. Arg. 3 Le. 271. in Caſe of Butler v. Baker.

22. *Leaſe by Tenant in Tail* not warranted by the Statute, is not void, but voidable. Arg. Per Holt Ch. J. 2 Salk. 619. 620. in Caſe of Machil v. Clerk.

23. *Bond by Infant* or *Non compos*, is void, becauſe the Law has appointed no Act to be done to avoid it; and the only Reaſon why the Party cannot plead Non eſt Factum, is becauſe the Cauſe of Nullity is extrinſick, and does not appear on the Face of the Deed. 2 Salk. 675. Thompſon v. Leach.—And tho' it be *for Neceſſaries*, yet if it be with a Penalty it is void. Noy 85. Delavel v. Clare.—But Bond *of Submiſſion to an Arbitration*, ſeems only voidable. See Noy 93. Stone v. Knight.

For more of Void and Voidable in general, See **Eſtates, Faits, Grants,** and other Proper Titles.

(A) Voire dire.

1. *Eleven were ſworn*, and becauſe the *twelfth was in the Vill*, the eleven were charg'd upon Voire dire of the Value of the Land per Ann. by which they ſaid 10s. and he was amerc'd in this Sum. Br. Challenge, pl. 109. cites 20 Aſſ. 11.

2. *Inqueſt was demanded*, and 11 *appear'd*, and the Court examin'd the Jurors upon Oath, *if any other came to Weſtminſter for the ſame Cauſe, and if they had any more Hundreds than one*, tho' it was not formal; & ita factum eſt. Quod nota. Br. Enqueſt, pl. 7. cites 47 E. 3. 24, 25.

S. P. For *tho' a Jury of one County cannot have Conuſance of an Act done in another County which is local, yet a Jury of one County may know the Perſon of the Jury of another County*, becauſe they are tranſitory. Br. Jurors, pl. 4. cites 48 E. 3. 30.

3. In Aſſiſe *Joinder of the Jury of two Counties was awarded* upon the Iſſue, and 16 *of the one County came, and one of the other*; by which the 16 and the one were ſworn upon a Voire dire by Belknap, Candiſh, Inglefield, and Tank, *if there were more in the Vill of the other County, or no*; for the Jury ſhall be taken by ſix of the one County, and ſix of the other; but Kirton did not aſſent. Br. Challenge, pl. 213. cites 48 E. 3. 30.

4. Thoſe that produce an Evidence, ought to examine him in chief only; but they *againſt whom* he is brought, may examine him upon a *Voire dire*, if they pleaſe, whether he is concern'd in Intereſt. 10 Mod. 151. Paſch. 12 Ann. B. R. Bewdley Corporation's Caſe.

5. An

5. An *Iſſue was, which Charter the Corporation was to act by, whether by the ancient one, or one of later Date?* A Witneſs brought to eſtabliſh the ancient Charter, was excepted againſt, as being a *Mortgagee under the old Corporation*; which they prov'd by an Anſwer of his to a Bill in Chancery. But this Anſwer being ſo uncertainly penn'd, as that it might be true, and yet his Mortgage of ſuch a Nature as not to prevent his Evidence, it was inſiſted that he might be call'd to explain the Ambiguity of his Anſwer. And the Court was of Opinion he might, ſince his Anſwer depended upon his Veracity as much as the Evidence he could then give; and if the one be to be credited, why not the other? But afterwards his Evidence was rejected upon another Conſideration, viz. That in his Anſwer he lays the whole Streſs of his Defence upon the Matter then in Iſſue, viz. the ſubſiſting of the preſent Corporation. 10 Mod. 151. 152. Paſch. 12 Ann. B. R. Bewdley Corporation's Caſe.

6. Whether *Evidence for the Crown* may be examined upon a *Voire dire*. See 10 Mod. 192. The Queen v. Muſcot.

For more of Voire dire in general, See **Trial**, and other Proper Titles.

Voluntary Conveyances.

(A) *What* are ſo. *And what paſſes* by them.

1. A DEED made *purſuant* and in order *to the Marriage Agreement*, and on juſt and good Conſiderations of Marriage, *tho' not ſo expreſs'd* in the Deed, and of natural Affection, and Settlement of an Eſtate on his Poſterity, and no Fraud therein, *is not a voluntary* Deed. Chan. Rep. 163. Thinn v. Thinn.

On a Marriage-agreement, the Husband being under Age, the Wife's Father gave *Bond to pay* 1500 *l. on his making a ſuitable Jointure* Settlement on the Wife, *ſaying nothing as to the Iſſue*. Afterwards 147 l. per Ann. Lands were ſettled in a ſtrict uſual Manner. The Maſter of the Rolls held the Settlement good, and not voluntary or fraudulent againſt *Bond-creditors*; and that the Words of the Bond would bear ſuch Conſtruction. Chan. Prec. 520. pl 321. Mich. 1719. Brunſden v. Stratton.

2. A. ſeiſed of a *Reverſion* in Fee of a Copyhold, *agreed on Marriage of M. her Daughter to B. to pay B.* 500 *l. and to ſurrender the Copyhold*, within two Months after it come into Poſſeſſion, *to the Uſe of B. and M. and the Heirs of their two Bodies*, Remainder *to the Heirs of M.* But contrary to ſuch Intention or Agreement, *A. ſurrender'd it to the Uſe of B. in Fee*, (or at leaſt the Remainder, inſtead of being limited to M. was limited to B. in Fee.) Upon diſcovering the *Miſtake*, B. as well as A. and M. was willing to rectify it, but to do it in ſuch a manner as that it might not come to his Father's Knowledge, who had ſettled handſomely on the Marriage, but was very paſſionate and ſevere towards B. his Son. Whereupon B. executed a Deed, reciting the Surrender and the Miſtake, and

and then *covenanted to ſtand ſeiſed of the Premiſſes in Truſt for himſelf and Wife for their Lives*, Remainder in Truſt *for the Heirs of their two Bodies*, Remainder in Truſt *for M. and her Heirs*, with a *Covenant from B. to convey the ſame to thoſe Uſes.* But B. having made a Surrender to the Uſe of his Will, his Father prevail'd on him to deviſe the Premiſſes to him and his Heirs; which B did, and died. On a Bill by A. and M. againſt the Father, Lord C. King ſaid, he did not think this a meer voluntary Conveyance; for that when B. under his Hand and Seal declares and recites all this, he muſt take B.'s Intention to be as himſelf recites it; and if ſo, and that the Surrender was made differently by Miſtake, it was but Juſtice in him to rectify it, and ſettle it as was firſt intended. And decreed the Father to ſettle the ſame accordingly. 2 Wms's Rep. 464. pl. 148. Trin. 1728. Randal v. Randal.

3. *A. on Marriage ſettled a conſiderable real Eſtate on his firſt and other Sons in Tail, but no Proviſion was made therein for younger Children.* A. had B. his eldeſt Son, and ſeveral younger Children, and *a little before his Death he requeſted B. that as his perſonal Eſtate would little more than pay his Debts, B. would give 200 l. to his younger Brothers and Siſters out of the real Eſtate that would come to him on A.'s Death*; which *B. promis'd* to do. A. died, leaving G. the Defendant his Executor, who requeſted B. to give ſuch Bond; but he refus'd, till upon G.'s giving him 30 l. out of A.'s perſonal Eſtate, *B. gave Bond for 120 l. for his Brothers and Siſters.* B. *afterwards died indebted.* On a Bill brought to poſtpone the Payment of this Bond till B.'s juſt Debts be paid, the Court was of Opinion that this Bond given by an eldeſt Son, by way of Proviſion for his younger Brothers and Siſters, cannot be call'd a voluntary Bond; and order'd accordingly. Barnard. Rep. in Canc. 397. Hill. 1740. Eales v. Gee.

(B) Voluntary Conveyances. *Binding the Party.*

1. A. *On* the *Marriage of his Son ſettled ſeveral Lands* in this manner, viz. *As to Part, to* the Uſe of *himſelf for Life*, and after to the Uſe of *his Son for Life*, then to his *firſt and other Sons in Tail*; and for Want of ſuch Iſſue, to the Uſe of *the Plaintiff, who was his Brother, and his Heirs*; and *as to other Part* of the Lands, to the Uſe of the *Son for Life*, and after to the Uſe of the *Wife for her Jointure*, then to the *firſt and other Sons in Tail*; and for Want of ſuch Iſſue, to the *Plaintiff and his Heirs.* The *Son and Wife died without Iſſue* in the Life-time of A. and after their Deaths *A. got the Settlement, and cut it in Pieces*; but the Counter-part was intire, and in the Hands of A. and the *Bill* was brought *to diſcover* it, and have it preſerv'd; and the *Counter-part* being confeſs'd in the Anſwer, the Plaintiff obtain'd an Order at the Rolls to have it brought into Court, and a Motion was made to have that Order diſcharg'd; for that the Remainder to the Plaintiff was meerly voluntary, and therefore he ought not to have any Aid from a Court of Equity. But the Court would not diſcharge the Order, but made the *Deed* to be *brought into Court, there to remain, and thereby hinder A. from ſelling the Eſtate* from the Plaintiff. Abr. Equ. Caſes 168. Trin. 1691. Brookbank v. Brookbank.

Afterwards K. the Husband brought a Bill, purſuant to

2. A *Widow had* a conſiderable Jointure, and *a real Eſtate of her own purchaſing*, and alſo 1000 l. South-Sea Stock, *conveys Part of the real Eſtates* to Truſtees *to the Uſe of herſelf during her Widowhood, Remainder to S. C. her 2d Son in Tail*, Remainder over, *and covenanted to transfer* the

the *South-Sea Stock to Truſtees for herſelf for her Widowhood, and afterwards to her ſaid 2d Son*; but the Stock never was transferr'd. There were *Duplicates of the Deeds*, and they were *deliver'd into her Attorney's Hands, with a Charge not to part with them*; and often declar'd ſhe had done this for the ſake of her Children. *Afterwards ſhe married K.* Whereupon S. C. brought a Bill to have theſe Lands and Stock, and mean Profits ſince the Marriage, and the Deeds to be deliver'd to him. The Widow ſwore ſhe never gave Notice to K. of theſe Writings, and *K. ſwore that he had no Notice* of any of them *before his Marriage* with her. Lord Chancellor ſaid, as to the Widow, if ſhe had kept theſe Deeds in her own Hands, and they had been got thence, or out of the Hands of her Agent, he thought ſhe ſhould not be bound by them; but there being Duplicates, and Evidence that ſhe declar'd her Intention to be to put this out of her Power, he ſaid he ſhould make no Difficulty to decree againſt her, were ſhe the Survivor, and the only Defendant; but as ſhe was in Poſſeſſion, and viſible Owner, it is hard to decree againſt K. who had no Notice of the Deeds; and that he inclin'd to give no Relief. Afterwards, upon the Plaintiff's praying no Decree againſt his Mother or K. but only as to the Defendants who had the Deeds, that they might be deliver'd him, his Lordſhip decreed accordingly, and that the Plaintiff might ſue in the Truſtee's Name, without Prejudice to any Relief that K. might have on his Bill, and the Bill to be diſmiſs'd as to the Mother and K. without Coſts. 2 Wms's Rep. 358. pl. 103. Trin. 1726. Cotton v. King.

the Liberty reſerv'd to him by the former Decree, in order to ſet aſide thoſe Settlements, and made his Wife a Party; but it being now *prov'd, that theſe Proviſions* by his Lady, *were made* before her Marriage-treaty with K. was begun, and *in a publick manner*; that ſhe herſelf deſir'd they might be publick; that ſhe made an Entertainment for ſeveral of her Tenants, whereat being preſent, ſhe acquainted them her younger Son Stephen was to be their Landlord, in caſe ſhe married again; and if ſhe married, her 2d Husband ſhould marry her for Love. And it appearing that ſhe had reſerv'd to herſelf out of theſe voluntary Settlements her original Jointure made by Sir Thomas Cotton, her former Husband (being 420 l. per Ann. Rentcharge;) that ſhe had nine younger Children by her ſaid former Husband, who at beſt were very ſlenderly provided for; and farther, that the Plaintiff K. when he married her, was in very mean Circumſtances, an Half-pay Lieutenant in Ireland, had 2 Sons by a former Wife; and that he had a conſiderable Sum of Money with this Lady, as ſhe had been Executrix and Reſiduary Legatee of her former Husband Sir Thomas; So that it was evident there had been *no Fraud or Impoſition on K.* the Plaintiff, *who did not ſo much as pretend he could make any Settlement* or Jointure on Lady Cotton. For theſe Reaſons the Lord Chancellor diſmiſs'd K.'s Bill, as to that Part of it which ſought to ſet aſide any of the Settlements made by the Wife in Truſt &c. And as to the South-Sea Stock, tho' there was no actual Aſſignment by Deed, but only a Covenant to transfer, yet this was ſuch an Aſſignment as would bind K. for it was not like a Bond from her to pay Money, ſince here K. was to pay none, nor to part with any thing which was his; it was only a Proviſion made by her before her Marriage-treaty with the Plaintiff, that in caſe of her Marriage ſuch a Part of her Eſtate ſhould go to her Children, which was but reaſonable. 2 Wms's Rep. 606. pl. 190. Trin. 1732. King v. Cotton.

3. Sir G. Rivers, by *Settlement after Marriage (recited to be in Purſuance of Articles before, but not prov'd)* conveys Land *to the Uſe of himſelf for Life*, Remainder *to his Wife for Life for her Jointure*, Remainder *to their firſt and other Sons in Tail*; and from and after Failure of ſuch Iſſue Male, *to Truſtees for 500 Years*, Remainder *to himſelf in Fee.* The Truſt of the Term was declar'd to be, that if there ſhould be one or more Daughters, the Truſtees ſhould or might, either by Rents, Iſſues, and Profits, after the Commencement of the Term, or by Demiſe, Sale, or otherwiſe, when, and in ſuch manner as the Truſtees ſhould think fit, *raiſe and pay particular Portions to the Daughters, at 19 or Marriage*, and Maintenance in the mean Time, *after the Death of Sir G. or his Wife.* And there was a *Proviſo* in the Settlement, that *if the Daughters ſhould be under Age, and not properly educated, Truſtees might raiſe Money for their Education.* The *Wife died*, Sir G. is ſtill living, and there *is no Iſſue-male.* In 1727 G. and his Wife (one of the Daughters of Sir G.) bring a Bill to compel a Sale of the Truſt-term, to raiſe the Portion provided by the Settlement, notwithſtanding Sir G. the Father was ſtill living. Lord Chancellor ſaid, The Maintenance here is expreſsly provided to begin upon Failure

of Iſſue Male, and upon the Death of either Father or Mother; and there can be no way of raiſing it, but by Sale; wherefore &c. and this ſtrengthened by the Proviſo touching the raiſing Money for Education &c. And as to the Settlement being made after Marriage, and the Articles precedent not proved, he declared Sir G. was eſtopped; and could not ſay the Settlement was voluntary, though as to Creditors it might be otherwiſe; and decreed the Term to be ſold &c. MS. Rep. Mich. 4 Geo. 2. in Canc. Goodall v. Rivers.

(C) Binding to *Perſons claiming under the Party.*

1. UPON Evidence in a Trial at Bar, the Caſe was, That *A.* 6 *Nov.* 1645, *conveys by Indenture to W. R. and W. S. in Fee*; and *levies a Fine* accordingly, *without any Conſideration:* And 13 *March* 1645. *A. covenants to ſtand ſeiſed to* the Uſe of *himſelf for Life*, Remainder to his *firſt Son in Tail*, who is the Leſſor of the Plaintiff, *and levies a Fine* accordingly. The 28th March 1653, A. and his Wife, *with W. R. and W. S. join in a voluntary Conveyance by Fine to J. N. and his Heirs.* A. having Iſſue B. (the Leſſor of the Plaintiff) dies. *J. N. makes his Will*, and *C. and D. Executors*, and deviſes the Lands to be ſold by them. They the 19th March 1657, ſell to E. and F. for 2000 *l.* who convey to G. and his Heirs. And it was reſolved by the Court, That altho' E. and F. paid a valuable Conſideration, yet the Eſtate to J. N. being voluntary, *if the Conveyance of 6 Nov. 1645 was forged*, the Plaintiff hath good Title; But the Jury found the firſt Conveyance good, and found for the Defendant. Raym. 25. Mich. 13 Car. 2. B. R. Eden v. Chalkhall.

Chan. Caſes, 59. Mich. 16 Car. 2. at the Rolls, S. C. and in almoſt the ſame Words; but adds that the Matter was compromiſed.

2. A. made a voluntary Conveyance to B. and afterwards *a Mortgage of the ſame Lands.* The firſt Deed, on a Trial at Law, is found fraudulent. B. exhibited his Bill to redeem the Mortgage. It was decreed, That tho' the Deed to B. was fraudulent, becauſe quoad the Mortgage-Money, and Pro tanto it was voluntary; yet it was good as to the Equity of Redemption, and would paſs it; for a voluntary Deed is good againſt the Party that makes it, and his Heirs, tho' not againſt the Mortgagee. Nelſ. Chan. Rep. 101. 16 Car. 2. Rand v. Cartwright.

But where one made a Leaſe for 80 Years without Conſideration, and afterwards convey'd the ſame to his Wife for a Jointure after Marriage, it was reſolved, by the 2 Ch. Juſtices, and 3 other J. that becauſe this laſt Conveyance was voluntary, without valuable Conſideration, the Wife could not avoid the former Leaſe by averring that it was fraudulent. Cited by Beamond, Cro. E. 445. in Caſe of Upton v. Baſſet, who ſaid he was privy to this Caſe.

3. A voluntary Conveyance precedent, is fraudulent as to a *Marriage-Agreement ſubſequent.* Chan. Caſes 99. Hill. 19 & 20 Car. 2. Douglaſs v. Ward.

S. C. cited accordingly 2 Vern. 476.

4. A. *on a Quarrel with his eldeſt Son, made a Settlement of* 100 *l. a Year on his Wife, in Augmentation of her Jointure*; and after, *being reconciled* to his Son, *cancell'd the Deed*; and ſo it was *found at his Death.* On a Trial at Law, the Deed being proved to be executed, was adjudged good, though cancell'd; and the Son, on a Bill brought here, was diſmiſs'd by Ld. Somers. Cited by Lord Keeper Wright. Chan. Prec. 235. as Lady Hudſon's Caſe.

5. A. makes his *Will of Lands, and afterwards* made *a voluntary Conveyance* of the ſame Lands. No Relief againſt the Conveyance, though made for a particular Purpoſe only, which never took Effect. Cited by Ld.

Ld. Keeper Wright as the **Lord Lincoln's** Caſe. 2 Vern. 475. in Caſe of Clavering v. Clavering.

6. A voluntary Deed *cancell'd*, and the Lands *deviſed for Payment of Debts*, and Debts paid under the Will: Quære, If Equity will relieve in ſuch Caſe, ſince the Teſtator himſelf could not avoid ſuch a voluntary Deed? Vern. 132. pl. 118. Hill. 1682. Franklin v. Thornbury.

B. who was only *Ceſty que Truſt of a Term* held by Leaſe from an Hoſpital in Leiceſter for 3 Lives, a little before his Death, *by a little Scrap of Paper at an Alehouſe*, but *under Hand and Seal, ſettled this Term to the Plaintiffs his Couſins to pay his Debts, and gave them the Surplus.* Afterwards being diſſatisfied with this Settlement, which he had delivered to a Creditor, he *deviſed this Term, by Will in Writing, to his Half-Brother, ſubject to Payment of his Debts.* The Queſtion was, Whether the Deed or Will ſhould prevail. Lord Chancellor held, That there was no Colour for ſetting the Deed aſide to make way for the Will; That if a Man will improvidently bind himſelf up by a voluntary Deed, and not reſerve a Liberty to himſelf by a Power of Revocation, this Court will not looſe the Fetters he has put upon himſelf; but he muſt lie down under his own Folly. For if you would relieve in ſuch a Caſe, you muſt conſequently eſtabliſh this Propoſition, viz. That a Man can make no voluntary Diſpoſition of his Eſtate, but only by his Will, which would be abſurd. Vern. 100. pl. 87. Mich. 1682 Villers v. Beaumont & al'.——See Chan. Rep. 165. the **Dutcheſs of Hamilton v. the Counteſs of Dirlton and Lord Cranborne**, where a Deed or Grant, and Declaration of Intention, was held good againſt a Codicil of a Will, 1654.

7. The *Plaintiff* Allen, being a *Servant to Defendant's Grandmother, married one of her Daughters, who brought him a Portion of* 600*l.* with Part of which he *purchaſed the Copyhold Lands* in Queſtion, which were ſurrendered to the Uſe of the Plaintiff and his Wife, and the Heirs of their 2 Bodies; the Remainder to himſelf in Fee. The *Wife* ſoon after *died, without Iſſue*; and the *Plaintiff, with reſpect to her Memory, and in Kindneſs to the Defendant her Nephew, did, in a Fit of Sickneſs, voluntarily ſurrender the Lands to the Uſe of himſelf for Life, with Remainder to the Defendant in Fee*; and the *Defendant was admitted to the Remainder in* Fee, *and paid* 5 *l. Fine.* The *Plaintiff afterwards married again, and made a Settlement thereof, before his* 2*d Marriage, on his* 2*d Wife and her Iſſue.* The Bill was to be relieved againſt the firſt Surrender, as obtained by Surpriſe, and without Conſideration. The Cauſe was at Iſſue, but no Surpriſe proved. Both the Plaintiff and Defendant died, and the 2d Wife and her Son brought a Bill, in Nature of a Bill of Revivor; And it was inſiſted, that the firſt Surrender, being made in A.'s Illneſs, it muſt be intended by him not to bind in caſe he recovered; and that this appears by his after ſettling it on his 2d Wife and Iſſue, who are to be taken as Purchaſors. But Lord Chancellor diſmiſs'd the Bill, no Fraud or Truſt appearing in the Caſe. Vern. 365. pl. 358. Hill. 1685. Allen v. Arme.

8. A. made a voluntary Settlement of Lands, *ſubject to ſome Annuities in Truſt for his Grandſon and his Heirs.* And ſome Years afterwards he made *another voluntary Settlement of the ſame Eſtate to* the Uſe of *his eldeſt Son for Life, and* to *his firſt and other Sons in Tail*, Remainder over; and *by Will gave a conſiderable Eſtate to his Grandſon.* It was proved, that *A. always kept the firſt Settlement* in his Cuſtody, *and never publiſhed it*; but it was *found after his Death* amongſt waſte Papers; and the After-Deed was often mentioned by him; and he told the Tenants, that the eldeſt Son was to be their Landlord, after his Death. Yet the Bill was diſmiſs'd, as to any Relief againſt the firſt Deed; but decreed the Payment of the Annuity and Arrears; and afterwards this Decree was affirmed in Parliament. 2 Vern. 473. Hill. 1704. Clavering v. Clavering.

Chanc. Prec. 235. pl. 197. S. C. ſtates it thus, viz. A Father, in 1684. makes a voluntary Settlement on his eldeſt Son and his Heirs, without any Power of Revocation; and afterwards makes another Settlement of the ſame Lands to his 2d Son for Life, with Remainder to his firſt and other Sons in Tail Male, and dies. After his Death the firſt Deed came to the Hands of his eldeſt Son's Heir, and the other to the Hands of the ſecond Son; who brought a Bill to ſet aſide the firſt. [Nothing is mentioned in the Report itſelf, as to any Order or Decree of the Court in this Caſe: But in the Margin it is added thus, viz.] Per Cur. Both Deeds being voluntary, the Proviſion for a younger Son is no ſuch Conſideration as to induce the Court to ſet aſide the firſt Deed.——And Abr. Equ. Caſes, 24. (C) pl. 6. has the S. C. as from a MS. accordingly.

9. A.

S. C. at the Rolls, Paſch. 4 Geo. 1. The Maſter held, that the Plaintiff ought to have Relief, tho' claiming under a voluntary Conveyance; for that the Suppreſſing and Deſtroying the Deed was a Fraud, tho' done by the Grantor herſelf, and tho' the Defendant was not aiding nor abetting to it; and that a Volunteer ſhall be aided in a Court of Equity againſt a Fraud. And decreed, that the Plaintiff be quieted in the Poſſeſſion, and the Title Deeds delivered to him. MS Rep.

9. *But where A. made a voluntary Settlement* on her Nephew B. and *kept the ſame in her own Poſſeſſion*; but it was *without any Power of Revocation*; and ſome time after the Nephew's Father, by Stealth, and without the Privity of A. *got* at this Settlement; and having *an atteſted Copy* thereof, put up the Deeds (there being 2 Parts) where they were before placed by A. and *A. burns theſe Deeds, and ſettles the Premiſſes on C. another Nephew.* B brought a Bill to eſtabliſh the firſt Settlement, which was diſmiſs'd with Coſts. And after C. claiming under the After-Settlement, brought a Bill to have the atteſted Copies delivered up, and it was decreed accordingly, becauſe it was indirectly gained. 1 Wms.'s Rep. 577. pl. 168. Mich. 1719. Naldred v. Gilham.

10. B. and C. two Brothers. *Lands are conveyed to C. and his Heirs, in Truſt for J. S. a Stranger, for his Life; Remainder to B. in Tail;* Remainder *to C. in Fee.* During the Life of J. S. (the Tenant for Life) C. in Conſideration of *5 s. conveys the Reverſion to B. and his Heirs in Fee. B.* ſuppoſing he had an abſolute Fee in him, *deviſes the Lands to his Executors, to be ſold for Payment of Debts and Legacies; and makes his Brother C. and another* Perſon *Executors, and dies without Iſſue. C. bargains and ſells the* Lands *to the Defendant* Arnold, *who had Notice of all theſe Tranſactions* &c. The Queſtion was, If the Defendant, being a Purchaſer for a valuable Conſideration, ſhall avoid the Conveyance from C. to B. of the Reverſion in Fee, (being voluntary) it being, at the Time of the Conveyance, a dry Reverſion in Fee Expectant upon an Eſtate Tail, and of no Conſideration in the Eye of the Law. Cowper C. was of Opinion, That *the Conveyance* of the Reverſion in Fee, *from C. to B. cannot be avoided as fraudulent by a ſubſequent Purchaſer*; becauſe, at the Time of the Conveyance, it was of no Value, being barrable by the Tenant in Tail by a Recovery, with Conſent of the Tenant for Life; yet he granted a Trial at Law, upon the Importunity of Counſel. MS. Rep. Trin. 2 Geo. in Canc. Buckley v. Arnold.

11. A Surrender was made to a *Feme Covert* of Copyhold Lands, with a *Power reſerved to her to ſurrender it to ſuch Uſes as ſhe, by Writing or laſt Will, in the Preſence of* 3 *Witneſſes, ſhould direct* or appoint. She made a Will, in Purſuance of her Power, executed in Preſence of 3 Witneſſes, and gave it to her Daughter and Heir. Afterwards ſhe made a Surrender, together with her Husband, to the Uſe of the Husband and his Heirs. But this was made in the Preſence of 2 Witneſſes only, who ſubſcribed their Names as Witneſſes. But the Deputy-Steward, who took the Surrender, had ſet his Name to it. On a Bill by the Husband, after the Wife's Death, to eſtabliſh this Surrender, who would have the Steward to be conſidered as a 3d Witneſs, the Daughter, the Defendant, pleaded a Title by the Will, and alſo demurr'd, for that the Plaintiff's Title, if any, was only at Law, and he might bring Ejectment. Lord Chancellor ſeemed to think the Plea good, as a Plea of the Defendant's Title; and the Demurrer good likewiſe, as a Demurrer to the Plaintiff's Title. But at laſt he over-ruled the Plea, and allowed the Demurrer. Abr. Equ. Caſes, 42. Trin. 1728. Cotter v. Layer.

(D) *Set aſide in Favour of Purchaſors or Creditors.*

1. THE Plaintiff *bought ſeveral Manors of T. B.* deceaſed, *who (before the Plaintiff's Purchaſe) had convey'd the ſame by Fine and Recovery to the Defendant, and his Heirs Male*; which being done *without Conſideration*, was adjudged and decreed to the Plaintiff. Toth. 257. cites **Standen v. Bullock**, 38 Eliz. li. A. ſo. 713. and 42 Eliz. li. B. fo. 289.

2. The *Father makes a voluntary Conveyance in Tail* of Lands, *reſerving an Eſtate for Life*, and after *ſells the Woods* upon the Lands *to a Stranger*. Decreed that the Vendees of the Woods ſhall have the Woods, notwithſtanding the Conveyance of the Lands. Toth. 258. cites 25 Jan. 9 Jac. Curſon v. Blackhall.

3. A Man conveys Land, *for Preferment of his Children*. This ſhall be good againſt a *Purchaſer*, if he *was not in Debt at the Time* of the firſt Conveyance to the Children: But if he was in Debt at that Time, it is then otherwiſe. D. 294. b. Marg. pl. 8. cites Paſch. 11 Jac. C. B. Holcroft's Caſe.

4. A. made a Conveyance to [Truſtees for] his Son; and *afterwards articled to ſell the Lands to B.* who had tender'd the Purchaſe-Money; and brought his Bill to be relieved. The Court, with Aſſiſtance of the Judges, declared the Conveyance fraudulent; and that it was juſt that the Son ſhould be in the ſame Caſe as his Father, had he never made the Conveyance: And *Decreed the Articles to be performed; but not to impeach the voluntary Conveyance, as between A. and his Son*; for any Advancement, or any other Thing thereby ſettled on the Son, other than making good the ſaid Articles; but the Truſtees to be paid their Debts and Engagements out of the Purchaſe Money. Chan. Rep. 146. 16 Car. 1. Leach v. Dean.

5. T. ſold to C. an Eſtate which he claimed as Heir to his Father by Virtue of a Marriage Settlement upon the Marriage of his Father with his Mother in Law M. being the Lands of the ſaid M.—B. as Heir under that Settlement, brought a Bill to diſcover the Title of T. and C. and alſo to compel the ſurviving Truſtee in a former Settlement in the Family, to convey to B. as Heir under the Settlement. Cowper C. declared he would not decree the Truſtee to convey the legal Eſtate to the Ceſty que Truſt, to compel him to ſuffer the Ceſty que Truſt to bring an Ejectment in his Name againſt C. becauſe he was a Purchaſor without Notice of this former Settlement, and Ceſty que Truſt was a Voluntier; and ſaid it was a *conſtant Rule* in Equity, *never to aid any Perſon who claims by a voluntary Settlement, againſt a Fair Purchaſor without Notice:* As in Caſe of a *Diſſeiſor* [as it now appear'd that it was] who *conveys away the Lands upon a valuable Conſideration*, this Court will not compel the Truſtee to convey the legal Eſtate to Ceſty que Truſt, to enable him to recover the Poſſeſſion at Law againſt the Purchaſor, but the Truſtee may do it himſelf if he think fit; but this Court will not compel him to it. Tho' Sir Jo. Jekill and Mr. Vernon inſiſted ſtrongly for it, and ſaid the Poſſeſſion of the Truſtee was the Poſſeſſion of the Ceſty que Truſt, and that it was a Breach of Truſt in the Truſtee not to convey at any Time to Ceſty que Truſt upon Requeſt. But in this Caſe Ld. C. *decreed that T. ſhould account for the Profits* of the Eſtate *from his Entry to the Time of the Conveyance to C.* for he was a Diſſeiſor, tho' T. had 2 Verdicts for him in Ejectment; but this old Settlement was diſcover'd after thoſe Trials. MS. Rep. Paſch. 1 Geo. Canc. Turner v. Buck & al. & e contra.

6. *A.* being *indebted* to 2 ſeveral Perſons *by Bond, and ſeiſed of Fee-Farm Rents charged with an Annuity for Life of M. for natural Love to H. his younger Son conveyed the ſame* to B. and C. *in Truſt*, after the Death of M. *to ſell, and with the Money to buy a Place for the ſaid H. for his Life, and if H. died before any Sale, in Truſt for himſelf and his Heirs.* After this Settlement *A. becomes indebted to others on Bond, and died not leaving Aſſets for Creditors.* Mr. Vernon had given his Opinion, That if there had been no Bond-Creditors at the Time of the Conveyance, it might have created a Doubt, whether it had been done to defeat Bond-Creditors; but there being Debts then owing by Bond, he thought it would be void even againſt Bond-Debts contracted after, or that if it were otherwiſe, it would come to the ſame thing, ſince the Eſtate in Queſtion is not ſufficient to anſwer the Bond-Debts, prior to the Conveyance; and if neceſſary, the later Bond-Creditors would be admitted to ſtand in the Place of the Prior Bond-Creditors, and the Aſſets ſo marſhalled, that all might receive a Satisfaction as far as the Aſſets will extend. And agreeable to this Opinion 22 Feb. 1716, the Court decreed, that the Fee-Farm Rents would be ſold for the Benefit of the Bond-Creditors, and that the Truſtees ſhould all join in any Conveyance to be made for that Purpoſe. Comyns's Rep. 255, 256. pl. 141. Hill. 3 Geo. 1. in Scacc. James St. Amand v. Counteſs Dowager of Jerſey.

(E) Voluntary Conveyances. Set aſide *(not as fraudulent) but for other Reaſons.*

In ſuch Caſe the Grantor was enabled to ſell and convey. Toth. 104. cites Hill. 18 Jac. Grant v. Edes.

1. A Voluntary Conveyance of a Leaſe for Years *in Truſt for his Wife and Children* was decreed at his own Suit to be broke in upon on Account of his *Neceſſities* and Debts, and the Truſtee to join in the Sale, and the Reſt to be ſecured to the Children. Per Ld. Coventry. N. Ch. R. 35. [ſeems to be about 11 Car. 1.] Jones v. Baugh.

2. A voluntary Conveyance made *by one of a weak Uunderſtanding*, to a Couſin German, was ſet aſide at the Suit of one in the ſame Degree of Kindred, tho' no Proof was of Lunacy. She could read and write, and taught a Child to read. 2 Ch. Caſes, 103. Paſch. 34 Car. 2. White v. Small.

(F) *Poſtponed.*

1. A Voluntary Conveyance made for a *Proviſion for younger Children*, muſt give Way to *ſubſequent Judgments* for good Conſiderations, and to a Mortgage; but after the Mortgage and Judgments ſatisfied with Intereſt, the Reſt of the Money raiſed by Sale of the ſaid Eſtate, ought to ſtand ſecured for the Benefit of the Children, and be raiſed by Sale of another Eſtate, which was ſettled as a *Collateral Security* on the Mortgage to make good againſt the Children, becauſe of the ſaid voluntary Conveyance, and by Rents and Profits in the mean Time *precedent to other Creditors not on Judgment*, and afterwards the Creditors to come in. 2 Ch. R. 262. 34 Car. 2. Girling v. Lowther.

2. *A. having no Land, covenants* or enters into Bond *to ſettle* 100 *l. a Year* in Land, or an Annuity out of Land of like Value on B. and *after purchaſes Land of greater Value.* A. *deviſes part of the Land to C.* and dies without making ſuch ſettlement. The Land voluntarily deviſed to C. together with the other Lands not deviſed, but which deſcended to A.'s Heir, ſhall be both liable to the Annuity; but after the Annuity ſatisfied, C. ſhall be reimburſed out of the deſcended Lands. 2 Vern. 97. pl. 90. Paſch. 1689. Tooke v. Haſtings.

(G) *Favoured or Relieved.* How far, and againſt whom.

1. WHERE there are 2 *voluntary Conveyances* executed, Chancery will not relieve the latter againſt the former; but diſmiſſed the Plaintiff's Bill. Chan. Rep. 173. 1658. Goodwin v. Goodwin.

In ſuch Caſes he that has the Eſtate by Law ſhall hold it. Per Treby Ch. J.

2 Chan. Rep. 432. 4W.& M. in the Caſe of Ld. Mountague v. the Earl of Bath —— S. P. Ibid 435. in S. C. by Holt Ch J. —— Where there are 2 voluntary Deeds, the firſt ſhall take place, *unleſs the laſt be for Payment of Debts.* Toth. 116. Hill. 7 Car. Darcie v. Allerton.

2. *Baron and Feme ſeiſed* of Land in Fee *in Jure Uxoris* levy a *Fine*, and declare the Uſes to the Baron and Feme &c. Remainder in Fee to the Husband. The Husband by Will deviſes the Land to J. S. who by Bill *prays Diſcovery of the Deed* and to have the Uſe of it. The Heir at Law inſiſts that the Fine was unduly gained, and the Deed was without Conſideration, and denies the having it. And ſo the Court would not relieve, but left the Plaintiff wholly to Law to help himſelf as he could. 2 Ch. Caſes, 133. Hill. 34 & 35 Car. 2. Anon.

(H) *Supported* or made Good. *By Matter Ex poſt Facto.* In what Caſes.

See (D) pl. 5;

1. UPON an *Aſſignment of a Mortgage* made by Kendall 1659, and and after by divers mean Aſſignments veſted in Newport, Executor of Secretary Coventry. It was objected firſt, That it does *not appear that any Money was paid upon the original Mortgage*, and therefore it was fraudulent, and it being fraudulent in the Creation, tho' Secretary Coventry paid a valuable Conſideration, yet this will not *purge the Fraud* and make it good againſt the Defendant, who was a Purchaſor bona fide, and for a valuable Conſideration; ſed non allocatur; for Holt Ch. J. ſaid, The firſt Mortgage was *good between the Parties*, and being ſo, when the firſt Mortgagee aſſigns for a valuable Conſideration, this is all one as if the firſt Mortgage had been upon a valuable Conſideration; for now the ſecond Mortgagee ſtands in his Place, and therefore is within the Proviſo of the Stat. of 27 *Eliz. cap.* 4. that no Mortgage bona fide, and upon good Conſideration ſhall be impeached by Force of this Act; but ſhall ſtand in ſuch Force as before the Act made. Skin. 423. Paſch. 6 W. & M. in B. R. Andrew Newport's Caſe.

S. P. Sid 133. Paſch. 15 Car. 2. B. R. Prodgers v. Langham — *As* A. *infeoffs* B. *by Covin* and *B. infeoffs C. upon valuable Conſideration*, and then *A. enters and enfeoffs D. upon valuable Conſideration*, ſhall retain the Land againſt D. For tho' the Eſtate of B. was in its Creation Covinous, and ſo voidable yet when B infeoffed C. upon valuable Conſideration, ſhall be preferred to D. Agreed per Cur. and ſaid it was adjudged lately in B. R. Sid. 134. Paſch. 15 Car. 2. B. R. Prodgers v. Langham.

2. A Settlement voluntary at firſt *may become good by Matter Ex poſt Facto*, as where a Father going Preſident to the Bay of Bengal, does before his Voyage convey Land for raiſing a Portion for his Daughter, and A. afterwards marries her in Conſidence of this Settlement. Ch. Prec. 377. 380. Paſch. 1714. * E. Ind. Company v. Clavel.

* Gilb. Equ. R. 37. S. C. in the ſame Words.

3. S. having ſeveral young Children, and being much in Debt, *conveyed* part of his *Lands in Truſt for the Payment of his Debts, and by another Deed* conveyed *other Part to* Truſtees *for the Maintenance of his Children*. This laſt Conveyance being voluntary, was declared void as to Creditors, and ſtill liable to their Demands as before; but it was good againſt S. himſelf, and ſhould bind him; and therefore if his Creditors ſhould fall upon thoſe Lands for a Satisfaction of their Debts, and thereby ſtrip the Children of their Maintenance, the Children ſhould have a Recompence out of the Reſidue of the Eſtate which S. had reſerved to himſelf for his own Maintenance; for tho' the Conveyance was voluntary in the Father, yet he is bound by Nature to provide for his Children; and it is a ſort of a Debt. Per Ld. C. Cowper. MS. Rep. Mich. 4 Geo. Canc. Sneed & al'. v. Lord and Lady Culpeper, & e contra.

4. The Father covenants with his younger ſon in *Conſideration of Natural Affection, and for Advancement in Marriage* &c. to *leave a Moiety of his Perſonal Eſtate* to him by his Will; the father has ſeveral other Children; afterwards the ſaid Father, on a then intended Marriage, *ſettles part of his Real Eſtate on his ſaid Son and W. and the Iſſue of that Marriage*, and afterwards the Son *releaſes to the Father all Covenants &c.* Per King C. the Covenant being in Prejudice of the Reſt of the Covenanter's Children, is not to be favoured; and as the Releaſe is voluntary, ſo is the Covenant. For the ſubſequent Settlement is plainly the Conſideration of the Marriage; ſo that the Queſtion is, Whether this Court will *take away any Defence* the Party has *at Law againſt a voluntary Deed*; which Ld. Chancellor ſaid he would certainly do, had the Covenant appear'd to be for a good Conſideration. And ſo diſmiſſed the Bill, and ſent them to Law, and that after Judgment there, they might reſort back. Gibb. 105. Mich. 3 Geo. 2. in Canc. Praund v. Turner.

(I) Supplied. In what Caſes *Defect* therein ſhall be *ſupplied*.

2 Ch. R. 218. S. C. — 2 Vent. 365. Paſch. 36. Car. 2. Anon.

1. THO' generally a *Defect* in a voluntary Conveyance ſhall * not be ſupplied in *Equity*, yet it is otherwiſe if made for a *Proviſion* and Maintenance *for Children*. Vern. 40. pl. 38. Paſch. 1682. Tomſon v. Atfield.

* S. P. Yet where there has been a *Covenant to ſtand ſeiſed to the Uſe of a Relation*, tho' 'tis a voluntary Settlement, yet this Court in the Ancient of Times always executed ſuch Uſes. Per Ld. Wright. 2 Vern 476. Mich. 1704. in Caſe of Clavering v. Clavering, cites Lady Hudſon's Caſe.—Affirmed in the Houſe of Lords.

2. The

2. The Court of Chancery will never help a Defective Conveyance without Conſideration; As if a Man voluntarily makes a Conveyance to another of his Eſtate, and it proves defective; ſecus if it be for *Money, Marriage, Jointure &c.* and whereas it was affirmed at the Bar that Equity would *compel an Execution of a Truſt declared expreſsly without Conſideration.* The Kd. Keeper anſwered, that he did not think ſo truly. 12 Mod. 603. Mich. 13. W. 3. Anon.

3. *One Jointenant of a Church Leaſe* being *taken ſick* in a Journey, *to ſever the Jointure, and provide for his Wife,* ſends for the School-Maſter of the Town (who was the only Perſon he could get to come at him) and acquainted him with his Intentions, and deſired him to prepare an Inſtrument for that Purpoſe. The Schoolmaſter *drew a kind of Deed of Gift of the Leaſe* from the Sick Man *to his Wife, which he executed, and died.* And this being to the Wife, and void in Law, ſhe would have made it good here; but was diſmiſſed, being voluntary, and without Conſideration. Chan. Prec. 124. pl. 108. Mich. 1700. Moyſe v. Gyles.

For more of Voluntary Conveyance in General, ſee **Creditors, Faits, Fraud, Grant, Uſes,** and other proper Titles.

Voucher.

Fol. 738.

(A) *Warranty* perſonal.

There is no Letter in Roll to this Diviſion.

1. IF A. be bound to B. in **an Obligation of** 40 l. for Payment of 20 l. **by the Condition** at a Day, and A. does not pay it, but * runs away, **ſo that B. cannot have his Debt,** upon which C. a Stranger, upon Conſideration that B. will give him a certain Quantity of Herrings, and will alſo make him a Letter of Attorney to ſue the ſaid Obligation, aſſum'd, **and promis'd** to B. to warrant the ſaid 20 l. to B. **In this Caſe, in an Action upon this Promiſe, it is a good Aſſignment of a Breach that he has perform'd the Conſideration, and that C. has not paid to him the** 20 l. **without ſaying that A. did not pay him, or that he was not able to pay it; for the Warranty being perſonal, the Intent, by Aſſignment of the Obligation, appears, that he ought to pay the Debt without any Reference to A. Mich. 7 Car. B. R. between** *Michael and Carden* **adjudged, this being mov'd in Arreſt of Judgment.**

* Orig. is (Soie eloigne)

2. **Upon a** Communication between A. and B. touching a Marriage to be had between A. and one C. a Feme ſole, and upon this B. affirms to A. that C. had a Portion of 600 l. **for her Preferment in Marriage,** Viro qui maritum ſuum fore contigerit tribuendam & acquirendam; **whereupon, in Conſideration that A. at the Requeſt of B. would marry with C. and other Conſideration there expreſs'd alſo, B.** promis'd that he firmam faceret, **Anglice, would make good** to the ſaid A. the

Cro. C. 202. pl. 5. Mich. 6 Car. B. R. Pilchard v. Kington, S. C. adjudged accordingly.—

Jo. 228. pl. 2. S. C. accordingly.

A. the ſaid 600 l. in Maritagio cum prædicta C. **In Action upon this Promiſe, it is a good Aſſignment of the Breach that he married with C. and yet the ſaid B. prædictas 600 l. vel aliquam inde partem præfato A. huc uſque minime ſolvit nec aliquo modo firmam fecit, Anglice, hath made good Secundum promiſſionem prædictam; for if ſhe had ſo much for her Portion, then B. has made it good; and if ſhe had not, then he himſelf ought to pay it. P. 7 Car. B. R. between** *Punchard and Kingſtone* **adjudged per Curiam, it being moved in Arreſt of Judgment; The which Intratur Tr. 6 Car. Rot. And this Judgment was after affirm'd in the Exchequer Chamber in Writ of Error.**

3. In *Treſpaſs* the *Defendant intitled himſelf to a Leaſe for 60 Years, and pleaded a Confirmation with Warranty of the Plaintiff*; Judgment &c. Per Brudnell and Fineux Ch. J. It is no Bar, but *he ſhall plead it by way of Covenant*; for by this Warranty he cannot vouch, becauſe it is not [but] perſonal; but in Writ of Ward he may vouch, but here he is put to Writ of Covenant, as in Waſte: But per Tremail J. it is a good Bar; which ſeems to be Law, that a *Perſonal Warranty* ſhall be a good Bar *in an Action perſonal.* Br. Treſpaſs, pl. 215. cites 21 H. 7. 32.

4. If a Man *gives Lands in Fee* with Warranty, *and binds certain Lands ſpecially to Warranty*, the Perſon of the Feoffor is hereby bound, and not the Land, unleſs he hath it at the Time of the Voucher. Co. Litt. 102. b.

The Letter in Roll to this Diviſion is (A)

(A. 2) Warranty in Law. In what Caſes the *Law* will *create* a Warranty.

1. **If a** Feme be endow'd in Chancery **of the 3d Part of the Land of her Baron whereof he was ſeiſed in Fee, this creates a Warranty** between her and the Heir, **in reſpect of two Parts which the Heir has,** tho' he has not the Reverſion of the 3d Part. **17 E. 3. 8. a. b. Time of E. 1. 69. b.**

2. So **ſhall it be** upon any Dowment. **17 E. 3. 65. b. Time of E. 1. 66. b. 69. b. admitted by Iſſue. Contra 29 E. 3. 41. b.**

Fol. 739. See (M) pl. 1.

3. **If** two exchange **together, this creates a Warranty between them of the Land which each of them gives to the other. 22 E. 3. 3. 45 Aſſ. 6. Admitted and adjudged.**

S. P. And that it is good Cauſe of Voucher. *But* where the Exchange does *not take Effect* in forma Juris, it is no Warranty. Br. Garranties, pl. 12. cites 45 E. 3. 20.

Exchange is a Warranty in Law, which is *as ſtrong as Warranty in Deed.* Br. Garranties, pl. 38. cites 14 H. 6. 2.

4. **18 E. 1. Libet Parliamentorum, it is there ſaid for the Reaſon of a Judgment,** Quod Excambium naturaliter vult in ſe Warrantiam.

(B) Warranty

(B) Warranty * in Law granted. *By what Words.*

* Warranties *in Law* are created by many Words, and are therefore called Warranties in Law, because in Judgment of Law they amount to a Warranty without this Verb Warrantizo. Co. Litt. 384. a.

1. IF a Man grants a Ward to another, this shall create a Warranty in Law of the Ward. 21 E. 3. 11. 22 E. 3. 6. 30 E. 3. 6. b. Adjudged 14. Dubitatur 29 E. 3. 48. b.

2. Warranty by *Dedi & Conceſſi* does not hold Place but *between the Feoffor and the Feoffee*, by ſome; Quære inde. Br. Garranties, pl. 81. cites 6 E. 2. and Fitzh. Voucher 258.

If a Man gives Lands to one in Fee by Deed, by theſe Words, *Dedi, conceſſi*, &c. now he is bound to warrant the Lands to the Feoffee, by thoſe Words, And if the Feoffee be impleaded, he ſhall have a Writ of Warrantia Chartæ *againſt the Feoffor*, by theſe Words, Dedi, conceſſi, &c. *but not againſt his Heir*; for the Heir ſhall not be bounden unto a Warranty made by his Father, *unleſs he bind him and his Heirs* to Warranty, *by expreſs Words* in the Deed; as to ſay, Ego & hæred' mei omnia prædict' terras &c. warrantizabimus &c. F. N. B. 134. (H)

3. Warranty was by theſe Words, *Ego & Hæredes mei acquietabimus & defendemus*, and *did not ſay* Quis, nec *cui* warrantizabunt; and yet well Per Cur. Br. Voucher, pl. 81. cites 6 E. 2. and Fitzh. Voucher 258.

4. And likewiſe there was a Clauſe of Warranty made, Et ego & Hæredes mei *Tenementa præd' warrantizabimus*; and did not ſay Cui illa garr'. And yet well Per Cur. Br. Voucher, pl. 81. cites 12 E. 2. Fitz. Voucher 262.

5. In Præcipe quod reddat, if *two make Warranty by Dedi*, and the *one dies*, the *other* who ſurvives, who is vouch'd, *ſhall be bound to the Warranty*, and ſhall render in Value only; for the Heir of the other who is dead ſhall not be bound to the Warranty, nor to render in Value by this Word *Dedi*, by the Statute of Bigamis, *unleſs Rent or Service be reſerved.* Br. Recovery, pl. 39. cites 39 E. 3. 26.

The beſt Opinion was, that *Dedi* only, *without Conceſſi*, is good Warranty, *by the Statute of Bigamis*, which mentions in the End Ratione proprii feodi. But contra of * *Conceſſi only*, quære; for Radeford contra. Br. Garranties, pl. 85. cites 11 H. 4. 41.——Dedi is a Warranty in Law to the Feoffee and his Heirs during the Life of the Feoffor. Co. Litt. 384. a.——But upon an *Exchange and Homage Anceſtrel*, the Warranty *extends reciprocally to the Heirs, and againſt the Heirs of both Parties.* Co. Litt. 384. a. b.——And before the Statute of *Quia emptores terrarum*, if a Man had given Lands by this Word Dedi, to have and to hold to him and his Heirs, of the Donor and his Heirs by certain Services, then not only the Donor, but his Heirs alſo, had been bound to Warranty. But if before that Statute a Man had given Lands by this Word Dedi to a Man and his Heirs for ever, to hold of the Chief Lord, there the Feoffor had not been bound to Warranty but during his Life, as at this Day he is. Co. Litt. 384. a.

* Conceſſi in a Feoffment or Fine implies no Warranty. Co. Litt. 384. a.——The Queſtion was, *Whether Conceſſi* did *imply a Warranty in Caſe of a Freehold.* Et *adjornatur*, to be argued. Freem. Rep. 339. pl 421. Trin 1673. Browne v. Honywood.

6. Where a Man is bound upon *Condition to warrant and defend Land* to W. S. the Warranty is where he is impleaded; but the Defending is to ſave the Party, that no Stranger enters upon him. Br. Garranties, pl. 60. cites 2 E. 4. 15.

Br. Condition, pl. 141. cites S C.

7. Neither *Defendere* nor *Acquietare* do create a Warranty, but *Warrantizare* only. Co. Litt. 384. a. (d)

(B. 2) Expreſs

(B. 2) Expreſs Warranty.

S. P. For it *ought to have* theſe Words, *Quod ipſe & hæredes ſui Warrantizabunt to the Donee & Hæredibus &c.* [1] 2. **If a Man makes a** Grant in Fee cum Clauſula Warrantiæ, **by ſuch Words no Warranty ſhall be created.** 11 H. 6. 41. b.

Br. Garranties, pl. 85. cites 11 H. 4. 41.

So of *Grant of Rent, with Clauſe of Diſtreſs*, he ſhall not diſtrain without more. Br. Garranties, pl. 85. cites 11 H. 4. 41.

There be 2 Branches of this Act, and two Conſequents thereupon; the firſt Branch is, that where Dedi is contain'd in a Deed (albeit there be no other Warranty) to hold of the Donor and his Heirs (as at the making of this Act, viz. in 4 Ed. 1. a Man might have done) there the Feoffor and his Heirs had been bound to Warranty. And this was the Common Law; for where *Dedi* is *accompanied with a perdurable Tenure of the Feoffor and his Heirs*, there Dedi imports a perdurable Warranty for the Feoffor and his Heirs, to the Feoffee and his Heirs; and herewith agrees Glanvill. 2 Inſt. 275. cites Glanv. l. 7. cap. 2. and Bracton, lib. 5. fol. 388. b.

2. 4 E. 1. *cap.* 6. *In Deeds where is contain'd Dedi & Conceſſi tale Tenementum* * *without Homage,*

And *in thoſe Days regularly the Donee did hold of the Donor*, unleſs there were a ſpecial Limitation to the contrary. And when the Feoffment was by this Word (Dedi) to hold of the Donor and his Heirs, then he and his Heirs are bound to Warranty. 2 Inſt. 275.

* See Warrantia Chartæ (B) pl. 4.

The Meaning of theſe Words is, That Dedi doth import a Warranty in Law, albeit there be an expreſs Warranty in the Deed; for if a Man makes a Feoffment by *Dedi*, and in the Deed doth *warrant the Land againſt J. S. and his Heirs*, yet Dedi is a general Warranty during the Life of the Feoffor; and ſo was the Statute expounded in both Points Hill 14 El. in C. B. which Lord Coke ſays he himſelf heard and obſerv'd. Co Litt. 384. a.——And if a Man makes a *Leaſe for Life reſerving a Rent*, and adds an expreſs Warranty, here the *expreſs Warranty does not take away the Warranty in Law*; for he has Election to vouch by Force of either of them. Co. Litt. 384. a.——S. P. 2 Inſt. 275.

Or without a Clauſe that contains Warranty,

So it is *if a Body* Politick or *Incorporate had* by Deed, wherein Dedi was contain'd, *infeoff'd another to hold of him and his Succeſſors*, this had created a like Warranty, as in this Act is mention'd. 2 Inſt. 276.

And to be holden of the Givers and their Heirs, by a certain Service, it is agreed that the Givers and their Heirs ſhall be bounden to Warranty;

This 2d Branch is, that where *Dedi* is contained in the Deed, *to hold of the Chief Lord*, and not of the Feoffor, there, altho' there were no other Warranty in the Deed, the *Feoffor ſhall be bound to Warranty during Life. But* then Dedi *binds none* to Warranty, *but him that made the Gift.* 2 Inſt. 275.

And where is contain'd Dedi & Conceſſi &c. to be holden of the Chief Lords of the Fee, or of other, and not of Feoffors or their Heirs, reſerving no Service without Homage, or without the foreſaid Clauſe, their Heirs ſhall not be bounden to Warranty, notwithſtanding * *the Feoffor during his own Life,* † *by Force of his own Gift, ſhall be bound to warrant.*

And it is to be known that *ſince the Statute of Quia emptores* 18 E. 1. the Feoffee in Fee-ſimple doth hold of the Chief Lord; and therefore at this Day in that Caſe the *Feoffor is only bound to Warranty during his Life*; *but if a Man at this Day gives Lands in Tail by* the Word *Dedi*, the Donor and his Heirs are bound to Warranty; and ſo it is of a Leaſe *for Life, reſerving a Rent*, tho' it be without Deed. 2 Inſt. 275.

The Conſequent hereupon is, that albeit there be in this Caſe of the 2d Branch, an expreſs Warranty, the Feoffee may take Advantage of the one or the other, as upon the firſt Branch has been ſaid. 2 Inſt. 275.

* The Letter of this Act extends only to the Feoffor upon a Feoffment made, but *if Dedi doth enure by way of Releaſe or Confirmation*, it imports a Warranty during the Life of him that makes the Deed. So it is if a *Reverſion expectant upon an Eſtate for Years, Life, or in Tail*, be *granted by this Word Dedi, and Attornment had*, here Dedi doth import a Warranty, tho' the State paſſes not by way of Feoffment. So it is of a *Rent*, of an *Advowſon*, or the like. 2 Inſt. 276.

If a Man by Dedi *lets Land for Life*, by this the *Leſſee ſhall vouch the Leſſor* (*tho' the Reverſion be granted away*) and yet the Leſſor is not properly Feoffator. 2 Inſt. 276. cites Bracton, li 5. fo. 389. 48 E. 3. 2. a. 14 H. 6. 25.

† Albeit in two Places before in this Act, Dedi & Conceſſi are coupled together, yet theſe Words *Ratione doni proprii* do appropriate the Warranty to Dedi only; and agreeable to this Expoſition in our Books, is the common and conſtant Opinion of learned Men at this Day. 2 Inſt. 276.——S. P. Co. Litt. 384 a. (f)

3. Land was *given to a Man, his Heirs and Aſſigns*; and the Deed will'd further, *And I the aforeſaid W. and my Heirs, will warrant all the aforeſaid Lands and Tenements againſt all Men in Form aforeſaid.* Per Norton, It is not expreſs'd to whom the Warranty ſhall go; and therefore void. But per Hank. It ſhall have *Relation to the Words of the Gift before* to the Feoffee, his Heirs and Aſſigns; and ſo is the Form in a Fine, and ſo it is rul'd tempore E. 2. which all the Juſtices affirm'd that the Warranty was good by the Manner. Br. Garranties, pl. 23. cites 14 H. 4. 13.

4. A Warranty *is* a *Covenant real* annex'd to Lands or Tenements, whereby a Man and his Heirs are bound to warrant the ſame; and either upon Voucher, or by Judgment in a Writ of Warrantia Chartæ to yield other Lands and Tenements (which in old Books is call'd in excambio) to the Value of thoſe that ſhall be evicted by a former Title, or elſe may be us'd by Way of Rebutter. Co. Litt. 365. a.

5. Warranty in Deed, or an expreſs Warranty, is *created only by* this Word *Warrantizo*. Co. Litt. 384. a.

6. A. releaſes with Warranty *for him and his Heirs, to B. and his Heirs,* without ſaying *Contra omnes Gentes*. Agreed per Cur. that this is a general Warranty, and a Warrantia Chartæ lies upon it. Noy 146. Ballard v. Ballard. Godb. 152. pl. 197. Paſch. 5 Jac. C. B. S. C. by Name of Ballet v. Ballet; but there it is, that upon a Releaſe for one and his Heirs, to another and his Heirs with Warranty Contra omnes Gentes, a Writ of Warrantia Chartæ lies.

7. Covenant was brought on the Word *Grant* in a Feoffment; the Defendant demurr'd. And per Curiam, This is no Warranty of a Freehold, but only in Caſe of a Leaſe for Years; and cited 5 Rep. Spencer's Caſe. And Judgment for the Defendant. 3 Keb. 617. pl. 84. Hill. 27 & 28 Car. 2. B. R. Brown v. Heywood.

(B. 3) Warranty of Lands or Chattles. *Good, and what amounts to it.*

1. IF the *King grants* Land *to me and my Heirs, and that if I am evicted,* or my Heirs, *by Title,* that *he ſhall make in Value* of other Lands. Per Wich and Finch, this *is no Warranty,* but that the King ſhall make in Value if &c. *which ſounds in Covenant,* if it was between common Perſons, and not in Warranty of Voucher; and therefore no Cauſe of Aid of the King in Lieu of Voucher, and yet the Aid was granted of the King. And ſo it ſeems there to be good Cauſe to have in Value againſt the King. Br. Recovery in Value, pl. 32. cites 39 E. 3. 12.

2. Warranty of a Chattle muſt be at the Time *when the thing is ſold.* Per Windham J. Godb. 31. pl. 40. cites 5 H. 7. Cro. J. 4. in Caſe of Chandelor v. Lopus.——Cro. J. 630. in Caſe of Pope v. Lewin.——S. P. Per Holt Ch. J. Comb. 143. Mich. 1 W. & M. B. R. Croſs v. Gardiner.

3. Warranty will not bind a Man in a *thing which is apparent*, as to warrant that a Horſe has both Eyes where he is apparently blind of one. Arg. Lev. 102. in Caſe of Ekins v. Treſham.

Ld. Raym. Rep. 593. S. C.

4. Where Seller has the Poſſeſſion of Goods, the *bare affirming them to be his* makes a Warranty. Otherwiſe if *out of Poſſeſſion.* 1 Salk. 210. Trin. 12 W. 3. B. R. Medina v. Stoughton.

Cro. J. 196. Roſwell v. Vaughan, S. P.

5. *But ſuch Affirmance* makes no Warranty of Lands in any Caſe. 1 Salk. 210. Medina v. Stoughton.

(B. 4) Warranty of Lands. Good or not. *Commencing by Diſſeiſin. And why ſo called.*

1. IT is called a Warranty that commences by Diſſeiſin, *becauſe* regularly *the Conveyance*, whereunto the Warranty is annexed, *works a Diſſeiſin.* Co. Litt. 366. b.

But ſee Paſch. 22 H. 6. fo 51. in Treſpaſs, that all the Juſtices ſaid, That if the *Father be Jointenant with his Son, and aliens all with Warranty*, as *to the Moiety*, *this* Alienation is *a Diſſeiſin*, and the Son may enter; and ſo it ſeems that the firſt Warranty is commenced for three Parts by Diſſeiſin, and therefore no Bar to the three Parts. Br. Jointenants. pl. 26.

2. In Aſſiſe, it was found that a *Man and his three Couſins purchaſed jointly in Fee*, and the *Anceſtor alien'd the Whole with Warranty, and died*; and 2 *of the others died*; and the fourth recovered the three Parts, quod mirum! For the Warranty was *collateral to one* of them, as it ſeems, if any of them was Heir to him; and if all three were Heirs to ſuch Anceſtor, then all three ſhall be barred of their Parts, and his own Part is gone by the Alienation. Br. Jointenants, pl. 26. cites 13 Aſſ. 6.

3. If *Guardian for* Cauſe of *Nurture aliens* the Land of the Heir with Warranty, and dies, whoſe Heir the Demandant is, this is a Warranty which commences by Diſſeiſin, and ſhall be *avoided by Plea.* Br. Garranties, pl. 78. cites 43 E. 3. 7.

* Warranty *commencing by Tort*, ſhall not be avoided; but Warranty commencing *by Diſſeiſin* ſhall. 5 Rep. 80. b in Coke's Nota on Fitzherbert's Caſe.

4. In Formedon the *Tenant pleaded a Feoffment of the Grandfather of the Demandant*, whoſe Heir he is *with Warranty*, Judgment &c. The *Demandant ſaid, that the ſame Grandfather gave in Tail to his Father, and enter'd upon him, and made the Feoffment* with Warranty immediately; ſo that the Warranty *commenced by Diſſeiſin*, Judgment &c. by which the Tenant took other Iſſue; and ſo ſee that collateral Warranty, which commences by * Diſſeiſin, does not bind. Br. Formedon, pl. 16. cites 49 E. 3. 6.

5. If *A. diſſeiſe B. and enfeoffs C.* with Warranty, *and C. enfeoffs D.* with Warranty, *upon whom a Stranger entereth*, in whoſe Poſſeſſion *B.* the Diſſeſee *releaſeth his Right*, now all former Warranties are extinct; and albeit *D.* is impleaded, yet ſhall he not have Warrantia Chartæ, becauſe he *is in of another Eſtate by Wrong.* Weſt's Symb. S. 197. cites F. N. B. 135. (g) 21 H. 6. 41. 22 H. 6. 22.

6. If a Man *diſſeiſes his Father, and makes a Feoffment without Warranty*, and the *Father dies*, the Heir cannot enter; and yet *the Heir of the Heir may enter*; but he who made the Feoffment cannot enter againſt his own Feoffment, tho' Right deſcends by the Death of his Father, who was diſſeiſed; Per Priſot. Br. Entre Cong. pl. 47. cites 39 H. 6. 42.

* It was reſolved, by great Ad-

7. Warranties commencing by Diſſeiſin have 4 Qualities; 1ſt, That the Diſſeiſin is *done immediately to the Heir* that is to be bound; and *yet* *

if

if the Father be *Tenant for Life*, the Remainder to the Son in Fee: The Father, *by Covin* and Conſent, *makes a Leaſe for Years, to the end that the Leſſee ſhall make a Feoffment in Fee to whom the Father ſhall releaſe with Warranty*; and all is executed accordingly. The Father dies. This Warranty ſhall not bind, albeit the Diſſeiſin was not done immediately to the Son; for the Feoffment of the Leſſee is a Diſſeiſin to the Father, who is *Particeps Criminis*. Co. Litt. 366. b.

vice, that he was not barr'd by the Warranty; but it was not adjudg'd. See 5 Rep 79. b. Paſch. 37 Eliz.

B. R. Fitzherbert's Caſe.——The ſame Caſe came in Queſtion again, Jo. 397. pl. 7. Mich. 13 Car. B. R. in Caſe of **Fitzherbert v. Leech**; and it was reſolved by the whole Court, that the Caſe of 5 Rep. 79. b. was good Law; and that the Warranty ſhall not bind the Remainder in Tail, [as the Remainder was in that Caſe] becauſe it was quaſh'd by Diſſeiſin, and Covin between the Parties.—Cro. C. 483. pl. 7. **Fitzherbert v. Fitzherbert** & al'. S. C. ſtates it, that the Father was Tenant for Life, Remainder to his Brother for Life, Remainder in Tail to the Son; and that they both made a Leaſe for Years to the Purpoſe mentioned; and that they, at diſtant Times, releaſed to the Leſſee's Feoffee with Warranty; and held, that they were all as one Act grounded upon this Fraud, and ſhall not bind him in Remainder.——Mo. 469. pl. 674. Mich. 39 & 40 Eliz. Garraway v. Braybridge, S. P. and the Court inclined accordingly, and miſliked the Practice; but the Caſe was ended by Compoſition.

So it is if *one Brother* makes a Gift in Tail *to another, and the Uncle diſſeiſes the Donee, and infeoffs another* with Warranty, the Uncle dies, and the Warranty deſcends upon the Donor, and then the Donee dies without Iſſue, albeit the Diſſeiſin was done to the Donee, and not to the Donor, yet the Warranty ſhall not bind. Co. Litt. 366. b. 367. a.——5 Rep. 80. cites 31 E. 3. Warranty 28.

8. The 2d is, That the *Warranty and Diſſeiſin are ſimul and ſemel*, both at one and the ſame time; and *yet* if a Man commit a *Diſſeiſin, of Intent to make the Feoffment in Fee with Warranty*, albeit he make the Feoffment * *many Years after the Diſſeiſin*, notwithſtanding, becauſe the Warranty was done to that *Intent and Purpoſe*, the Law ſhall adjudge upon the whole Matter, and by the Intent couple the Diſſeiſin and Warranty together. Co. Litt. 367. a.

* S. P. 5 Rep. 79. b. in Fitzherbert's Caſe, tho' it was 20 Years after.

9. The 3d is, That the Warranty commences by Diſſeiſin, by all theſe Examples, (if it ſhould bind) it ſhould bind as a *collateral Warranty*, and therefore *commencing by Diſſeiſin ſhall not bind at all.* Co. Litt. 367. a.

10. The 4th is put for an Example, and the rather for that it is moſt uſual and frequent, commences by *Abatement or Intruſion*, (that is, when the Abatement or Intruſion is *made of Intent to make a Feoffment in Fee with Warranty*) this ſhall not bind the right Heir, no more than a Warranty that commences by Diſſeiſin, becauſe all do commence by Wrong. And *ſo* it is *if the Tenant dies without Heir*, and an *Anceſtor or the Lord enters before the Entry of the Lord, and makes a Feoffment in Fee with Warranty, and dies*, this Warranty ſhall not bind the Lord, becauſe it commences by Wrong, being in Nature of an Abatement. Et ſic de ſimilibus. Co. Litt. 367. a.

11. The *Father*, the *Son, and a 3d Perſon*, are *Jointenants* in Fee. The *Father makes a Feoffment* in Fee *of the Whole with Warranty*, and dies. The Son dies. The 3d Perſon ſhall not only avoid the Feoffment for his own Part, but alſo for the Part of the Son; and he ſhall take Advantage that the Warranty commenced by Diſſeiſin, tho' the Diſſeiſin was done to another. Co. Litt. 367. a.

(B. 5) Warranty. *Bound* by it, *Who.* Heir &c.

1. THE *Heir* ſhall *never* be *bound by any expreſs Warranty, but where the Anceſtor was* bound by the ſame Warranty; for if the Anceſtor were not bound, it cannot deſcend upon the Heir, which is the Reaſon yielded by Littleton. Co. Litt. 386. a.

As if a Man makes a *Feoffment in Fee, and binds his Heirs to Warranty*, this is void by the Warrant of this Maxim, as to the Heir, becauſe the Anceſtor himſelf was not

not bound. Co. Litt. 386. a.——*So* if a Man *binds his Heirs to pay a Sum of Money*, this is void. Co. Litt. 386. a.—— And of the other Side, if a Man bind himſelf to Warranty, and bind not his Heirs, they be not bound; for he muſt ſay, Ego & Heredes mei Warrantizabimus &c. And Fleta ſays, Nota quod Hæres non tenetur in Anglia ad debita Anteceſſoris reddenda, niſi per Anteceſſorem ad hoc fuerit obligatus, Præterquam debita regis tantum. A Fortiori in Caſe of Warranty, which is in the Realty. Co. Litt. 386. a.

As if a Man *deviſe Lands* to a Man *for Life, or in Tail, reſerving a Rent*, the Deviſee for Life, or in Tail, ſhall take Advantage of this Warranty in Law, altho' they be not named. Co. Litt. 386. a.

2. *But* a *Warranty in Law* may bind the Heir, altho' it never bound the Anceſtor, and may be created by a laſt Will and Teſtament. Co. Litt. 386. a.

3. The Warranty of the Predeceſſor ſhall not bind the *Succeſſor*. 2 Inſt. 155.

4. A. the Grandfather, B. the Father, and C. the Grandſon. *A.* was *Tenant for Life*, Remainder *to B. in Tail*, Remainder over. *A. and B. joined in a Feoffment of the 5th Part* of the Lands *to T. M. and his Heirs, with Warranty. B. died*, and then *A. died*; and C. who was an *Infant*, and the *Iſſue in Tail, enter'd, and held this 5th Part, with the reſt of the Lands*. The Queſtion was, Whether his Entry was lawful; and adjudged that it was not; for whether this Feoffment was the Feoffment of the one or the other, *viz.* the Surrender of the Tenant for Life to him in Remainder, and ſo the Feoffment of him; yet ſince *the Warranty of B. deſcended on C. the Infant*, it ſhall bind him; and *he can never avoid it*, unleſs his Entry was lawful, *(i. e.) unleſs he had a Right to enter at the Time of the Warranty deſcended*; which he had not, becauſe *the Warranty was annexed to the Eſtate in Fee, which continued at the Time of the Death of the* Father, and ſhall bind the ſaid C. the Iſſue. And. 286. pl. 293. 34 Eliz. Minter v. Collins.

(B. 6) *To what Eſtate*, or on what Conveyance a Warranty may be *annexed* or created.

As a Man (ſome ſay) may grant a *Rent* &c. *out of Land for Life, in Tail or in Fee* with Warranty; for tho' there

1. A Warranty may not only be annexed *to Freeholds*, or Inheritances Corporeal, which paſs by Livery, as Houſes and Lands, but alſo to Freeholds *or Inheritances incorporeal which lie in Grant, as Advowſons*; and to *Rents, Commons, Eſtovers*, and the like, which Iſſue out of Lands or Tenements. And not only to Inheritances in Eſſe, but alſo to Rents, Commons, Eſtovers &c. *newly created*. Co. Litt. 366. a.

can be no Title precedent to the Rent, yet there may be a Title precedent to the Land, out of which it iſſues before the Grant of the Rent, which Rent may be avoided by the Recovery of the Land, in which Caſe the Grantee may help himſelf by a Warrantia Chartæ upon the eſpecial Matter. Co. Litt. 366. a.

So a *Warranty in Law* may extend *to a Rent &c. newly created*; and therefore if a Rent newly created be granted *in Exchange* fot an Acre of Land; this Exchange is good; and every exchange implies a Warranty in Law. *And* ſo a Rent newly created may be granted *for Owelty of Partition*. Co. Litt. 366. a.

2. A *Warranty extends* not to any Leaſe, though it be for many Thouſand Years, or to Eſtates of Tenant by Statute Staple, or Merchant, or Elegit, or any other Chattel, but *only to Freehold or Inheritances*. Co. Litt. 389. a.

3. It

3. It was ſaid, that a Warranty may be annexed *to a Fine with Grant and Render*. Carth. 141. and cites it as reſolved. *Cro. E. 17. Co. Ent. 579. a. *Paſch. 25 Eliz. C. B. Anon. Treat. of Ten. 178.—See Tit. Copyhold (B. a) pl. 2.

4. A Warranty cannot be annexed to a *Copyhold Eſtate*; for it is only an *Eſtate at Will*, to which no Warranty can be annexed of Common Right, nor is any Eſtate leſs than a Freehold capable of it. And a Surrenderee of a Copyhold comes in *En le Poſt* by the Lord, and *not En le Per* by the Party. Treat. of Ten. 163.

(B. 7) The *Operation and Effect* of a Warranty.

1. TENANT *in Tail of Rent purchaſed the Land in Fee*, and *made Feoffment of the Land with Warranty*, and this was pleaded in Avowry againſt the Iſſue in Tail, who avow'd for the Rent in Tail, and that Aſſets is deſcended. And per Kingſm. if the Land was *charged at the Time of the Feoffment with Warranty*, the Feoffee ſhall hold it charged, and the Warranty ſhall not diſcharge it; for *he Warrants the Land as it is at the Time* &c. and *if it was diſcharged at the Time, tho'* it was *not* diſcharged *in Right*, as by Unity of Poſſeſſion of the Tenant in Tail of the Rent, or by Releaſe &c. tho' the Right remains, yet *he may vouch of the Land diſcharged*, and he who warrants, or his Heirs ſhall diſcharge it. Br. Garranties, pl. 40. cites 21 H. 7. 9. 10.

2. *For* if a Man makes *Feoffment with Warranty of the Land charged with Rent Service*, the Feoffee ſhall hold it charged, and the Feoffor ſhall not diſcharge it by the Warranty; and contra where it was diſcharged at the Time of the Feoffment; quod nota Diverſitatem inde. Br. Garranties, pl. 40. cites 21 H. 7. 9. 10.

3. A Warranty ſhall never *enlarge an Eſtate*, but may *ſtrengthen* the ſame. Per Williams J. Bulſt. 163. Trin. 9 Jac. in Caſe of Heywoood and Smith. S. P. per Fleming Ch. J. Ibid.

4. *Nor* ſhall it be of *Force but ſo long as the Eſtate to which* it is annex'd *has Continuance*. Per Fleming Ch. J. Bulſ. 166. in Caſe of Heywood and Smith, cites Litt. S. 749.

5. No Warranty extinguiſhes a Right, but only *binds* or bars it *as long as* the Warranty *continues in Force*; for if the Warranty be *releaſed*, the ancient Right * revives. 2 Salk. 686. Paſch. 4 Annæ B. R. Smith v. Tyndall. * 11 Mod. 90, 91. pl. 13. Trin. 5 Ann. B. R. S. C. & S. P.

(B. 8) Warranty. In what Caſes it ſhall *not attach*.

1. IF *Tenant in Tail doth diſcontinue*, and the *Diſcontinuee is diſſeiſed*, and *Tenant* in Tail *releaſeth with Warranty to the Diſſeiſor*, the Diſſeiſee entereth in the Life of Tenant in Tail, who afterwards dieth, the Warranty works nothing; for the Warranty deſcending afterwards, cannot attach upon the Poſſeſſion which was at the Time of the Warranty made, which was by the Concluſion; which by the Death of Tenant in Tail, is determined and removed by an Eign Title, viz. the Entail. Arg. 2 Le. 58. pl. 82. Mich. 30 Eliz. C. B. in Caſe of Ards v. Smith.

2. Tenant in Tail of Lands *grants a Rent-Charge in Fee*, and an *Anceſtor collateral releaſeth* to the Grantee with Warranty *and dieth*, the Tenant in Tail dieth; now the Iſſue is bound; *but if Tenant in Tail dieth before him, who maketh the Releaſe*, now the Rent is determined by the Death of Tenant in Tail, and then the Warranty cannot attach upon it. Arg. 2 Le. 58. pl. 82. in Caſe of Ards v. Smith.

3. A. Tenant for Life, Remainder to B. in Tail; *A. leaſeth for Years*, a *Recovery is had againſt B.* living A. the Recoverors enter and oult the

Leſſee for Years, the Son and *Heir of B. releaſeth with Warranty* to him to whom the Recoverors have aſſured the Lands; the Leſſee enters, B. *dieth*, the *Releaſor dieth* &c. It was holden that the Entry of the Leſſee, before that the Warranty had attached upon the Poſſeſſion which paſſed, had avoided the Warranty. Arg. 2 Le. 56, 57, 58. pl. 82. Ards v. Smith.——als. Lincoln College Caſe.

(B. 9) *To what Titles* a Warranty ſhall *not extend.*

1. NO Warranty doth extend unto *meer and naked* Titles, as by Force of a *Condition with Clauſe of Re-entry, Exchange, Mortmain, conſent to the Raviſher*, and the like, *becauſe* that for theſe *no Action doth lie*; and if no Action can be brought, there can be neither Voucher, Writ of Warrantia Chartæ, nor Rebutter, and they continue in ſuch Plight and Eſſence, as they were by their Original Creation, *and by no Act can be diſplaced* or diverted *out of their original Eſſence*, and therefore cannot be bound by any Warranty. Co. Litt. 389. a.

(C) Warranty. *To what Eſtate* it ſhall *extend.* It ſhall *not* extend *more largely than the Eſtate.*

S. P. Co. Litt. 385. b. (g) as if Leſſor

1. A Warranty ſhall not enlarge an Eſtate. 44 Aſſ. 35. per Thorpe.

by Deed releaſes to his Leſſee for Life, and warrant the Land to the Leſſee and his Heirs; yet this does not anlarge his Eſtate.

S. P. Br. Garranties, pl. 10. cites it as admitted 44 E. 3. 10.

2. If Leſſee for Life be, the Remainder in Tail the Remainder to the right Heirs of Leſſee, and Leſſee grants over his Eſtate to another and his Heirs, and after releaſes to him in Fee with Warranty and dies, and this deſcends upon him in Remainder in Tail; yet this ſhall not bind him; for the Warranty does not extend but to the Eſtate which the Releſſee had at the Time of the Releaſe made. 44 Aſſ. 28. Adjudged.

S. P. Br. Garranties, pl. 51. cites 44 E. 3. 35. Per Belk.

3. If a Releaſe be with Warranty to one, who has an Eſtate in Fee, the Warranty ſhall extend to the Fee. 44 Aſſ. 28. 35.

4. If there be Leſſee for Life, the Remainder in Fee to another, and an Anceſtor of him in Remainder releaſes to the Leſſee in Fee with Warranty, and dies, and this deſcends upon him in Remainder, this Warranty ſhall not bind him; for it cannot enlarge the Eſtate of the Leſſee to which it was made, and therefore is determined by his Death. 44 Aſſ. 35. by Thorpe.

5. If my Anceſtor leaſes for Years, or for Life, and after I releaſe to the Leſſee with Warranty in Fee, and then my Anceſtor dies, by which the Reverſion deſcends to me, and then the Leſſee dies, my Warranty ſhall not bar me, becauſe the Eſtate is determined. 17 E. 3. 67. b.

6. If a Man *gives in Tail to Baron and Feme with Warranty*, and *they leaſe for Life, ſaving the Reverſion to them and to the Heirs of the Feme*, and the

the *Tenant for Life is impleaded by one who is Heir to the Warranty*, and *makes Default* after Default, and the *Baron and Feme are received* by this Reverſion in Fee, they may rebut by the Warranty of Tail; but if they vouch to deraign the Warranty, the Vouchee does not warrant but only the Eſtate Tail. Note the Diverſity. Br. Voucher, pl. 31. cites 45 E. 3. 18.

7. A Warranty being a Covenant real Executory *may extend to an Eſtate in futuro*, having an Eſtate whereupon it may work in the Beginning. Co. Litt. 378. a.

As if a Man *lets Land for Life upon Condition to have Fee*, and *warrants* the Land *in forma prædicta*, and afterwards the *Leſſee performs the Condition*, whereby the Leſſee has Fee, the *Warranty ſhall* extend and *increaſe according to the Eſtate*. Co. Litt. 378. a.——*So* it is *if Leſſor had died before the Performance* of the Condition, the Warranty ſhall riſe and increaſe according to the Eſtate, and yet the Leſſor himſelf was never bound to the Warranty, but it has *Relation from the firſt Livery*. Co. Litt. 378. a.

8. *But if* a Man *grants* a Seigniory *for Years*, upon Condition to have Fee with a Warranty in forma prædicta, and after the Condition is perform'd, this ſhall not extend to the Fee, becauſe the firſt *Eſtate* was but *for Years*, which was *not capable of a Warranty*. Co. Litt. 378. a. b.

Leaſe for Years on Condition to have in Fee, with Warranty, the Warranty ſhall go to the Fee increas'd. Arg. Mo. 481. pl. 684. in Caſe of **Loyd v. Wilkinſon**, cites 32 E. 3. Fitzh. Garranty, pl. 30. and 31 E. 1. Fitzh. Voucher, pl. 285.

9. *And ſo* it is, if a Man makes a *Leaſe for Years*, the *Remainder in Fee*, and warrants the Land in forma prædicta, *he in the Remainder* cannot take Benefit of the Warranty, becauſe he *is not Party to the Deed*; and immediately he cannot take, if he were Party to the Deed, becauſe he is nam'd after the Habendum, and the Eſtate for Years is not capable of a Warranty. Co. Litt. 378. b.

10. And *ſo* it is, if the Land be given *to A. and B. ſo long as they jointly together live, Remainder to the right Heirs of him that dieth*, and warrants the Land *in forma prædicta*, *A. dies*, his *Heir ſhall have the Warranty*, and yet the Remainder veſted not during the Life of A. for the Death of A. muſt precede the Remainder, and yet the Heir of A. has the Land by Deſcent. Co. Litt. 378. b.

11. If *Tenant in Fee-ſimple*, that *hath a Warranty for Life*, either by an expreſs Warranty, or by Dedi, be impleaded, and vouch, he *ſhall recover a Fee-ſimple* in Value, albeit his Warranty were but for Term of Life, becauſe the *Warranty extended* in that Cauſe *to the whole Eſtate of the Feoffee in Fee-ſimple*. Co. Litt. 387. a.

12. If a *Leaſe for Life* be made *to the Father*, the *Remainder to his next Heir*, the *Father is diſſeiſed, and releaſes with Warranty, and dies*, this ſhall bar the Heir, altho' the Warranty doth fall, and the Remainder comes in Eſſe at one Time. Co. Litt. 388. b. (w)

13. If there be Father and Son, and the *Son hath* Rent-ſervice, Suit to a Mill, Rent-charge, Rent-ſeck, Common of Paſture, or other *Profit apprender out of the Land of the Father*, and the *Father makes a Feoffment in Fee with Warranty, and dies*, this ſhall not bar the Son of the Rent, Common, or other Profit apprender, quamvis clauſula ſpecialis Warrantiæ vel Acquietanciæ in Chartis tenentium inſeratur, quia in tali caſu tranſit terra cum onere; and he that is in Seiſin or Poſſeſſion need not to make any Entry or Claim: And *albeit the Son*, after the Feoffment with Warranty, and *before the Death of the Father, had been diſſeiſed, and ſo being out of Poſſeſſion the Warranty deſcended upon him*, yet the Warranty ſhould not bind him, becauſe at the Time of the Warranty made, the Son was in Poſſeſſion. Co. Litt. 388. b.

But if he that hath Rent, Common, or any *Profit out of the Land in Tail, diſſeiſes the Tenant of the Land, and makes a Feoffment of the Land, and warrants the Land to the Feoffee and his Heirs*, regularly the Warranty doth extend to all things iſſuing out of the Land, that is to ſay, to warrant the Land in ſuch Plight and Manner as it was at in the Hands of the Feoffor, at the Time of the

the

the Feoffment with Warranty, and the *Feoffee ſhall vouch as of Lands diſcharg'd of the Rent* &c. at the Time of the Feoffment made. Co. Litt. 388. b. (y)

14. *So* if my *Collateral Anceſtor releaſes to my Tenant for Life*, this ſhall not bind my Reverſion or Remainder, becauſe the Reverſion or Remainder continued in me. Co. Litt. 388. b. (y)

15. *A. Tenant in Tail, Remainder to B.*——*A. made a Leaſe to* 3 *for their Lives*, according to the Statute of 32 H. 8. *with Warranty, and died without Iſſue, B. being his Brother and Heir.* This Warranty ſhall not bind B. in Remainder; for he cannot have the Rent reſerv'd, and then the Eſtate is determin'd, and the Warranty with the Eſtate, and ſhall not bar him in Remainder. And Judgment for the Plaintiff. Cro. E. 602. pl. 13. Hill. 40 Eliz. C. B. Keen v. Cope.

The Report has a Nota, that the Leſſor did *not warrant* it for him and his Heirs, *but Pro redditu prædicto* he warrants it againſt him and his Heirs. And for this Reaſon alſo it was held, that it was a Warranty for his Life, and was determined by his Death. Ibid.

16. A Warranty *always follows the Eſtate unto which it is annex'd*, and *if the Eſtate* unto which the Warranty is annex'd *be determin'd, the Warranty alſo ſhall be* gone and be determin'd, as appears by Littleton in his Chapter of Warranty, fo. 16. 8. Pla. 738, 739. and *therefore if a Leaſe for Life be made to one, with Warranty to him and his Heirs, if he be vouch'd* by Reaſon of this Warranty, *he ſhall only recover according to his Eſtate for Life*; for where the Eſtate is determin'd to which the Warranty is annex'd, if this Eſtate be determin'd, the Warranty is gone, and at an End; Per Croke J. 2 Bulſt. 163. Trin. 9 Jac. Heywood v. Smith.

17. When one makes a *Gift in Tail* with Warranty ſince the Statute, this Warranty, into whatſoever Hands it comes, cannot extend *to bar the Reverſion in Fee*; for the Eſtate to which the Warranty extends, is *determin'd* by Death of the Tenant in Tail without Iſſue, and Feoffment or other Act done by the Donee ſubſequent, ſhall not extend the Warranty further than the Eſtate to which the Warranty at the Time of the Creation of it was annex'd. 10 Rep. 96. b. Mich. 10 Jac. B. R. in Seymour's Caſe.

(C. 2) Warranty. *Extent* thereof, *as to* the *Heirs*. Gavelkind, &c.

Br. Garranties, pl. 11. cites S. C.

1. ASSISE *by* 2 *Brothers.* The Tenant *pleaded a Feoffment of their Father with Warranty againſt both*; and the *Eldeſt was compelled to anſwer to the Deed*; and *the Aſſiſe was awarded againſt the youngeſt*, becauſe it was pleaded againſt both, and the youngeſt is not Heir to the Warranty, for it was *of Land in Gavelkind.* And ſo ſee, that the *Feoffment with Warranty* of the Anceſtor of the Plaintiff *is a Bar to him who is Heir to the Warranty*; *but* the Warranty is *no Bar to the youngeſt*, and a Feoffment alone is no Bar in Aſſiſe. Br. Aſſiſe, pl. 22. cites 44 E. 3. 16.

Co. Litt. 376. a. ſays this is a Maxim

2. Every Warranty *deſcends upon* him that is *the Heir* to him that made the Warranty, *by the Common Law.* Litt. S. 718.

of the Common Law.—— Hob. 31. pl. 13. 10 Jac. in Caſe of Counden v. Clarke, ſays, Note that Warranties and Eſtoppels do always deſcend upon the right Heirs general, as being to ſimple Heirs. 38 E. 3. 22. If there be a Warrantor, who hath Lands in *Gavelkind*, the eldeſt Son ſhall be vouched alone; but the Tenant may alſo vouch the others for the Poſſeſſion; and cites 32 E. [3] F. Voucher 94. That the Heir general ſhall take ſuch Advantage of ſuch Warranty, and no other, except he comes in as vouched for Poſſeſſion with the true Heir.——A Warranty of Land in *Borough Engliſh*, or *Gavelkind*, binds only the Heir at Common Law; Per Dyer. D. 343. b. pl. 55. Trin. 17 Eliz.——Lien Real

Real deſcends only on the Heir at Common Law; but Lien Perſonal binds all, as Heirs in Gavelkind &c. As if a Man oblige himſelf and his Heirs in an Obligation &c. Per Coke. Cro. J. 218. pl. 6. Hill. 6 Jac. B. R. in Caſe of Game v. Symms.

(C. 3) *Upon what* Conveyance a Warranty may be *created.*

See (P)

1. IF a *Leſſee for Years*, or *Tenant by Elegit* &c. or a *Diſſeiſor* incontinent, *make a Feoffment in Fee with Warranty*, if the Feoffee be impleaded, he ſhall vouch the Feoffor, and after him his Heir alſo; becauſe this is a Covenant real, which binds him and his Heirs to recompence in Value, if they have Aſſets by Deſcent to recompence; for there is a Feoffment de Facto, and a Feoffment de Jure; and a *Feoffment de Facto*, made by them that have ſuch Intereſt or Poſſeſſion, as is aforeſaid, *is good between the Parties*, and againſt all Men, but only againſt him that hath a Right. Co. Litt. 367. a.

2. Upon every Conveyance of Lands, Tenements, or Hereditaments, as upon *Fine*, *Feoffments*, *Gifts* &c. *Releaſes and Confirmations* made *to the Tenant of the Land*, a Warranty may be made; albeit he that makes the Releaſe or Confirmation hath no Right to the Land &c. But ſome do hold, that by Releaſe or Confirmation, where there is no Eſtate created, or Tranſmutation of Poſſeſſion, a Warranty cannot be made to the Aſſignee. Co. Litt. 371. a. b.

3. An expreſs Warranty cannot be created without Deed, and a Will in Writing is no Deed; and therefore an expreſs Warranty cannot be created *by Will.* Co. Litt. 386. a.

(C. 4) Warranty *ſuſpended.* In what Caſes.

See (D)

1. IF the *Baron has Cauſe of Action to the Land of which his Feme is bound to warranty*, and the Baron brings Action, he ſhall be barr'd, and rebutted by the Warranty of his Feme, if ſhe be alive at the Time &c. Br. Voucher, pl. 131. cites 11 Aſſ. 10.

S. P. Br. Garranties, pl. 43. cites 13 Aſſ. 10. and 13 E. 3. But Brooke makes a Quære.

2. *And* the common Opinion was, That if *Feme ſole* be *bound to warrant* Land to me, and *he who has Cauſe of Action of it takes her to Feme*, and he impleads me, he ſhall be barr'd during the Coverture. Br. Voucher, pl. 131. cites 11 Aſſ. 10.

3. If *Anceſtor Collateral makes Feoffment in Fee with Warranty*, and after the *Feoffee leaſes to the Anceſtor Collateral again for Life, or in Tail, or* if he *leaſes or gives* the ſame Land *for Life or in Tail*, the *Remainder over* &c. there the Warranty is ſuſpended for the Time; But after the Leaſe or Tail extinct, he in Reverſion or Remainder may barr the Heir in Tail by this Warranty. And therefore ſee there, that if the Heir impleads the Uncle, or Anceſtor Collateral in his Life, the Warranty ſhall not ſerve. Br. Garranties, pl. 91. cites Litt. Tit. Garr.

4. M. ſeiſed in Fee, married A. and they by Indenture covenanted to levy a *Fine to the Uſe of them 2 for their Lives, Remainder to A. and his Heirs, with Warranty.* A Fine was levied accordingly. Afterwards A. deviſed the Premiſſes to the Leſſor of the Plaintiff, and died, and then

M. died. It was objected, that the Warranty was deſtroy'd in its Creation; and that the Heir ſhall not be bound by it, but where the Anceſtor was. But it was reſolved, that the Warranty made a good Title to the Leſſor of the Plaintiff, and it was but ſuſpended during the Life of M. that if one makes a Feoffment in Fee, with Warranty to another and his Heirs, and the Feoffee re-infeoffs the Feoffor for Life, the Warranty here is only ſuſpended; and when the Feoffor dies the Warranty will remain, and his Heir will be bound; that *if*, in the principal Caſe, *M. had taken back an Eſtate for Life, by way of Remainder, from the Conuſee*, the Warranty could be only ſuſpended, and the Heirs of M. ſhould warrant theſe Lands to the Heirs of A. MS. Rep. Mich. 5 Annæ, B. R. Smith v. Tindall.

5. *So* if a Man levies a *Fine, with Warranty to another and his Heirs*, and the Conuſee *renders back to the Conuſor for his Life*, the Warranty is ſuſpended during the Life of the Conuſor; but when he dies, it ſhall deſcend upon and bind his Heir: For *where the Warranty is more extenſive than the Eſtate taken back*, the Warranty is only ſuſpended. MS. Rep. Mich. 5 Annæ, B. R. in Caſe of Smith v. Tindal.

(C. 5) Warranty *divided*.

1. NOTE, where *two Parceners* are, and the *one aliens her Part*, and the *other is impleaded*, there, becauſe ſhe cannot have Aid of her Coparcener, ſhe may vouch alone, and ſhall have the Warranty alone; Per Finch and Knivet. Quod non negatur in Formedon. And ſo note the Warranty ſever'd, and ſhe ſhall have it alone for her Moiety. Br. Garranties, pl. 27. cites 38 E. 3. 20.

Br. Voucher, pl. 32. cites S. C.——8 Rep. 51. b. Mich. 6 Jac. S. C. cited in Syms's Caſe, that the Baron and Feme were Tenants in ſpecial Tail to them and the Heirs of their Bodies.

2. Præcipe quod reddat. The *Tenant in ſpecial Tail had Iſſue a Daughter, and diſcontinued with Warranty*. The *Feme died*. He *took another Feme*, and *had Iſſue another Daughter, and died*. The *eldeſt Daughter* took Baron, and ſhe and her Baron *brought Formedon*; and the *Tenant vouched the* [*eldeſt*] *Daughter*, Wife of the Demandant, *and the other Daughter by a ſtrange Name*. The Feme *Demandant appear'd*, and *the other made Default at the Sequatur*; whereupon the Tenant rebutted againſt the Demandant by the Warranty, and Aſſets deſcended for a Moiety; and for the other Moiety the Demandant had Seiſin of the Land. Quod nota; for he cannot rebut for the Whole, becauſe the Warranty did not deſcend upon the Feme of the Demandant only. And ſo ſee a Warranty ſever'd. Br. Garranties, pl. 14. cites 45 E. 3. 23.

The Caſe of Syms's was a Formedon in Remainder, and counted of a Gift by W. to S. his Son in ſpecial Tail, the Remainder to J. his Son in ſpecial Tail, the Remainder to A. his Daughter, and her Heirs; and that S. and J. were dead without Iſſue. The Tenant pleaded a Fine levied by S. with Warranty, and then J. died without Iſſue, and afterwards S. died without Iſſue; and that the Warranty thereupon deſcended upon the ſaid A. and after her Death it deſcended upon the Demandant. The Demandant replied, that the Warranty deſcended upon the ſaid A. and alſo upon B. another Co-heir of the ſaid S. and ſhew'd how, and that the Warranty deſcended upon the Demandant as to a Moiety only. But notwithſtanding the Caſe of 45 E. 3. 23. above, it was reſolv'd by Coke Ch. J. and the whole Court, that A. and her Heir (the Demandant) is barr'd for the whole; for the Warranty is intire, and extends to all the Land, and bars every one upon whom it deſcends, of all the Right in the Land, whether the Right be Joint or Several; And if one only has Right, and the other nothing, he that has Right will be barr'd of all; for to this Purpoſe *the whole Warranty deſcends upon every of them*. And they ſaid (Ibid. 52. a.) That the 45 E. 3. 23. a. b. did not warrant any ſuch Opinion as was inferr'd from thence; for that the principal Caſe in the Book at large is, that in Præcipe quod reddat the Tenant vouch'd two as Heirs, and ſaid that one was within Age, and pray'd that the Parol might demur. The Demandant replied that he was of full Age, and pray'd he might be view'd by the Court; whereupon Proceſs was to the Sequatur &c. when he came not, nor was any Writ return'd; and the Demandant pray'd Judgment for a Moiety for the Default of one, and a Summons ad Warr' againſt

againſt the other. But to this it was ſaid, that Summons ad Warrantizandum he cannot have, becauſe he who is vouch'd is Demandant. Whereupon the Tenant ſaid, that the Anceſtor of thoſe who are vouch'd, did by Deed here produc'd infeoff one R. with Warranty, Que Eſtate he has, Judgment if againſt the Deed &c. And further that he had Aſſets by Deſcent; to which the Demandant ſaid, that he had nothing by Deſcent. And the Court gave Judgment for a Moiety for Default of one of the Vouchees, which the Tenant had loſt by his Voucher, for which Moiety he can plead Nothing: and for the other Moiety, tho' he had vouched the Demandant by a ſtrange Name, and ſo in a Manner pleaded in Chief, yet inaſmuch as the Demandant had told him of this Voucher as to him, becauſe he is Demandant himſelf, he may plead the Warranty and Aſſets in Bar for the other Moiety; And that upon this Plea no Judgment is given in the Book, and therefore the Court paid no Regard to the Collection or Inference of the Ld. Brooke, the Book being adjudged upon another Point, viz. upon Default of one of the Vouchees. —— Cro. J. 217. pl. 6. Hill. 6 Jac. B. R. S. C. adjudged accordingly, by the Name of Game and Symms.——Mod. 182. Paſch. 26 Car. 2. in C. B. in the Caſe of **Fowle v. Doble**, Vaughan Ch. J. ſaid he queſtion'd the Reſolution in **Symms's** Caſe; and ſaid that the Caſe cited in Symms's Caſe, out of 45 E. 3. 23. is expreſsly againſt the Reſolution of that Caſe, and that it is ſaid in the Reports, that no Judgment was given in that Caſe; which he ſaid is falſe; and alſo that the Caſe is not well abridged by Brooke; which he ſaid, is alſo falſe. And asked, if in a Caſe of Voucher a Man loſes his Warranty, that does not vouch all that are bound, why ſhould not one that is rebutted have the like Advantage? He ſaid, that there is a Reſolution quoted in Symm's Caſe, [Pag. 51. b.] out of 5 E. 2. Fitzh. Tit. Garranty, 78. upon which the Judgment is ſaid to be founded, being as is there ſaid a Caſe in Point, but he conceived it was not; For Harvey, that gave the Rule ſaid, there the Tenant may bar you all; and conſequently may bar one only. In the Caſe there were ſeveral Co-heirs, and if all were Demandants, all might have been barr'd; and if one be Demandant, there is no Queſtion but ſhe may be rebutted for her Part. But Symms's Caſe is quite otherwiſe; for the one Perſon is Co-heir to the Warranty, who is not Heir to any Part of the Land; In 6 E. 3. 50. there is a Caſe reſolved upon the Ground and Reaſon of the 45 E. 3. And he ſaid, that for theſe Reaſons he could not rely on Symms's Caſe.——Freem. Rep. 159. pl. 175. S. C. and S. P. accordingly, by Vaughan Ch. J.

3. If *Father and Son make a joint Purchaſe in Fee*, and the *Father aliens the Whole with Warranty, and dies*, the Son ſhall avoid it for a Moiety: *But* if the Purchaſe were *to the Father and Son, and the Heirs of the Son*, and the *Father makes a Feoffment in Fee with Warranty*, if the *Son entreth in the Life of the Father*, and the *Feoffee re-enters*, and the *Father dies*, the Son ſhall have an Aſſiſe of the Whole; and ſo is the Book of 22 H. 6. to be underſtood. *But if* the Son had *not enter'd in the Life of the Father*, then for the * Father's Moiety it had been a Bar to the Son, for that therein he had an Eſtate for Life; and therefore *the Warranty, as to that Moiety, had been collateral to the Son, and by Diſſeiſin for the Son's Moiety*; and ſo a Warranty defeated in Part, and ſtand good in Part. *But if* the Purchaſe had been *to the Father and Son, and to the Heirs of the Father*, then the Entry of the Son in the Life of the Father, as to Avoidance of the Warranty, had not availed him; becauſe his Father lawfully conveyed away his Moiety. Co. Litt. 367. b.

* But ſee now the Statute, 4 & 5 Ann. cap. 16.

4. If a *Man of full Age and an Infant make a Feoffment in Fee, with Warranty*, this Warranty is not void in Part, and good in Part; but it is good for the Whole againſt the Man of full Age, and void againſt the Infant; for albeit the Feoffment of an Infant paſſing by Livery of Seiſin be voidable, yet his Warranty, which takes Effect only by Deed, is merely void. Co. Litt. 367. b.

5. If a *Man, ſeiſed of a Rent* by a defeaſible Title, *releaſes to the Tertenant all his Right, and warrants the Land to him and his Heirs*, if he be impleaded for the Rent, he ſhall vouch and recover in Value for the Rent; and if after he be impleaded for the Land, he ſhall vouch and recover in Value again for the Land, in reſpect of the ſeveral Eſtates recovered: But for one and the ſame Eſtate he ſhall never recover but once in Value; and tho' the *Land recovered in Value* be *evicted*, yet ſhall he never take Benefit of the Warranty after. Co. Litt. 393. a.

6. And as Warranties may be defeated in the Whole, ſo they may be defeated as to Part of the Benefit that may be taken of the ſame; as he that hath a Warranty may make a *Defeaſance not to take any Benefit by way of Voucher*, or that he ſhall take no Advantage *by way of Warrantia Chartæ*, or by way *of Rebutter*. Co. Litt. 393. a.

(C. 6) Warranty *Defeated, Avoided, or Determin'd* by what Act.

1. A Warranty *executed* is determin'd for ever, *tho' the Record, in which it was executed, is revers'd after by Judgment in Writ of Deceit*; and there by the firſt Execution the Warranty is gone for ever; Per Scot, quod non negatur. Br. Counterple de Voucher, pl. 52. cites 4 E. 3. 36. and Fitzh. Scire facias 40.

2. If *Fine is levied to Baron and Feme, and* to *W. P. their Son, and to the Heirs of W. P.* and after the *Baron and Feme levy a Fine with Warranty to a Stranger, and W. P. enters*, and the *Baron and Feme die*, now Warranty and Fine is void; for, *for the one Moiety the Fine was a Diſſeiſin*, by which the Entry of W. was lawful, *and to the other* Moiety, becauſe *it was an Alienation to his Diſinheritance*, his Entry was lawful, and ſo the whole Warranty avoided; for, for the Moiety, it ſeems to be Warranty which commenc'd by Diſſeiſin, and of the other Moiety, Warranty collateral. Br. Garranties, pl. 35. cites 24 E. 3. 38.

Warranty *cannot be* avoided *but by Entry, or continual Claim*, which countervails Entry, where he durſt not enter for Doubt of Death, which ſhall be ſo *pleaded expreſsly*. Per Bab.

3. Warranty ſhall *not* be avoided *but by Entry, or* by *Action before that the Warranty deſcends*; for if he may enter, and will not, he ſhall not recover before that the Warranty deſcends; then, when it is deſcended, he ſhall be barr'd. And ſo note that in *Formedon, Cui in Vita*, and ſuch Actions, where a Man *cannot enter, there if the Warranty be deſcended* and pleaded, this is Bar for ever. Br. Garranties, pl. 96. cites the printed Abridgment of Aſſiſes, fol. 38. Br. Recover, pl. 38. cites S. C.

4. If *Tenant in Tail has Iſſue two Daughters*, and *infeoffs the one with Warranty, and dies*, the Warranty between her and her Father is determin'd; and yet by Cauſe ſhewn that the *Reverſion* is *deſcended to the other Daughter*, there in Formedon brought in Name of both, the Feoffee by this Cauſe ſhewn ſhall vouch herſelf and her Siſter, and otherwiſe not. Br. Garranties, pl. 21. cites 11 H. 4. 20.

Br. Recovery, pl. 11. cites S. C — Br. Voucher, pl. 71. cites S. C —— Br. Garranties, pl. 32. cites 21 H. 6. 45.

5. T. brought Warrantia Chartæ againſt H. and *counted that one R. brought Aſſiſe againſt him of* 100 *Acres* of Land, *pending which Aſſiſe* the *Plaintiff came to him, and ſhew'd that he was in of his Feoffment with Warranty, and requeſted him to adminiſter to him a Plea in Bar of the Aſſiſe, which he refus'd to do* &c. Port. ſaid, before *that the Defendant any thing had in this Land, A. was ſeiſed in Fee till diſſeis'd by C. who infeoff'd the Defendant, who infeoff'd the Plaintiff, upon whom the ſaid A. enter'd*; Judgment ſi Actio. Per Markham, he ſhall not diſable his own Eſtate; for if a Man, who *has granted Rent-charge, ſays, that he was in by Diſſeiſin made to K. at the Time of the Gift, which K. after releas'd to his Poſſeſſion*, this ſhall not defeat the Grant; and yet the Releaſe countervails Entry and Feoffment. And per Newton, Paſton, and Aſcue J. *by the Entry of the Diſſeiſee all meſne Eſtates are defeated*, but *in Caſe of Releaſe the Eſtate continues*; ſo a great Difference. And after the Defendant chang'd his Plea, and *ſaid that A. was ſeiſed in Fee, and infeoff'd B. C. and D. after whoſe Death E claim'd as Heir of A. and, thinking that A. had died ſeiſed, enter'd upon the ſaid B. C. and D. and thereof infeoff'd the Defendant, who infeoff'd the Plaintiff in Fee with Warranty, upon whom F. enter'd, and D. died, and B. and C. releas'd to the Poſſeſſion of the ſaid F. all their Right*; Judgment ſi Actio; and becauſe he *did not ſhew whether the Feoffment and Releaſe was before the Aſſiſe* brought, or not, therefore no Plea; Quod tota Curia conceſſit; by which Portingt. alleg'd it to be before the

the Aſſiſe brought; and after Arderne pleaded the firſt Bar by Entry made by C. after the Diſſeiſin and the Warranty made. And per Cur. the *Entry ought to be alleg'd before the Aſſiſe brought, or before any Requeſt made to adminiſter the Bar*; for per Newton, Entry before Requeſt in Aſſiſe avoids the Warranty. And *ſo* of Entry *before Voucher in Præcipe* quod reddat, notwithſtanding that it be *pending the Præcipe*; for the Party is not intitled to his Warranty, but by the Voucher in the one Caſe, and by the Requeſt in the other; but Entry lawful before is a Determination of the Warranty; by which Arderne waiv'd the Plea aforeſaid, and *ſaid that A. was ſeis'd till diſſeiſs'd by R. who infeoff'd H. who infeoff'd the Plaintiff with Warranty, and A. re-enter'd upon the Plaintiff, before which Entry the Plaintiff made no Requeſt.* And per Newton, if a Man be *in of my Feoffment, and is impleaded, and after infeoffs a Stranger, and retakes an Eſtate*, there this is a good Avoidance of the Warranty, and he cannot bind me; for he is *in of another Eſtate, and yet Poſſeſſion continues as to the firſt Writ.* Br. Warrantia Cartæ, pl. 11. cites 21 H. 6. 41. and 22 H. 6. 22.

6. *Entry lawful, or Recovery before Voucher or Requeſt*, is a clear Determination of the Warranty; Per Paſton J. Quod nota. Br. Warrantia Carte, pl. 11. cites 21 H. 6. 41. and 22 H. 6. 22. Br. Voucher, pl. 71. cites S. C.

7. Where *Diſſeiſor infeoffs* B. *with Warranty, and* the firſt *Diſſeiſee releaſes all his Right to the Feoffee*, and *Aſſiſe is brought againſt him*, there the Warranty ſhall remain, notwithſtanding the Releaſe. Br. Voucher, pl. 71. cites 21 H. 6. 41. and 22 H. 6. 22. A Diſſeiſor *makes Feoffment in Fee*, and the *Feoffee makes Feoffment over with Warranty, upon whom a Stranger enters as Diſſeiſor*, the *1ſt Diſſeiſee releaſes to the 2d Diſſeiſor*, the *2d Feoffee re-enters*, the *firſt Diſſeiſee brings Aſſiſe*, and the *2d Feoffee brings Warrantia Chartæ againſt his Feoffor*, and he pleads this Matter, and the Releaſe of the firſt Diſſeiſee, this is not good; for the *Poſſeſſion continued.* Contrary if the firſt Diſſeiſee had re-enter'd or recover'd, and infeoff'd him. And ſo note a *Difference* between *Releaſe made by him, who may lawfully enter* upon one who is in by Tort, *and where ſuch* a Man *enters or recovers, and takes Execution.* In the one Caſe the Warranty remains, and in the other not. Br. Warrantia Carte, pl. 11. cites 21 H. 6. 41. & 22 H. 6. 22.

8. *So* where ſuch *Releaſe* is made *to a ſecond Diſſeiſor by the firſt Diſſeiſor.* Contra of Entry or Recovery. Br. Voucher, pl. 71. cites 21 H. 6. 41. and 22 H. 6. 22. If *Diſſeiſor* be, and he *makes Feoffment with Warranty*, and the *Feoffee is diſſeiſed by another Diſſeiſor*, and the *firſt releaſes to the 2d Diſſeiſor*, by this the Warranty of the Feoffee is determined; per Paſton. And concord. Littleton in his Chapter of Releaſe, as to the meſne Titles. Contra Newton; and that Warranty is not determined without an Entry in Fact. Brooke ſays, and ſo it ſeems clear, that lawful Entry by Recovery, or otherwiſe, determines meſne Acts. Br. Counterplea de Voucher, pl. 2. cites 21 H. 6. 41.

9. Where *Diſſeiſor makes Feoffment with Warranty*, and the *Diſſeiſee enters, the Warranty is loſt*; for his Entry determines meſne Acts. Br. Counterple de Voucher, pl. 2. cites 21 H. 6. 41.

10. Warranty cannot ſtand in Part, and be defeated in Part; Per Newton and Paſton. And therefore Brook ſays it ſeems to him, that *by* the *Entry into Part all* the Warranty *ſhall be defeated*; for all the Juſtices ſaid that he may enter into the Moiety; Quod nota. Br. Garranties, pl. 34. cites 22 H. 6. 56.

11. If *Tenant in Tail has Warranty to deraign againſt his Donor, and is diſſeiſed*, and *A. who has Title paramount, recovers againſt the Diſſeiſor*, the Warranty of the Tenant in Tail is loſt; Per Jay. Br. Garranties, pl. 55. cites 4 H. 7. 2.

12. Altho' a collateral Warranty be deſcended, yet if the *Eſtate whereunto the Warranty was annex'd is defeated*, albeit it be *by a meer Stranger*, the Warranty is defeated; As if the Diſcontinuee of Tenant in Tail is diſſeiſed, and a collateral Anceſtor had releas'd to the Diſſeiſor with Warranty, this barr'd the Iſſue; but if the Diſcontinuee had

enter'd on the Diſſeiſor, the Bar was remov'd: So that altho' the Diſcontinuance remain, and no Remitter wrought to the Heir, yet the Warranty is defeated, and Bar remov'd; and therefore the Iſſue in Tail may have his Formedon, and recover the Land. Sublato Principali tollitur adjunctum. See Litt. S. 741. and Co. Litt. 389. a.

13. If *Tenant in Tail* be *diſſeiſed*, and after *makes a Releaſe to the Diſſeiſor with Warranty in Fee*, and after is attaint or *outlawed of Felony*, and has Iſſue, *and dies*, the Iſſue in Tail may enter upon the Diſſeiſor, becauſe nothing makes Diſcontinuance in this Caſe but the Warranty, and Warranty may not deſcend to the Iſſue in Tail, the Blood being corrupt between him that made the Warranty, and the Iſſue in Tail. Litt. S. 746.

The Reaſon is, that by the Attainder of the Father, *it is now in Judgment of Law but a Releaſe without Warranty*; for albeit *the Warranty* at the Time of the Releaſe was effectual, yet it *works no Diſcontinuance, unleſs it deſcends upon the Iſſue* in Tail, ſo as if it be defeated, extinct, or determined in the Life of the Tenant in Tail, then no Diſcontinuance is wrought. Co. Litt. 391 b.

And ſo it is *if the Tenant in Tail* has Iſſue, and releaſes to the Diſſeiſor with Warranty, and after is attainted of Felony, and *after obtains his Pardon, and dies*, the Iſſue in Tail may enter; for the Pardon does not reſtore the Blood as to the Warranty, nor makes the Iſſue in that Caſe inheritable to the Warranty. *But if the Iſſue* in Tail, in that Caſe, *had been attainted of Felony in the Life of his Father, and obtained his* Charter of *Pardon, and then his Father had died, the Iſſue cannot enter* into the Land, in reſpect of the Corruption of Blood upon the Attainder of himſelf. *But* in the Caſe of Littleton, *if Tenant in Tail at* the Time of *his Attainder had no Iſſue, and after the Obtaining of his Pardon had Iſſue, that Iſſue ſhould have been bound by the Warranty*; for by the Pardon he was as a new Creature, tanquam Filius terræ, whoſe Blood upwards remains corrupted; but for the Iſſue had after the Pardon, he is inheritable to his Father; and if his Father had *Iſſue before the Pardon, and had Iſſue alſo after, and dies*, nothing can deſcend to the youngeſt, for that the eldeſt is living, and diſabled: But if the eldeſt Son had died in the Life of the Father, without Iſſue, then the youngeſt ſhould inherit. Co. Litt. 391. b. 392. a.

14. A *Releaſe of all Warranties*, or of *all Covenants real*, or of *all Demands*, will defeat and extinguiſh a Warranty. Litt. S. 748.

15. If the *Heir impleads* the Uncle, or *Anceſtor collateral in his Life*, the Warranty ſhall not ſerve. Br. Garranties, pl. 91. cites Litt. tit. Garr.

16. If the *Baron diſcontinues the Right of his Feme*, and *Anceſtor collateral of the Feme releaſes with Warranty and dies*, to whom the Feme is Heir, and after the *Baron dies*, the Feme ſhall be barr'd in Cui in Vita by this Warranty, notwithſtanding the Coverture, becauſe *ſhe is put to her Action by the Diſcontinuance*; for Coverture cannot avoid Warranty, but where the Entry of the Feme is lawful, which it is not upon a Diſcontinuance, as above. Br. Garranties, pl. 84. cites M. 33 H. 8.

17. If a *Collateral Anceſtor releaſes with Warranty, and enters into Religion*, now the Warranty binds; but if after he be *deraigned*, now it is defeated. Co. Litt. 392. b.

18. If a *Seigniory* be *granted with Warranty*, and the *Tenancy eſcheats*, the Seigniory whereunto the Warranty was annex'd, is extinct; and conſequently the *Warranty* defeated; and it ſhall *not extend to the Land* Et ſic de ſimilibus. Co. Litt. 392. b.

19. By *Partition by Writ*, the Warranty is not extinguiſh'd, becauſe it is compellable by Act of Parliament, to which every Man is Party; and ſo no Man can have wrong by its Operation. 6 Rep. 12. b. Paſch. 27 Eliz. C. B. Morrice's Caſe.

20. *But* if 2 Jointenants make Partition *by Deed* by Conſent, ſince the ſaid Act, (viz) 31 H. 8. 1. this Partition remains at Common Law; and conſequently the Warranty is gone. 6 Rep. 12. b. Morrice's Caſe.

S. P. Hob. 25. in Caſe Roll v. Oſborn.——S. C. cited per Cur. Ld. Raym. Rep. 360. in Caſe of Hawkins v. Cardy.

(D) Warranty. *Deſtruction.* *What* Act or Thing will deſtroy a Warranty. *Act of God.*

1. IF my Father and J. S. enfeoff me with Warranty, and after my Father dies, I may vouch my ſelf as Heir to my Father * with J. S. and ſo the Warranty is not deſtroyed by the Deſcent. 29 E. 3. 46. Admitted.

* Fol. 740. *But in Præcipe* quod reddat, per Cur. if the *Father infeoffs his Son with Warranty*, and the *Son is impleaded*, he may vouch his Father; but if the *Father dies*, and the Son is Heir to him, now if the Son be impleaded, he cannot vouch as Heir of his Father; for by the Death of his Father, the *Warranty of his Father is extinct*, and alſo he cannot vouch himſelf; for he is Heir to the Father who made the Warranty. Br. Voucher, pl. 124. cites 43 E. 3 23. —— S. P. And it is the ſame Perſon who ſhall vouch and who ſhall render in Value, and he cannot render to himſelf in Value. Br. Garranties, pl. 5. cites 40 E. 3. 13. —— Br. Voucher, pl. 13. cites 40 E. 3. 14. S. C.

2. If 2 are enfeoffed with Warranty, and after one dies the Survivor ſhall have all the Warranty; for he comes in from the firſt Feoffor. 13 E. 3. Age. 96. by Shard.

[3.] If a Man makes a *Gift in Tail* at this Day, *and warrants the Land to him, his Heirs and Aſſigns*, and after the *Donee makes a Feoffment and dies without Iſſue*, the Warranty is expired as to any Voucher or Rebutter; for that the Eſtate in Tail, whereunto it was knit, is ſpent; *otherwiſe* it is, *if the Gift and Feoffment had been made before the Statute of Donis* conditionalibus; for then both the Donee and Feoffee had a Fee Simple, and ſo are our Books to be intended in this and the like Caſes. Co. Litt. 385. a. (d)

(D. 2) Act in Law.

See (K. b) pl. 15.

[1.] 3. IF a Villein and another have Joint Warranty, and the Lord enters into the Moiety of his Villein, the other ſhall have the Warranty alone. 48 E. 3. 17.

2. If a Man *has Cauſe of Warranty, and cannot take thereof Advantage at the Time when Neceſſity requires, as againſt an Abbot or Biſhop, in the Time of Vacation, or againſt the Heir in Ventre ſa mere, where there is no other* Heir at the Time who can be vouch'd with him, now the Warranty is loſt for ever, as it is ſaid there. Br. Garranties, pl. 68. cites 38 E. 3. 29.

3. If *A. diſſeiſes B. and infeoffs C. with Warranty, who infeoffs D. with Warranty*, upon whom a *Stranger enters*, in whoſe Poſſeſſion B. the *Diſſeiſee, releaſes his Right*, all the Warranties are extinct; and if *D. reenters* and be impleaded, he ſhall not have a Writ of Warrantia Chartæ, becauſe *he is in of another Eſtate by Wrong*. F. N. B. 135. (G)

Ibid in the new Notes (e) cites 21 H. 6. 41. accordingly.

(E) What

(E) What Act or Thing will be an *Extinguiſhment.* *Act of him who has the Warranty.*

S. P. becauſe he cannot warrant the Land to himſelf, nor can he be Aſſignee to himſelf. Co. Litt. 390. a. (g) —— *But* if a Man makes a Feoffment with Warranty, and the *Feoffee enfeoffs the firſt Feoffor upon Condition*, that Warranty remains, and he ſhall vouch by Reaſon of the firſt Warranty; *but if* upon that Feoffment *he had limited any new Uſe*, there, becauſe the *Eſtate was alter'd*, the Voucher was gone. 4 Le. 251 in Caſe of Roll v. Osborn, cites it is adjudg'd in C. B. 43 Eliz. 3. Bointon v. Cheſter. —— And ibid. ſays it was reſolved 34 Eliz. in B. R. in **Kempe and Ennyngham's** Caſe, that in ſuch Caſe he ſhould not have ſeveral Warrantia Chartæ's.

1. **If Feoffee with Warranty enfeoffs the Feoffor with Warranty, the firſt Warranty is deſtroyed.** 20 H. 6. 29. b. 17 E. 3. 47. b.

S.P. Co.Litt. 390. a. (i)

2. But **if the Feoffee with Warranty** enfeoffs the Feoffor and his Feme with Warranty, **the firſt Warranty is not deſtroyed.** 17 E. 3. 47. **Adjudged. But Quære there** 74. 29. E. 3. 49. **Adjudged,** 39 E. 3. 9. b. 26 Aſſ. 40.

Br. Garranties, pl. 22. cites S. C. —

3. [So] **if Feoffee with Warranty enfeoffs** the Feoffor and a Stranger **with Warranty, the firſt Warranty remains.** 11 H. 4. 42.

Co. Litt. 390 a (i) S. P.—For tho' the Fee-Simple of the Warranty and of the Eſtate warranted meet in the ſame Perſon, yet another is jointly ſeiſed with him, who would be prejudiced if the Warranty ſhould be extinct. Hawk. Co. Litt. 491.

Br. Garranties, pl. 22. cites S. C. —

4. **If** 2 enfeoff me with Warranty, and I re-enfeoff the one with Warranty, **yet their Warranty to me remains.** 11 H. 4. 42.

S. P. Co. Litt. 390. a. (i) — For the other Feoffor may ſtill warrant the Land to him that was his Companion, as well as to me who was the firſt Feoffee. Hawk. Co. Litt. 491.

See (G) pl. 1. S. C.

5. **If** 2 Feoffees with Warranty **are, and the** one releaſes to the other all his Right in the Land, **he, to whom the Releaſe is made, ſhall have all the Warranty, and no Part ſhall be deſtroyed by it; for he comes in from the firſt Feoffor into the whole.** 13 E. 3. **Age.** 96. **by Shard.**

6. In *Dower*, if the *Tenant vouches the Heir*, and the *Demandant has Judgment againſt the Heir*, and the Tenant holds in Peace, and after *the Heir reverſes the Judgment by Writ of Diſceit*, and the *Demandant brings new Writ of Dower*, the Warranty is loſt by Falſity of the Tenant, and by the Reverſal of the Judgment in Writ of Diſceit. Br. Garranties, pl. 83. cites 4 E. 3. 36. and Fitzh. Sci. fa. 140.

Br. Garranties, pl. 43. cites S. C.

7. If the *Baron in another Writ confeſſes the Warranty to be made by his Feme*, if he has Cauſe of Action of the ſame Land, he *ſhall be barred during the Coverture*; Quære. Br. Extinguiſhment, pl. 26. cites 13 Aſſ. 9. and 13 E. 3. and Fitzh. Warranty 36.

Br. Garranties, pl. 43. cites S. C.

8. But 'tis ſaid elſewhere, that if *he who gets the Warranty eſpouſes the Feme, who warrants, and is impleaded*, he has *loſt the Warranty for ever*; For he cannot vouch his own Feme; and if the Demandant recovers he has loſt the Warranty for ever, and ſo is not ſuſpended, but extinct. Br Extinguiſhment, pl. 26. cites 13 Aſſ. 9.

Br. Voucher, pl. 13. cites S. C. —— Br. Garranties, pl 5. cites 40 E. 3. 13. S. C. becauſe he re-infeoffed his Father of as high an Eſtate as he took.

9. In Præcipe quod reddat, the Caſe was that the *Father and two Sons* were, and the *Father infeoffed the eldeſt in Fee*, and he *re-infeoffed the Father and the youngeſt, and the Heirs of the Father*, and the *Father died*; by this his firſt Warranty is extinct. Br. Counterple de Voucher, pl. 5. cites 40 E. 3. 14.

10. If

10. If two Jointenants are, and the *one infeoffs a Stranger of his Part*, the Warranty is gone. Per Aſcue, which Luddington did not deny. Br. Garranties, pl. 67. cites 5. H. 5. 7.

If *I infeoff two* with Warranty, and the *one infeoffs a Stranger of his Part*, I ſhall not warrant to the ſecond Feoffee. Br. Garranties, pl. 75. cites 11 E. 4. 8, Per Huſſey and Choke.

11. If a Man makes a *Feoffment with Warranty*, and after the *Feoffee by Deed grants* to the Feoffor, *that if he or his Heirs vouch by the Warranty that it ſhall be void*, this is a good Grant; for he may *rebut* notwithſtanding, but not vouch. Br. Grants, pl. 166. cites 7 H. 6. 43.

12. If a Man enfeoffs another of Lands by Deed with Warranty, if the *Feoffee makes a Feoffment over, and takes back an Eſtate in Fee*, the Warranty is determined, and he ſhall not have a Writ of Warrantia Chartæ, becauſe he is *in of another Eſtate*. F. N. B. 135. (G)

Ibid. in the new Notes (d) ſays, ſee accordant per Newton.

22 H. 6. 22——S. P. Weſt's Symb. S. 197. cites F. N. B. 135. (A)——If A. makes *Feoffment in Fee* with Warranty, and *takes back Eſtate in Fee*, the Warranty is gone. The ſame as to Warranty for Life, if he takes back Eſtate for Life. Mod. 182. pl. 14. Paſch. 26 Car. 2. C. B. Fowle v. Doble.——Cart. 243. S. C & S. P. by Vaughan Ch. J. ——Freem. Rep. 157, &c. S. C. accordingly.——Mo. 71. pl. 192. Trin. 6 Eliz. Anon. S. P.——Dal. 71. pl. 47. S. C. & S. P.

13. Grandfather, Father, and Son. The *Grandfather* is *ſeiſed for Life*, *the Remainder to the* * *Son in Tail*, Remainder *to the right Heirs of the Grandfather*. The *Grandfather* covenants by Indenture to make Aſſurance to J. S. and that it ſhould be to the Uſe of him and his Heirs; and after he ſuffers a Recovery againſt him, and *levies a Fine* to the ſaid J. S. *Come ceo &c.* and Proclamations upon it, and *and after the Statute of 27 H.* 8. is made, and *the Grandfather makes a Feoffment to the Son*, and dies. And 'twas held that the Entry of the Father upon the Son is lawful, and ſhall not be eſtopped upon the *Warranty of the Grandfather*; for this *is gone by the retaking of the Eſtate*; for *when the Statute veſts as high a Poſſeſſion in him as he had when he alien'd, the Warranty is extinct*; for the Statute of 27 H. 8. does not ſave the Warranty. And there Dyer ſaid, that tho' the 5 Years paſſed in the Life of the Grandfather; ſo that the Entry which was given by *Cauſe of Forfeiture* is taken away, yet when the Grandfather died he ſhall have other 5 Years to make his Claim or Entry for Cauſe of the *Title coming to him by the Remainder in Tail*; and this by the Stat. of 4 H. 7. Mo. 71. pl. 192. Trin. 6 Eliz. Anon.

* *To the Father in Tail*, Dal. 71. pl. 47. S. C.

14. If a *Woman Tenant in Tail and her Husband* make a *Leaſe Pour auter Vie*, if *in an Action they be received*, they *cannot vouch over*. Per Hobart Ch. J. Hob. 26. in Caſe of **Roll v. Osborn**, cites 45 E. 3. 18. and 46 E. 3. 24.

But if the *Leaſe* had been only *for the Life of the Woman*, upon the Receipt they might have vouched; for by Repreſentation they are in of the firſt Eſtate. Per Hobart Ch. J. Hob. 26. in Caſe of Roll v. Osborn.

15. If a Man *conveys Land to me and my Heirs with Warranty*, and I *make a Feoffment*, or levy a Fine, *or ſuffer a Recovery*, *without vouching my Feoffor*, *to the Uſe of my ſelf and my Heirs*, yet I may vouch my Feoffor as I might do before; for this is my old Fee-Simple in the ſame Degrees and Privity in Effect, as before. Per Hobart Ch. J. Hob. 27. in Caſe of Roll v. Osborn.

16. If *one levies a Fine to me in Fee with Warranty to me and my Heirs*, and *I ſuffer a Common Recovery againſt me to mine own Uſe as before*, my Warranty remains; for I am in by him as I was in before. Hob. 27. in Caſe of Roll v. Osborn.

17. *And* if the Warranty were *to me*, *my Heirs*, *and Aſſigns*, and *I ſuffer the Recovery to the Uſe of a Stranger*, he ſhall vouch my Feoffor as my Aſſignee; for common Recovery is indeed an Aſſignment. Hob. 27. in Caſe of Roll v. Osborn.

(F) Warranty. Extinguiſhment. *What* Act or Thing ſhall be ſaid an Extinguiſhment *of all* the Warranty, *and* what *but of part.*

Cited 1 Rep. 67. in Archer's Caſe.

1. If Leſſee for Life be the Remainder or Reverſion in Fee, and Leſſee is diſſeiſed, and an Anceſtor of him in Remainder or Reverſion releaſes to diſſeiſor with Warranty and dies, and after Leſſee enters or recovers by Aſſiſe, becauſe the Warranty does not deſcend upon him; yet this ſhall not reduce the Remainder or Reverſion. But it ſhall be bound by the Warranty, becauſe it was bound before the Re-entry. 44 Aſſ. 35.

2. But otherwiſe it is if the Leſſee re-enters before the Death of the Anceſtor, then the Remainder or Reverſion is not bound by the Warranty becauſe it does not deſcend upon him; and therefore the Re-entry of Leſſee reduces the Eſtate of him in Reverſion and Remainder, and then the Eſtate upon which the Warranty was annexed is deſtroyed. 44 Aſſ. 35.

2 Le. 57. Arg. in the Caſe of Ards v. Smith, S. P. cites 44 E. 3. 30. 31. but it ſhould be 44 Aſſ. pl. 35. as in Roll. and is Lib. Aſſ. pag. 295. a. at the Top, that the Warranty is loſt by the Entry of him in Remainder for Life, and the firſt Remainders recontinued. Same Caſe is at 44 E. 3. 30. 31. but not S. P.

3. So if Tenant for Life, Remainder for Life, Remainder in Fee are, and Tenant for Life aliens in Fee, to whom an Anceſtor of him in Remainder in Fee releaſes with Warranty, and after before his Death, he in Remainder enters for a Forfeiture, this deſtroys the Warranty as to the Remainder alſo, for the Cauſe aforeſaid. 44 Aſſ. 35. by Thorp.

Fol. 741.

* Cro. C. 291. pl. 2. S. C. and S. P. ſeems admitted, if the Jury had found the Son to have been Heir, which they did not; and that not being found, Jones and Berkley J. held the Warranty to be no Bar, but Crooke e contra; but upon that Point they would adviſe ——— † Cro. C. 145. pl. 23. S. C. Mich. 4 Car. in B. R. adjudg'd. ——— Jo. 199. pl. 15. S. C. adjudg'd.

4. If Baron and Feme are ſeiſed for Life of Land, the Remainder to the Son in Tail, the Remainder to the Son in Fee, and the Baron makes Feoffment with general Warranty, and dies, and this deſcends upon the Son, and after the Feme enters by Force of the Statute of 32 H. 8. tho' the Feme be remitted to her Eſtate for Life, yet this ſhall not deſtroy the Warranty as to the Son; for his Eſtate was bound by the collateral Warranty before the Entry of the Feme; and therefore the Warranty cannot be deſtroyed by the Entry of the Feme. Hill. 10 Car. B. R. between * *Gimlet and Saundrey*, Per Curiam, and Counſel, admitted, and agreed without Argument of this Point. Intratur. Tr. 8 Car. Rot. 1000. Car. B. R. between † *Fox and Kendall* adjudged upon a ſpecial Verdict, and the ſame Judgment afterwards Mich. 5 Car. affirm'd per Curiam, without Scruple, in Writ of Error in the Exchequer Chamber. Intratur in B. R. Tr. 3 Car. Rot. 746. But in this Caſe the Reverſion in Fee was limited to the right Heirs of the Baron.

5. If a Man *gives to Father and Son, and to the Heirs of the Body of the Father*, and the *Father aliens* the Land *with Warranty, and dies*, the *Son may enter into the one Moiety* for the Diſſeiſin to him, and ſhall have his Action of the other Moiety, by all the Juſtices. But by Askue [Aſhton] it is to be known if he may enter into any Parcel; for then the Warranty as to this Parcel is defeated, and *Warranty cannot ſtand in Part and be defeated in Part*; Per Newton and Paſton. And therefore Brook ſays, it ſeems

ſeems to him that by the Entry into Part all the Warranty ſhall be defeated; for all the Juſtices ſaid that he may enter into the Moiety. Quod nota. Br. Garranties, pl. 34. cites 22 H. 6. 51.

6. *Two make a Feoffment in Fee*, and *warrant* the Land *to the Feoffee and his Heirs*, and the *Feoffee releaſes to one of the Feoffors* of the Warranty, yet he ſhall vouch the other for the Moiety. Co. Litt. 393. a.

So it is if *one infeoffs two with Warranty*, and the *one releaſes* the Warranty, yet the other ſhall vouch for his Moiety. Co. Litt. 393. a.

(G) Warranty. Extinguiſhment. *What* Act or Thing *will deſtroy all the Warranty.*

See (F)

1. IF two are infeoff'd with Warranty, and after the one infeoffs the other of his Part (admitting that he may) this ſhall extinguiſh all the Warranty, and not the Moiety only. Contra 13 E. 3. Age 96. by Shard.

(H) Warranty. A *Title* happening *of later Time* ſhall not be bound.

1. IF my Anceſtor be diſſeiſed, and I releaſe to the Diſſeiſor with Warranty, and after my Anceſtor dies, by which the Right deſcends to me, yet my Warranty ſhall bar me. 17 E. 3. 67. b.

2. If Tenant in Tail, the Remainder in Tail are, and Tenant in Tail levies a Fine with Warranty, and after ſuffers an erroneous Common Recovery, and dies without Iſſue, and the Warranty deſcends upon him in Remainder, it ſeems that it ſhall not bar him to have Writ of Error upon the Common Recovery, becauſe this Title of Error accrued to him after the Warranty created. Hill. 13 Ja. B. R. between *Holland and Lee* dubitatur.

S. C. argued 2 Roll. Rep. 301. but the Writ of Error abated by the Death of one of the Plaintiffs.——Bridgm. 69 to 79. S. C. argued, but the Writ abated.——It was agreed by all the Juſtices, that when a Man binds himſelf and his Heirs to Warranty, they are not bound to warrant new Titles of Actions accrued by the Feoffee, or any other, after the Warranty made, but only ſuch Titles which are in Eſſe at the Time of the Warranty made. D. 42. b. pl 15. Mich. 30 H. 8. Anon.——S. C. cited Bridgm 77. in Caſe of Holland v. Jackſon.

3. It is a Maxim, that no Voucher ſhall *extend to bar* any Eſtate of *Franktenement* or Inheritance, which is *in Eſſe*, *Poſſeſſion*, *Reverſion*, *or Remainder*, (*and not diſplac'd* or turn'd to a Right) *before or at the Time of the Warranty* made, tho' after and at the Time of the Deſcent of the Warranty the Eſtate of Franktenement or Inheritance be diſplaced and diveſted. 10 Rep. 96. b. 97. a. Mich. 10 Jac. B. R. in Seymour's Caſe.

S. P. 9 Rep. 106. reſolv'd Paſch. 10 Jac. in Margaret Podger's Caſe.

4. A Warranty *extends to Rights precedent, and never to any* Right *that commences after* the Warranty. Co. Litt. 388. b.

5. *As* if *Lord and Tenant* be, and the *Tenant makes a Feoffment in Fee with Warranty*, and after the *Feoffee purchaſes the Seigniory*, and then the *Tenant ceſſes*, the Lord ſhall have a Ceſſavit. Co. Litt. 388. b.

(H. 2) Warranty. *Pleadings.*

1. WHEN the Vouchee will avoid the Warranty *by Alteration of the Eſtate*, he *muſt ſhew How* the Eſtate is chang'd; Per Hobart Ch. J. Hob. 26. in Caſe of Roll v. Osborn, cites 3 E. 3. 51.

2. In Aſſiſe the *Tenant pleaded Warranty of the Grandfather of the Plaintiff*; to which the *Plaintiff ſaid that at the Time of the making* &c. *the Grandfather had nothing unleſs for Term of Life*, the *Remainder to W. N. which W. N. enter'd for the Alienation, becauſe to his Diſinheritance*; and well confeſs'd and avoided. And this agrees with Libro Littleton, that if the *Heir can avoid or defeat the Poſſeſſion upon which* the Warranty is made, it is a good Avoidance of the Warranty. Br. Garranties, pl. 99. cites 9 E. 3. 11.

3. If a Man *enters into a Warranty with a Proteſtation of an eſpecial Eſtate* in the Tenant who admits it, the Vouchee ſhall warrant no other Eſtate, tho' it be greater; Per Hobart Ch. J. Hob. 26. in Caſe of Roll v. Osborn, cites 41 E. 3. 25.

4. In Aſſiſe *Warranty of the Uncle* of the Plaintiff was pleaded whoſe Heir he is, and the *Plaintiff ſaid that he never had ſuch an Uncle*; and ood. Br. Garranties, pl. 74. cites 44 Aſſ. 1.

(H. 3) Warranty a good *Bar. In what Actions.*

1. IN ſome Actions, eſpecially *Actions real*, the Warranty of the Anceſtor of the Plaintiff ſhall be a good Bar; but then the Concluſion of the Plea muſt be conſidered, which appears by the Books of Entries to be, *Si encounter le Garanty ſon Aunceſtor que Heir &c.* Heath's Max. 60.

2. In Aſſiſe of Common the Warranty of the Anceſtor is no Bar; for *it is of another thing which is not in Plaint*, and alſo the Heir cannot enter into the Warranty to defeat the Warranty; and therefore it ſhall be no Bar to him, inaſmuch as the *Law gives him no Means by Action or by Entry to avoid it.* Br. Garranties, pl. 96. cites the printed Abridgment of Aſſiſes, fol. 38.

But in Treſpaſs the *Defendant ſaid, that it was his Franktenement*; and the *Plaintiff ſaid, that W. P. Anceſtor of the Plaintiff, whoſe Heir he is*, and ſhew'd how, *was ſeiſed in Fee, and infeoff'd N. in Fee by Deed, Que Eſtate*

3. Treſpaſs of breaking his Houſe, and carrying away his Goods: The *Defendant ſaid, That it was his Franktenement at the time of the Taking, and he took them Damage feaſant.* And the *Plaintiff ſaid that before this, the Father of the Defendant was ſeiſed, and infeoff'd W. with Warranty* to him, his Heirs, and Aſſigns, *who leaſed to the Plaintiff for Life*, Judgment if againſt the Deed with Warranty, he ſhall be received to ſay, that it is his Franktenement. And per Hull, This is all in the Realty; by which he ſaid, *that after the Leaſe for Life the Father of the Defendant died, and the Defendant enter'd, and the Plaintiff ouſted him*; Judgment if againſt the Deed with Warranty as above. Note the Diverſity. And the *Defendant ſaid, that before this his Father was ſeiſed in Fee, and infeoff'd him, and after diſſeiſed him, and infeoff'd W.* as above; *and he made continual Claim* to the Land all the Life of the Father, *and durſt not enter* for fear of Menace; and his Father died, and he enter'd, and ſo his Franktenement, and the Iſſue taken upon the continual Claim; and

ſo

ſo ſee that Warranty is a good Eſtopple in Treſpaſs. Br. Treſpaſs, pl. 102. cites 14 * E. 4. 13.

he has, Judgment if againſt the Deed of his Anceſtor, whoſe Heir he is, he ſhall be received to ſay that it is his Franktenement; and at laſt he was compell'd to conclude upon the Franktenement, to *ſay that it is his Franktenement, and not the Franktenement of the Defendant*; for the *Realty ſhall not come in Iſſue in Treſpaſs*, as agreed there. And per Hanke, Warranty is no Plea in Action of Treſpaſs. Br. Treſpaſs, pl. 105. cites 14 H. 4. 35.—— And by 22 E. 4. 4. he ſhall not averr Feoffment nor Warranty in Bar. Quære [if] by Concluſion. Ibid.—*So* where the Defendant in Treſpaſs *ſaid that the Place is* 20 *Acres*, and *pleaded a Releaſe of all the Right with Warranty of the Anceſtor* of the Plaintiff, whoſe Heir he is, *made to J. N. Tenant of the Land, Que Eſtate he has, and rely'd upon the Warranty.* Per Suliard, This is no Plea; but if he had given *Colour*, it had been a good Plea; but ſeveral contra, and that it is no Plea, unleſs *when the Franktenement comes in Debate, and by way of Concluſion*, it is then a good Plea, and not as here; for the Action ſtands indifferent; for it may be brought by Tenant of Fee-Simple, Fee-Tail, for Term of Life, or for Years, and *this is a real Bar*, which is no Plea in an Action merely perſonal; for it may be that the Plaintiff is Tenant for Years, or by Execution by Elegit, Statute Merchant, or the like, and therefore no Plea. Br. Treſpaſs, pl. 361. cites 21 E 4. 82.——And 22 E. 4. 4. by the Opinion of the whole Court there, except Catesby, it is no Plea. Quod nota. Ibid.——*So* in Treſpaſs upon the Statute 5 R. 2. Ubi ingreſſus non datur per Legem, the *Warranty of the Anceſtor was pleaded*, Judgment if againſt the Deed of his Anceſtor, whoſe Heir &c. and the *Plaintiff demurr'd*. And the beſt Opinion was, that *it is no Plea before that the Franktenement comes in Debate*; for the Warranty cannot be Satisfaction for the Damages which are to be recover'd in Treſpaſs. Br. Treſpaſs, pl. 262. cites 1 H. 7. 12.——Br. Garranties, pl. 75. cites S. C. Quod nota.—— *And* in the ſame Caſe and ſame Year, fol. 22. the *Defendant pleaded Feoffment of J. B. Anceſtor of the Plaintiff, whoſe Heir* he is *by Deed*, and demanded Judgment, Si Actio, againſt the Deed of his Anceſtor, whoſe Heir &c. and no Plea. Br. Treſpaſs, pl. 262.——It was ſaid by the Juſtices, that *in Treſpaſs done in Land collateral Warranty is no Plea*, becauſe the Plaintiff is ſuppoſed in Poſſeſſion; *But if he intitles himſelf after to the Franktenement*, then it is a good Bar. Quære inde; for it appears often that it is a good *Eſtopple* in Treſpaſs, after that the Franktenement comes in Debate, but no Bar; for the Warranty is real, and the Action is perſonal. Br. Treſpaſs, pl. 173. cites 15 H. 7. 9.

Treſpaſs Vi & Armis. The *Defendant ſaid, that the Place is* 4 *Acres, of which J. S. was ſeiſed in Fee; to whom R. Anceſtor of the Plaintiff, whoſe Heir he is, releaſed all his Right with Warranty by this Deed* &c. *Que Eſtate the Defendant has*, Judgment if againſt the Warranty &c. Quære; for he *did not convey Title by Feoffment or otherwiſe.* And Quære if J. S. was Diſſeiſor, and he, who Right has, releaſes to him, and the Defendant diſſeiſes J. S. and gets the Deed, if he ſhall plead it by reaſon of the Poſſeſſion. And per Pigot and Bridges, it is no Plea; but Starkey contra; therefore quære. Br. Garranties, pl. 65. cites 21 E. 4. 18.——Heath's Max. 60. cites S. C.

In *Treſpaſs* the Defendant *pleaded Leaſe for* 60 *Years* by the Father of the Plaintiff, *and Confirmation of the Plaintiff with Warranty*, and relied upon the Deed. And per Brudnel, it is no Plea; but ſhall plead it *by way of Covenant*; for by the Warranty he cannot vouch, becauſe it is only perſonal; but in Writ of Right of Ward a Man may vouch; but here he is put to Writ of Covenant, as in Writ of Waſte; quod Fineux Ch. J. conceſſit. But per Tremaile J. he may plead it by way of Bar. Br. Covenant, pl. 25 cites 21 H. 7. 32.—— Br. Garranties, pl. 41. cites S. C.

* This ſhould be 14 H. 4. 13. and ſo are the other Editions.

4. It is holden no Plea that the Plaintiff did *confirm to* the Defendant, *Leſſee for Years, with Warranty*; nor in Aſſiſe by Tenant by Statute is the Warranty collateral of his Anceſtor a good Bar, *becauſe* only *a Chattel is demanded*; yet holden, that a Ward may be granted with Warranty, and the Voucher may be in a Writ of Ward. Heath's Max. 61. cites 20 H. 7. [4. a. pl. 11.]

5. A Sale of a *Chattel* without * expreſs Warranty bindeth not the Seller to warrant; and that Warranty alſo muſt be made at the Time of the Sale, and not after; and *no Advantage* thereof to be taken *by way of Bar, but by* way of *Action*. Quod nota. Heath's Max. 61. cites 5 H. 7. 18.

* The Original is (Eſplees of)

6. In a *Formedon in Deſcender* the Tenant may plead, That the Anceſtor of the Demandant *exchanged the Lands* with the Tenants, for other Lands taken in Exchange, which deſcended to the *Demandant*, whereinto he had *enter'd and agreed*; or if he had not enter'd and agreed unto the Lands taken in Exchange, then the Tenant may plead the Warranty in Law, and other Aſſets deſcended. Co. Litt. 384. b.

7. *Tenant in Tail made a Feoffment in Fee with Warranty, and diſſeiſed the Diſcontinuee, and died ſeiſed, leaving Aſſets* to this Iſſue. Some hold, that in reſpect of this ſuſpended Warranty and Aſſets, the Iſſue in Tail ſhall not be remitted; but that the Diſcontinuee ſhall recover againſt the Iſſue in Tail, and he take Advantage of his Warranty, if any he hath;

and after, *in a Formedon* brought by the Iſſue, the Diſcontinuee ſhall bar him in reſpect of the Warranty and Aſſets, and ſo every Man's Right ſaved. Co. Litt. 390. a. b. (o.)

8. A Warranty does not bind a Title of *Dower*. Arg. Roll Rep. 307. Hill. 13 Jac. B. R. in Caſe of **Holland v. Lee**, cites 34 E. 3. Garranty, 72. 21 E. 4. 8. And Ibid. S. P. admitted by Counſel; but ſaid, this ſeems intended where the Title of Dower accrues after the Warranty deſcended.

But if *Tenant by the Curteſy aliens with Warranty, and dies*, and *the Heir brings Writ of Right*, he ſhall be barr'd by the Warranty, tho' no Aſſets be deſcended. Br. Garranty, pl. 95. cites 5 E. 4.——*Contra if he brings Action poſſeſſory*, according to the Statute of Glouceſter, cap. 20. Ibid.

9. In a *Writ of Right* a Warranty ſhall not be a Bar. Arg. Roll Rep. 307. in Caſe of Holland v. Lee, cites 34 E. 3. Conuſans 29.

(H. 4) *Voucher. What* it is. *And the ſeveral Sorts.*

1. A Voucher *is*, in the Underſtanding of the Common Law, when the Tenant calls another that is bound to him to warranty into the Court; that is, *either to defend the Right* againſt the Demandant, *or to yield him other Land* &c. *in Value*; and *extends* to Lands or Tenements of an Eſtate of Freehold or Inheritance, and *not to any Chattel real, perſonal, or mix'd, ſaving only in Caſe of a Wardſhip* granted with Warranty; for in the other Caſes concerning Chattels, the Party, if he hath a Warrant, ſhall not vouch, but have his Action of Covenant, if he hath a Deed; or if it be by Parol, then an Action upon his Caſe, or an Action of Diſceit, as the Caſe ſhall require. He that vouches is called the Voucher, Vocans; and he that is vouched is called Vouchee, Warrantatus. Co. Litt. 101. b.

2. There is a Recovery with a *ſingle* Voucher, and that is where there is but one Voucher; and with *a double Voucher*, and that is when the Vouchee vouches over; and ſo a *treble* Voucher &c. There is alſo a **foreign Voucher*, and that is when the Tenant, being impleaded within a particular Juriſdiction, (as in London or the like) vouches one to warranty, and prays that he may be ſummoned in ſome other County, out of the Juriſdiction of that Court: This is called a foreign Voucher, but might more aptly be called a Voucher *of a Foreigner*, De Forinſecis vocatis ad Warrantizandum. Co. Litt. 102. a.

* See the Statute of Glouceſter, cap. 12. at (B. b. 3)

(I) *Voucher. Who* may vouch. *In reſpect of his Eſtate.* [*Being but a Chattel.*]

1. **In a Writ of** Dower againſt Tenant by Elegit, and the Heir in Reverſion, **the** Tenant **by Elegit cannot vouch** the Heir, **becauſe he has** only a Chattel. **1 E.** 3. 2. **Contra 2 E.** 3. 42. **b.**

2. *Treſpaſs* upon the Statute of 5 *R.* 2. The *Defendant pleaded Leaſe for Years of the Anceſtor of the Plaintiff, and Confirmation made by the Plaintiff to the Leſſee with Warranty*; Judgment if againſt the Deed which comprehends Warranty. Brooke ſaid, the Warranty is no Plea; for *it is only of Chattel real*, of which Action does not lie, in which a Man may

may vouch or rebut; To which Fairfax agreed, and that it is only as Warranty of an Horſe. Br. Garranties, pl. 97. cites 20 H. 7. 4.

3. *Grant of Ward* is good with Warranty; and *in Writ of Ward* the Grantee may vouch or rebut. Br. Garranties, pl. 97. cites 20 H. 7. 4. Per Newport and Elliot.

4. In Aſſiſe by Tenant by *Statute Merchant*, Warranty Collateral by Anceſtor of the Plaintiff is no Bar; for it is *only a Chattel real*, tho' the Writ be Ut de libero Tenemento. Br. Garranties, pl. 97. cites 20 H. 7. 4. Per Rede J.

(K) What *Perſons may* vouch, [and *How.*]

Fol. 742.

1. IN a Writ againſt the Lord and his Villein, **the** Villein, **by Sufferance of his Lord, ſaving to him his Servitute,** may vouch as Stranger to **warranty.** 18 E. 3. 19. b. **So they may** join **in the Voucher [in ſuch] Special [Manner.]** 33 H. 6. 1. b.

If a *Villein purchaſes* with Warranty, and the *Lord enters, and is impleaded* by one who is bound by the Warranty, he may rebut by this Warranty, but cannot vouch by it. Br. Voucher, pl. 132. cites 22 Aſſ. 37.

2. If Feoffee with Warranty to him and his Aſſigns infeoffs his Heir within Age, and dies, **the Heir ſhall vouch** as Heir, **notwithſtanding the Feoffment, and claim the one Eſtate or the other, becauſe he accepted the Eſtate being an Infant.** 40 E. 3. 44. 30 E. 3. 16. b. 24 E. 3. 36. b.

For he is remitted becauſe of his Infancy. Br. Garranties, pl. 7. cites S. C.—6 Rep. 69. b. in **Sir Moyle Finchs's** Caſe, cites 43 E. 3. 5. (23. b.) For the Law which has determined the Warranty of the Father to the Son, will give the Son Benefit of the firſt Warranty; becauſe this is by Act of Law.

3. But **if he had been enfeoffed** at his full Age, **he could not vouch as Heir, but** as Aſſignee. * 40 E. 3. 44. **Contra** 18 E. 3. 52.

* Br. Garranties, pl 7. cites S. C.

4. [But] **If Feoffee with Warranty enfeoffs his Son and Heir** with Warranty, and dies, **the Son may vouch** as Heir **to his Father,** tho' he be in by **Purchaſe; becauſe the** Warranty between him and his Father is loſt. 43 E. 3. 23. b. **Co.** 11. **Bowles** 81.

Br. Garranties, pl. 9. cites S. C. Per Finch.—1 Rep 98. in Shelley's Caſe.

5. [But] **If Feoffee with Warranty** gives in Tail **to his Heir, and dies, the** Heir cannot vouch the firſt Feoffor before he has vouched himſelf. **Dubitatur.** 18 E. 3. 6. 18 E. 3. 52.

6. [But] **If Feoffee with Warranty** leaſes for Life to his Heir, and dies, **by which the Reverſion deſcends upon the Leſſee, he may vouch** as Heir, **becauſe he may be in by Deſcent of all the Eſtate at his Election.** 18 E. 3. 52.

7. In Mortdanceſtor, the *Tenant vouched* to Warranty *A. and prayed that he may be ſummoned in another County.* Fith *counterpleaded that the Vouchee nor none of his Anceſtors had any Thing* &c. upon which the Aſſiſe was taken, and *found for the Tenant*, by which it was *awarded that the Voucher ſtand.* Br. Voucher, pl. 102. cites 36 Aſſ. 6.

8. *Formedon* in Remainder *againſt two Barons and their Femes*, the *Barons made Default*, and the *Femes were received* and allow'd to vouch. D. 298. pl. 28. Hill. 13 Eliz. Anon.

(K. 2) [What

(K. 2) [What Perſon may vouch] *By what Names.*

[1.] 7. IF a Reverſion deſcends, **and after** Tenant by the Curteſy ſurrenders to him, **he may vouch** as Heir. 1 H. 6. 2.

(K. 3) What Perſons [may vouch] *in Reſpect of their Eſtates.*

[1.] 8. THREE Jointenants are with Warranty, **and** one ſurrenders or releaſes to the others, **they may vouch for the Entierty; for they are in by the Feoffor for the whole.** 40 E. 3. 41. b.

[2.] 9. **One** Coparcener **cannot vouch alone** without the other as Heir. 43 E. 3. 23. b. 19 H. 6. 78. b.

3. *Statute Weſtm.* 2. 13 *E.* 1. *Cap.* 4. *Parag.* 5. *When Tenants in Dower in free Marriage by the Law of England, or for Term of Life, or in Fee Tail, loſe their Land by default,* * *and it is come to that Point that the Tenants* † *muſt be compelled to ſhew their Right,*

* In the *Quod ei deforceat* given by this Act, the Demandant *muſt count that he or ſhe was ſeiſed* of the Land *for* Term of *Life, or in Tail, without ſhewing of whoſe Leaſe or Gift,* for that the Action is brought of his own Poſſeſſion, and alledge the Eſplees in himſelf, *and that the Defendant hath deforced him, without making of any mention of the Record.* And then the *Tenant may defend the Right of the Demandant* &c. *and either ſhew how he recover'd againſt the Demandant by Formedon, or other real Action*; *and* in the Purcloſe of his Plea ſhall *ſay,* that *ipſe paratus eſt ad manutenendum jus & titulum ſuum prædict' per donum prædict'* &c *unde petit Judicium,* whereby *the Defendant* in the Quod ei deforceat *is become Actor,* and in Effect revives the former Action, *and the Demandant* in the Quod ei deforceat *is become in manner of a Tenant to the former Action, and may vouch as if he were Tenant to the former Action*; becauſe if he hath but an Eſtate for Life, it is not ſafe for him to plead in chief, but to vouch him in the Reverſion; therefore he can vouch no other, but him in the Reverſion; or *if the Defendant* notwithſtanding, *upon the Title of the former Recovery, plead ſome other Bar,* then the *Demandant in the Quod ei deforceat ſhall not vouch at all, becauſe the former Action is not revived.* And if the Defendant plead the former Recovery, the Demandant may traverſe the Title, or plead any thing in Bar of the Title. 2 Inſt. 351, 352.

† It is *not of Neceſſity that the Defendant,* in the Writ of Quod ei deforceat, do *plead the former Recovery*; *but* (as hath been ſaid) he *may plead any other Bar.* 2 Inſt. 352.

* By theſe Words the Demandant in the Quod ei deforceat after the Recovery pleaded *cannot vouch any* other *but him in the Reverſion* 2 Inſt. 352.

[And] *they* * *cannot make Anſwer without them to whom the Reverſion of Right belongs*;

* Upon theſe Words two Concluſions are to be obſerved. Firſt, that albeit the Demandant in the Quod ei deforceat after the Recovery pleaded cannot vouch, yet the Quod ei deforceat may be maintainable. Secondly, if the Recovery by Default be in ſuch an Action where no Voucher doth lie, yet the Quod ei deforceat is maintainable. 2 Inſt. 352.

Therefore it is * *granted unto them to vouch to Warranty* † *as if they were Tenants, if they have a Warranty. And when the Warrantor hath warranted, the Plea ſhall paſs between him that is ſeiſed and the Warrantor, according to the Tenor of the Writ that the Tenant purchaſed before, and by which he recovered by Default. And ſo from many Actions, at length they ſhall reſort to one Judgment, which is this, That the Demandants ſhall recover their Demand, or the Tenant ſhall go quit.*

† Theſe Words are to be intended that *ſuch Tenant* ſhall vouch, *which might have vouched in the firſt Writ,* and therefore if the *Judgment by Default* be *in a Scire facias* brought upon a Recovery or Fine, or in a Writ of Entry, or in the Quibus brought *againſt the Diſſeiſor himſelf,* there lies no Voucher; and yet a Quod ei deforceat is given by this Act upon ſuch a Recovery by Default. 2 Inſt. 352.——

S. P.

S. P. Per Keble. Br. Pernor of Profits &c. pl. 10. cites 14 H. 7. 17. 15 H. 7. 18.——S. C. cited Pl. C. 113. a. in Townsend's Case, says that these Words, tho' spoken affirmatively, *contain a Negative* in them, viz. Nullo alio Modo, so that the Words (Vouch to Warranty, as if they were Tenants) have one and the same Effect of all those Words, viz. (vouch to Warranty as if they were Tenants, and in no other Manner.) —— S. P. by Sanders Ch. B. Pl. C 206. b. 207. a. in Case of Stradling v. Morgan. — Pl. C. 113. a. In Marg. it is said thus, viz. Nota Reader, that the Statute is, Vouch to Warranty (*according to the Tenor of the Writ*) as if they were Tenants.

And *where the Vouchee should not have his Age in the former Writ*, he shall not have his Age in this Writ; for this Writ is of the Nature of the other. 2 Inst. 352.

The Tenant in a Quod ei deforceat may vouch &c. and so *both Tenant and Demandant* (as hath been said) *may vouch* in this Act, [and] seeing the Statute doth give a Voucher, by Consequence he shall recover in Value. 2 Inst. 352.

But note *this Act doth give but one Voucher*, and therefore the Vouchee shall not vouch over. 2 Inst. 352.——Br. Parliament, pl. 21. cites 14 H. 7. 17. S. P. by Vavisor, because in this Point the Statute is to be taken strictly.

This (As if &c) extends only to the Point to which it is referred, viz. Notwithstanding that he be Demandant; but this will not alter or abbrogate the Law in other Cases, and therefore if Tenant pleads other Bar, and does not maintain the first Recovery, he shall not vouch at all; nor shall he vouch other than him in the Reversion, neither shall he vouch in any Action in which no Voucher lies. 11 Rep. 62. b. in Dr. Foster's Case, cites 9 E. 3. 22. tit. Counterple de Voucher 101. 33 H. 6. 16. 14 H. 7. 18.

4. *Gift in Tail reserving the Reversion*; the Tenant is impleaded; this is good Warranty to plead, unless against him who is to Defeat this Warranty with Reversion; and so Reversion is good Warranty in Law. Br. Garranties, pl. 29. cites 38 E. 3. 32. Br. Cui in Vita, pl. 6. cites S. C.

5. In Præcipe quod reddat the Tenant vouched, the *Vouchee entered into the Warranty, and shew'd that M. was seised of this Land and other, and had Issue A. and N. who made Purparty and this Land allotted to A. in Allowance of other Land allotted to N. and after A. had Issue J. who had Issue the Vouchee*, and *N. had Issue E.* and *E. had Issue W. of whom he pray'd Aid, and that the Parol demur for his Nonage*; the *Demandant said that A. infeoffed I. Father of the Vouchee, and so the Purparty destroy'd.* And the Opinion of the Court was that yet he shall have Aid, and therefore because he alone cannot have the the Warranty Paramount, he and the other shall have the Warranty. Br. Garranties, pl. 9. cites 43 E. 3. 23.

6. Where a Man abates, and *the Abator infeoffs J. S. who leases for Life, and grants the Reversion to J. S. Heir of the Abator*, the Tenant attorns, and the *Tenant is impleaded, and makes Default* after Default, and he in *Reversion is received*, he cannot vouch, by Reason that the Statute is general, That it is good Counterplea that the Ancestor of the Tenant who vouch'd, whose Heir he is, was the first who abated, and yet the Tenant, who vouch'd, claim'd in by Purchase, and not as Heir; and yet upon a Fine, he who claims by Purchase, and not by Descent, may say that his Ancestor, who levied the Fine, had nothing at the Time &c. Br. Voucher, pl. 33. cites 46 E. 3. 2. Per Finch. *But* if *Abator infeoffs J. who reinfeoffs the Abator, and another*, and they are impleaded, they may vouch for the Advantage of the other; And per Finch, the Statute extends as well to him who is Tenant by Receipt and Voucher, as to the Tertenant who vouches; for he is in Loco tenentis. Br. Voucher, pl. 33. cites 46 E. 3. 2. Per Persey and Finch.

7. It was said, that where *two abate to the Use of the one*, and *Cesty que Use &c. infeoffs the other in Fee*, who vouches, he shall not have the Voucher. Br. Voucher, pl. 33. cites 46 E. 3. 2.

8. Where the Statute is, that a Man shall not vouch *out of the Degrees* in Writ of Entry within the Degrees, yet the *Tenant by Receipt may vouch extra Gradus*; ad quod non fuit responsum. Br. Voucher, pl. 33. cites 46 E. 3. 2. Per Perle.

9. After the 4 Degrees are past, the *Issue in Frankmarriage* shall do such Services to the Donor as the Donor does over to his Lord, and yet the Issue shall vouch by the Frankmarriage, and shall have Writ of Mesne by it. Br. Voucher, pl. 126. cites 12 H. 4. 9. Per Hank.

He cannot vouch and recover in Value, if his Leaſe be not by *Dedi Conceſſi* or *Rent reſerved* Br. Voucher, pl. 106. cites 6 H. 7. 2. Per Huſſey and Fineux.——Br. Recovery, pl. 18. cites S. C.

10. *Tenant for Life may* chuſe to vouch *or pray in Aid*. Br. Voucher, pl. 6. cites 9 H. 6. 3.

11. In Cui in Vita the Caſe was, that *a Feme ſeiſed of Land took Baron*, and had *Iſſue two Sons*, the *Baron alien'd in Fee*, the *Feme died*, and the *youngeſt Son recover'd* the Land *by Cui in Vita* in the Per in the Life of the Baron as Heir, and the *eldeſt Son brought Cui in Vita in the Poſt againſt the youngeſt*, *and* he *vouch'd the Tenant againſt whom he recover'd*; and the *Demandant counterpleaded*, *becauſe he who is now Tenant recover'd the ſame Land againſt the ſame Vouchee by Cui in Vita in the Per*, *ſuppoſing his Entry by the Baron of his Mother whoſe Heir* &c. *and ſued Execution*; *and this Eſtate continued by Force of the Recovery till the Day of the Writ purchas'd*, *and always after*. Et hoc *paratus eſt* &c. *abſque hoc that the ſaid Vouchee*, *or any of his Anceſtors*, *had ever any thing in other manner*; and pray'd that he be ouſted of the Voucher. And per Babb. and Paſton, this is not any Counterplea to the Voucher, but to the Lien which is for the Vouchee to have, and not for the Demandant, by reaſon that the Demandant has conteſs'd Poſſeſſion in the Vouchee, who might make Feoffment. But Marten contra; for *if it may appear by a Cauſe ſhewn*, *that the Vouchee had nothing but a Poſſeſſion*, *which is defeated by a Recovery or lawful Entry*, *he ſhall not have the Voucher*; Quod Paſton conceſſit. Br. Counterple de Voucher, pl. 2. cites 9 H. 6. 49.

He ſhall not vouch the Heir to recover in Value, *nor* the *Leſſee for Life him in Remainder*. F. N. B. 134. (G) in the new Notes there (c) cites 14 H. 6. 25.——S. P. And that it is the *ſame of any* other *who comes in En le Poſt*. 5 Rep. 17. Paſch. 25 Eliz. the 5th Reſolution in Spencer's Caſe.

12. *Tenant by the Curteſy* cannot vouch. Br. Voucher, pl. 162. cites 10 H. 7. 10. Per Frowike.

13. *No Man* ſhall vouch as Party, Heir, or Aſſignee, *but in Privity of Eſtate*. Co. Litt. 385. a.

Ceſty que Uſe *may rebut*, but *not vouch*; for that is to recover in Value for the Loſs. 2 Salk. 685. Paſch. 4 Ann. B. R. Smith v. Tindall.

14. *Ceſty que Uſe* might vouch; Per Windham J. and he ſaid there was no Authority to the contrary, but only Opinions obiter. 1 Mod. 193. Hill. 26 & 27 Car. 2. C. B. in Caſe of Williamſon v. Hancock.

15. At Common Law many Perſons might rebut, that could not take Advantage of a Warranty by way of Voucher; As the *Lord by Eſcheat*, the Lord *of a Villein*, a *Stranger*, *Tenant in Poſſeſſion*. Mod. 193. Arg. in Caſe of Williamſon v. Hancock, cites 35 Aſſ. 9. and 11 Aſſ. 3. and 45 E. 3. 18. pl. 11. and 42 E. 3. 19. b.

(K. 4) [What Perſon may vouch. Perſons] *in of other Eſtate.*

Br. Voucher, pl. 71. cites 21 H. 6. 41. and 22 H. 6. 22.

[1] 10. **He who is in of other Eſtate** than that to which the Warranty was annex'd, **cannot vouch.** 45 E. 3. 18. b.

* 4 Le. 94. pl. 192. in Caſe of **Owen v. Morgan**, Anderſon Ch. J. cites S. C.

[2] 11. As if Tenant in Tail with Warranty be in of a Fee upon a Diſcontinuance, **he cannot vouch.** * 45 E. 3. 18. b. 4 H. 6. 21.——So if *Tenant in Tail general diſcontinues*, *and retakes*

retakes in Tail to him and his ſecond Feme, and is impleaded, he *ſhall not vouch the firſt Donor*, by Reaſon that he is in of the ſecond Tail. Br. Voucher, pl. 142. cites 46 E. 3. 24.

[3] 12. **If a Warranty be** annex'd to a Seigniory, and after a Tenancy eſcheats, **and afterwards [the] Tenancy is demanded, he cannot vouch for this.** 6 H. 4. pl. 1. **Dubitatur.**

4. If a Man *releaſes with Warranty to a Baſtard*, and the *Baſtard dies without Heir in the Life of him who releaſes*, the *Lord enters by Eſcheat*, and now he who made the Warranty dies, and his Heir brings Action againſt the Lord, he ſhall not plead this Warranty: The Reaſon ſeems to be, inaſmuch as it is *deſcended upon other Poſſeſſion in which it was not made*; and alſo this Poſſeſſion is *in the Poſt*, and not in the Per. Br. Garranties, pl. 49. cites 29 Aſſ. 34.

5. If *Baron diſcontinues the Right of his Feme, and retakes to him and his Feme*, and they are impleaded, and the *Baron makes Default*, and the *Feme* is *received*, ſhe may vouch and have the firſt Warranty; for the Feme *is remitted*. Br. Recovery, pl. 5. cites 44 E. 3. 17.

6. If *two exchange* Lands, and the *one enters* by the Exchange into the Land of the other, *and infeoffs the other of his Land, which the other has in Exchange*, and after the Feoffee is impleaded, and vouches by the Exchange, the other may rebut him of the Voucher, becauſe he is *in by the Feoffment*, and not by the Exchange, as it is ſaid. Br. Voucher, pl. 148. cites 45 E. 3. 20.

7. *Cui in Vita*, the *Tenant pray'd Aid of two*, becauſe they were *Heirs in Gavelkind, and made Partition, and this Land allotted to the Tenant*. The *Demandant ſaid that after the Partition the Tenant infeoff'd N. in Fee, who reinfeoff'd the Tenant in Fee*, Judgment if the Aid &c. and they were adjourn'd to another Term, at which Day it was awarded that he anſwer without the Aid, becauſe he is *in of other Eſtate, and* cannot have the Voucher or Warranty paramount, becauſe he *is not in as Heir*, nor can he *recover pro rata*; for he is now *Purchaſor*, and ſo does not hold in Parcenary. And ſo ſee that he did not loſe Seiſin of the Land, tho' it was after Adjournment. Br. Aid, pl. 46. cites 11 H. 4. 22.

8. If *I infeoff A.* with Warranty, *who infeoffs R.* and after *re-infeoffs A.* now he cannot vouch me, nor ſhall not have Warrantia Chartæ, inaſmuch as he is in of another Eſtate. Br. Warrantia Carte, pl. 24. cites Fitzh. Voucher 266. Per Barr.

S. P. And yet the Poſſeſſion continues as to the firſt Writ. Br. Warrantia Cartæ, pl. 11. cites 21 H. 6. 41. and 22 H. 6. 42.

9. *Tenant for Life*, Remainder *in Tail*, Remainder *in Fee*. *Tenant in Tail levies a Fine*; this has for ever hinder'd Tenant for Life, and Remainder in Tail, from deſtroying the Remainder in Fee, becauſe the Fine has turn'd his Eſtate into a baſe Fee, and has deſtroy'd all Privity of Eſtate; ſo that if Tenant for Life and Remainder in Tail would make a Tenant to the Præcipe, yet they cannot vouch the Remainderman in Fee, without he will voluntarily enter into it. 11 Mod. 121. pl. 7. Trin. 1707. 6 Ann. B. R. Anon.

(K. 5) [What Perſon may vouch] *upon Warranty in Law.*

[1] 13. FEme endow'd by the Guardian may vouch the Heir of the Baron, who has the other 2 Parts, and the Reverſion of this 3d Part. Time of E. 1. 69. b. admitted by Iſſue.

[2] 14. [So] Feme endow'd in Chancery, may vouch the Heir of the Baron who has the other 2 Parts, tho' he has not the Reverſion of the 3d Part. 17 E. 3. 8. b.

Fol. 743.

[3] 15. A Feme Tenant in Dower may vouch the Heir of the Baron. 17 E. 3. 65. b.

[4] 16. So in Writ of Dower againſt Tenant in Dower, where the Dowment of the Tenant is more low than the Title of the Demandant, yet the Tenant may vouch. 17 E. 3. 65. b.

[5] 17. A Feme endow'd by the Vendee of the Baron may vouch the Vendee for Cauſe of her Endowment, and the Reverſion in him. Time of E. 1. 66. b. adjudged.

This Voucher is by reaſon of the Word (Grant) See

[6] 18. The Grantee of a Ward may vouch by Force of a Warranty in Law. 21 E. 3. 11. 22 E. 3. 6. 29 E. 3. 48. b. 30 E. 3. 6. b. *Symkin Simeon's* Caſe. Adjudged 25 E. 3. 38. b. 40.

5 Rep. 17. a. Reſolv'd Paſch. 35 Eliz. in B. R. in Spencer's Caſe.—And being in Caſe of a Chattle real, it imports in itſelf a Warranty. Ibid. 18. cites 29 E. 3. 48. and 30 E. 3. 14. Simpkin Simeon's Caſe.

[7] 19. Tenant by Elegit cannot vouch, becauſe he comes in by the Law. 1 E. 3. 2. Contra 2 E. 3. 42. b.

8. In Præcipe quod reddat, if the Tenant vouches, the Demandant cannot counterplead by this Matter, viz. *becauſe the Vouchee had no other Eſtate but only by the Feoffment of a Baron and Feme, who were Ceſty que Uſe in Right of the Feme, which Baron is dead*; for there was a good Poſſeſſion for the Time for the Life of the Baron: And then to ſay that he, who is Vouchee, had never other Eſtate but for Life of a Stranger who is dead, is not good; for he had Eſtate as Son, who might make Feoffment; and therefore tho' it be now determin'd, it is not determin'd ab initio. Br. Counterple de Voucher, pl. 1. cites 27 H. 8. 23. Per Fitzherbert J.

9. *And* where the Statute 1 R. 2. wills that Feoffments made to great Men for Maintenance ſhall be void, and where the Statute of 11 *H.* 7. *wills that Feoffments made by Femes of their Jointures made in Uſe or Poſſeſſion, by their firſt Baron or his Anceſtor, ſhall be void*, yet this is not void between the Feoffor and the Feoffee, but againſt Strangers; Per Fitzherbert J. But quære if it be a good Poſſeſſion to vouch, but that a Stranger, who is not Heir, may counterplead it; for this is not like to the other Caſe, for the other was a good Plea for a Time, and thoſe are void. Br. Counterplea de Voucher, pl. 1. cites 27 H. 8. 23.

(L) Voucher.

(L) Voucher. Who may vouch *as Heir.* [*And how*]

1. IF A. be inſeoff'd with Warranty in Fee, and after A. dies without Iſſue, by which the Land deſcends to the Uncle, and then the Uncle enters and dies without Iſſue, by which it deſcends to the Father of A. it ſeems that the Father may vouch upon this Warranty, ſhewing the ſpecial Matter, tho' he cannot make himſelf Heir to his Son. Contra Co. Litt. 11. b. Co. Litt. 12. a. ſays that the Father cannot vouch the Feoffor as Heir to his Son; for tho' the Warranty deſcended to his Uncle, yet the Uncle leaves it as he found it, and then the Father cannot take Advantage of it; for Litt. S. 603. ſays that Warranties ſhall deſcend to him that is Heir by the Common Law. And S. 718. he ſays that every Warranty which deſcends doth deſcend to him that is Heir to him which made the Warranty by the Common Law, which proves that the Father ſhall not be bound by the Warranty made by the Son; for that the Father cannot be Heir to the Son that made the Warranty; and a Warranty ſhall not go with Tenements whereunto it is annex'd to any ſpecial Heir, but always to the Heir at the Common Law. And therefore if the Uncle be ſeiſed of certain Land, and is diſſeiſed, and the Son releaſes to the Diſſeiſor with Warranty, and dies without Iſſue, this ſhall bind the Uncle; but if the Uncle die without Iſſue, the Father may enter; for the Warranty cannot deſcend upon him.——G. Treat. of Tenures 15. 16. ſays, that in Caſe of the Son's being infeoff'd with Warranty, and the Uncle's entering after his Death into the Land, and dies, it is doubted whether the Father ſhall take Benefit of ſuch Warranty where the Uncle has not, as it were, actually poſſeſs'd it by Voucher or Warrantia Chartæ. And ſays that Coke excludes the Father, as not repreſenting the Son, with whom the Contract was made; but that Hale admits him; for ſince the Uncle was poſſeſs'd of the Land, he was in actual Poſſeſſion of all its Appendices.

2. If the Feme *Tenant in Dower leaſes her Eſtate to the Heir, rendring Rent for Term of her Life*, this is a Surrender; and if he be impleaded he ſhall vouch as Heir living the Tenant in Dower, well enough. Br. Voucher, pl. 30. cites 45 E. 3. 13. Br. Recovery, pl. 6. cites S. C. And that he may deraign the firſt Warranty as Heir in the Life of the Tenant in Dower, but he ſhall not have in Value during the Life of the Tenant in Dower; Per Mombray, quod non negatur. Brook ſays, But ſee Anno 1 H. 5. which is Contra, as it is ſaid, and that he ſhall have in Value immediately.

3. If a Man has Iſſue a *Son and a Daughter by one Venter*, and a *Son by another*, and dies, *the eldeſt Son enters, and dies without Iſſue, and the Siſter enters*, it ſeems that *ſhe cannot vouch as Heir to the Father*, nor be vouch'd as Heir to him; for the youngeſt Son of the Half-Blood is Heir to the Father; *but ſhe is Heir to her Brother* of the Whole-Blood. Br. Voucher, pl. 12. cites 35 H. 6. 33, 34. and Fitzh. Voucher, 94. 32 E. 3. S. C. cited by Hobert Ch. J. Hob. 125. in Caſe of Roll v. Osborne, That ſhe is without Remedy; for ſhe cannot vouch as Heir alone, except ſhe comes in as Vouchee for Poſſeſſion with the very Heir.

4. No Man ſhall vouch as Heir, *unleſs in Privity of Eſtate.* Co. Litt. 385. a.

5. *If* any *Lands be given to 2 Brethren in Fee-ſimple, with a Warranty to the Eldeſt and his Heirs*, the *Eldeſt dies without Iſſue*, the Survivor, *albeit he be Heir* to him, yet *ſhall he not vouch.* Co. Litt. 385. a.

(M) Voucher. *Upon Warranty in Law.* Upon *what Warranty* it may be.

Br Garranties, pl. 12. cites S. C— S. P. F. N. B. 135. (B) ——See (A. 2) pl. 3.

1. IF 2 exchange Land, without any Clauſe of Warranty, yet the Law creates a Warranty between them, and thereupon the one may vouch the other. 45 E. 3. 20. b. Time of E. 1. 132.

2. *The King gave Land in Tail to his Couſin, ſaving the Reverſion.* The *Tenant in Tail exchanged* this Land for other to M. P. *with Warranty*, and *left Aſſets*, and *died without Iſſue*; by which the King, upon Office thereof found, demanded to have the Land to revert, and becauſe it appear'd of Record that other Land was deſcended to the King, and this Land was *exchanged*, which *is a Warranty in Law*, therefore M. P. was reſtored by reaſon of the Warranty, and Aſſets deſcended to the King. Br. Taile & Dones &c. pl. 34. cites 45 Aſſ. 6.

(M. 2) Upon what Warranty a Voucher may be. *In reſpect of the Words and Extent of them.*

S. P. for it ſhall have Relation to the Eſtate precedent. Br. Garranties, pl. 66. cites S. C.

1. IF a Man makes *Feoffment in Fee*, and *warrants the Land to the Feoffee in Forma prædicta*, now it ſhall by this be *intended Warranty in Fee*, by theſe Words in Forma Prædicta. Br. Expoſition, pl. 29. cites 14 H. 4. 13.

Br. Recovery, pl. 9. cites S. C.

2. Where a Man *infeoffs B. in Fee, and warrants the Land to him*, he may vouch, and recover Fee-ſimple in his Life; but if he dies, his *Heir cannot vouch.* Br. Garranties, pl. 26. cites no Book; but ſays, Vide Alibi pro Lege.

3. It was held by all the Juſtices in the Exchequer-Chamber, except June, that where a *Man will make Warranty to bar him and his Heirs, but not to be vouched, or to render in Value*, he may *warrant it for him and his Heirs againſt the Dean of P. and his Succeſſors* &c. *who have no Title.* Br. Garranties, pl. 30. cites 7 H. 6. 43.

4. *Or* with this Clauſe, *Provided always that the Party nor his Heirs ſhall not vouch the Feoffor nor his Heirs, nor recover in Value*; for he may yet rebut, and plead this in Bar; and therefore the *Proviſo does not reſtrain all the Force of the Warranty*, and ſo it is not void. Br. Garranties, pl. 30. cites 7 H. 6. 43.

5. *And* he may *make the Warranty ſimple, and* make *Defeaſance by Indenture, that if he vouches that the Warranty ſhall be void*; and this holds good, by all the Juſtices; and the other way alſo, by all, except June. Br. Garranties, pl. 30. cites 7 H. 6. 43.

6. But Sir Robert Brudnell, late Ch. J. of C. B. deviſed other Warranty, which is now in Uſe, viz. That the Grantor, *for himſelf and his Heirs, will warrant againſt him and his Heirs*; and by this the Feoffee ſhall

ſhall rebut, but ſhall not vouch. Br. Garranties, pl. 30. cites 7 H. 6. 43.

(N) Voucher. Upon what Warranty a Voucher may be. As Aſſignee. [*Warranty in Deed.*]

See (S) pl. 14.—(D) pl. 1. 11.—— (F. a) pl. 5.

1. UPON a Warranty to one and his Heirs, the Aſſignee ſhall not vouch. 14 H. 4. 5. b. Br. Garranties, pl. 26. cites 38 E. 3. 14.

2. But upon a Warranty to one, his Heirs, and Aſſigns, the Aſſignee may vouch. 20 H. 6. 34. b. Co. Litt. 47.

3. [And] upon a Warranty to one, his Heirs, and Aſſigns, the Aſſignee of the Aſſignee may vouch. Contra admitted 25 E. 3. 50. Per Curiam, and 26 E. 3. 56. b.

If *A. infeoffs B.* with Warranty to him, his Heirs, and Aſſigns, and after *B. infeoffs C. who* after infeoffs *D.* who is impleaded, he ſhall not vouch as Aſſignee of R. Per Cur. Br. Voucher, pl. 160. cites It. Not. fol. 14. but cites 12 E. 2. and 18 E. 2. and 28 E. 3. contra.——If a Man *infeoffs A. and B.* to have to them and their Heirs, *with* a Clauſe of *Warranty*, *prædictis A. and B. & eorum Hæredibus & Aſſignatis*; in this Caſe if *A. dies*, and *B. ſurvives, and dies*, and the *Heir of B. infeoffs C.* he ſhall vouch as Aſſignee; and yet he is but the Aſſignee of the Heir of one of them; for in Judgment of Law, *Aſſignee of the Heir* is the Aſſignee of the Anceſtor; and ſo the Aſſignee *of the Aſſignee* ſhall vouch in Infinitum, within theſe Words, his Aſſigns. Co. Litt. 384. b.

So if a Man *infeoffs A. to have to him, his Heirs, and Aſſigns*, and *A. infeoffs B. and his Heirs, and* B. *dies*, the Heir of B. ſhall vouch as Aſſignee to A. ſo as Heir of Aſſignees, and Aſſignees of Aſſigns, and Aſſigns of Heirs, are within this Word (Aſſigns,) which ſeemed to be a Queſtion in Bracton's Time. Co. Litt. 384. b.

4. If A. warrants Land to B. and his Aſſigns, the Aſſignee, by force of this Warranty, may vouch during the Life of B. but not after the Death of B. becauſe the Warranty is but for the Life of B. for Default of the Word (Heirs.) Co. Litt. 47.

[5.] *No Man ſhall vouch as Aſſignee, but he that comes in Privity of Eſtate*; but *he muſt vouch his Feoffor, and he* to *vouch as Aſſignee.* Co. Litt. 385. a.

And therefore if a *Man* at this Day be *infeoffed with Warranty to him, his Heirs, and Aſſigns*, and he *makes a Gift in Tail, the Remainder in Fee*, the *Donee makes a Feoffment in Fee*, that Feoffee ſhall not vouch as Aſſignee. Co. Litt. 385. a.

(N. 2) [Upon what Warranty a Man may vouch as Aſſignee. Warranty *in Law.*]

[1] 5. UPON a Warranty in Law, the Aſſignee may vouch without any Word of Aſſignee in the Grant. Co. 5. *Spencer*, 17.

[2] 6. As if a Ward be granted to another, the Aſſignee may vouch the firſt Grantor. Co. 5. *Spencer*, 17. Contra 39 E. 3. 8. Agreed.

(O) Voucher.

Fol. 744.

See (S) pl. 14.

(O) Voucher. *Who ſhall be ſaid Aſſignee.*

1. HE that comes in not by Title, but by Abatement, **cannot vouch as Aſſignee.** 41 E. 3. 18. b.

2. If Feoffee, with Warranty to him and his Aſſigns, gives in Tail, the Donee **may vouch as Aſſignee.** 14 H. 6. 4.

3. **He who** is in of other Eſtate, **cannot vouch as Aſſignee.** 20 H. 6. 34 b.

4. If Feoffee, with Warranty to him, his Heirs, and Aſſigns, aliens in Fee, and retakes **to him** in Fee, and aliens to another in Fee, **he may vouch as Aſſignee; for he is not in of other Eſtate. Contra** 20 H. 6. 34. b.

5. If a Ward be granted to a Feme who takes Baron, and dies, **the** Baron **ſhall vouch as Aſſignee by Force of this Warranty in Law.** Co. 5. *Spencer*, 17. 18. **See** 30 E. 3. 6. b. 14 b. *Simkin Simeon's* **Caſe. And Quære whether this Caſe will warrant this Opinion; for there the Vouchee could not [prove] the Death of the Wife; and upon this the Vouchee demands what they had to bind him; but there the Judgment is given only againſt the Baron, and he over againſt the Vouchee, which implies that they intended the Feme dead.**

6. If a *Warranty* be made *to a Man and his Aſſigns*, the *Aſſignee of the Heir of the Feoffee* ſhall vouch as Aſſignee. Quod nota. F. N. B. 135. (G) in the new Notes there, cites 7 E. 3. Warranty &c. 44. 10 E. 3. 32. 19 E. 2. 85. 13 E. 1. 93.

7. An *Aſſignee of Part of the Land* ſhall vouch as Aſſignee; as if a Man make a Feoffment in Fee of 2 Acres to one, with Warranty to him, his Heirs, and Aſſigns, if he make a Feoffment of one Acre, the Feoffee ſhall vouch as Aſſignee; for there is a *Diverſity* between the *whole Eſtate in Part*, and *Part of the Eſtate in the Whole*, or of any Part. *As* if a Man hath a Warranty to him, his Heirs, and Aſſigns, and he make a *Leaſe for Life, or a Gift in Tail*, the Leſſee or Donee ſhall not vouch as Aſſignee, becauſe he hath not the Eſtate in Fee-ſimple, whereunto the Warranty was annexed; but the Leſſee for Life may pray in Aid, or the *Leſſee or Donee may vouch the Leſſor or Donor*, and by this means he ſhall take Advantage of the Warranty. *But* if a *Leaſe for Life, or Gift in Tail* be made, the *Remainder over in Fee*, ſuch a Leſſee or Donee ſhall vouch as Aſſignee, becauſe *the whole Eſtate is out of the Leſſor*; and the particular Eſtate, and the Remainder, do in Judgment of Law, to this Purpoſe, make but one Eſtate. Co. Litt. 385. a.

8. If a Man *infeoffs* 3, *with Warranty to them and their Heirs*, and *one* of them *releaſes to the other* 2, they ſhall vouch; *but if* he had releaſed *to one of the other*, the Warranty had been extinct for that Part; for he is an Aſſignee. Co. Litt. 385. a.

9. When one comes in as a *Ceſty que Uſe*, it is by the Limitation of the Party; and tho' he does not come in En le Per, yet his Eſtate is under the Warranty, and he ſhall be an Aſſignee to take Advantage of a Condition. MS. Rep. Mich. 5 Annæ, in Caſe of Smith v. Tindall.

(P) *Upon*

(P) *Upon what Conveyance* a Voucher may be.

1. A Man cannot vouch upon a Releaſe of a Right, which enures by way of Extinguiſhment, with Warranty. 21 E. 3. 27. Br. Voucher, pl. 63. cites S. C.——

Br. Counterple de Voucher, pl. 29. cites S. C.

2. As if one Coparcener enters into the Whole in her own Name, and after the other releaſes to her with Warranty, ſhe cannot vouch upon this, becauſe the Releaſe enures by way of Extinguiſhment. 21 E. 3. 27. Br. Voucher, pl. 63. cites S. C.—— Br. Counterple de Voucher, pl. 29. cites S. C.

3. Upon a Releaſe with Warranty, which enures by way of Mitter l'Eſtate, a Voucher may be. 21 E. 3. 27.

4. As if 2 Coparceners are ſeiſed, and the one releaſes to the other in Fee with Warranty, ſhe may vouch upon this Warranty, becauſe this Releaſe enures by way of Mitter l'Eſtate. 21 E. 3. 27. Br. Voucher, pl. 63. cites S. C. That where 2 *Coparceners* are, and the *one enters in the Name of both*, and the *other releaſes* to her all her Right, this is good Cauſe of Voucher; for it *countervails Entry and Feoffment*, and ſhe may vouch her Siſter who releas'd. Br. Counterple de Voucher, pl. 29. cites S. C.

5. *Reverſion* and *Rent reſerv'd upon a Leaſe for Life*, is good Cauſe to vouch, and to recover in Value. Br. Recovery, pl 44. cites 6 E. 3. 11. and Fitzh. Voucher 126.

6. If Feme *Tenant in Dower leaſes her Eſtate to the Heir rendring Rent for Term of her Life*, this is a Surrender; and if he be impleaded he ſhall vouch as Heir, living the Tenant in Dower, well enough. Br. Voucher, pl. 30. cites 45 E. 3. 13.

7. If a Man makes Feoffment in Writing by the Word *Dedi*, and the Feoffee dies, his Heir cannot vouch by this Deed of Gift. Br. Voucher, pl. 160. cites It. nota, fol. 14.

8. A Man cannot vouch by a *Confirmation with Warranty*; for the Warranty is *perſonal*. Br. Bar, pl. 55. cites 21 H. 7. 32. See Warrantia Chartæ (B) pl. 3.

——If *A.* be *ſeiſed of Lands in Fee*, and *B. releaſes* unto him, *or confirms his Eſtate in Fee, with Warranty to him, his Heirs and Aſſigns*, all Men agree this Warranty to be good; but ſome have holden, that no Warranty can be rais'd upon a bare Releaſe or Confirmation, without paſſing ſome Eſtate or Tranſmutation of Poſſeſſion. But the Law, as it appears by Littleton himſelf, is to the contrary, and that both the Party, and (as ſome do hold) his Aſſignee ſhall vouch; but *he that is vouch'd in that Caſe, muſt be preſent in Court, and ready to enter into the Warranty, and to anſwer; and the Tenant muſt ſhew forth the Deed of Releaſe or Confirmation with Warranty, to the Intent the Demandant may have an Anſwer thereunto*, and either deny the Deed or avoid it; for that at the Time of the Confirmation made, he to whom it was made, had nothing in the Land &c. for otherwiſe the Demandant may counterplead the Voucher by the Stat. of W. 1. viz. That neither Voucher, nor any of his Anceſtors, had any Seiſin whereof he might make a Feoffment; and this is grounded upon the ſaid Statute of W. 1. the Words whereof be, Sil neit ſon garrantie en preſent que l'un voile garranter de long [ſon] gree, & maintenant enter en reſpons: Otherwiſe the Tenant muſt be driven to his Warrantia Chartæ. Co. Litt. 385. a. b.

Hob. 21. 22 in Caſe of **Roll v. Osborn**, cites 12 H. 7. 12. [but it ſeems miſprinted for 21 H. 7. 32.] where it has been ſaid, that upon a *Releaſe or Confirmation with Warranty*, a Man cannot vouch, and therefore he ſhall have a Warranty of Charters, Hobart Ch. J. ſays, it is clear, that as to him that warranted, he may, and cites 4 E. 2. Fitzh. Voucher 244. and 1 H. 4. 19. 38 E. 13. But he ſays the Cauſe may be ſo, as the Demandant may counterplead the Voucher, and then the Tenant is driven to his Warranty of Charters for Default of his Voucher in Deed; And that ſo the Book 12 [21] H. 7. is in that Senſe true; for if the Defendant ſhould vouch, as he may, againſt the Warrantor, and be counterpleaded by the Demandant, truly he ſhould loſe his Land, and the Aid of Voucher too; for he were paſs'd the requiring of a new Plea of the Warrantor, when he had been by the Voucher counterpleaded before.

See (X)

(Q) Voucher. *In what Actions.*

In *Dower of 4 Acres* of Land, the *Tenant as to one* Acre *vouch'd* to Warranty, which the *Demandant counterpleaded that he who is vouch'd, nor none of his Anceſtors, ever had any thing* &c. after the Seiſin of the Baron. And ſo *it ſeems* that the Tenant in Writ of Dower *may vouch at large.* Br. Voucher, pl. 74 cites 22 H. 6. 42.——See pl. 11.

1. IN Writ of Dower **no Voucher ſhall be.**

Quod ei deforceat upon a Recovery in Aſſiſe by Default, the *Tenant vouch'd one within Age, and pray'd that the Parol might demur*; and the Voucher ſtood, but the Parol did not demur, becauſe it was upon Aſſiſe, where a Man ſhall not have his Age. And ſo ſee that the *Tenant may vouch in Quod ei deforceat by the Common Law, and* the *Demandant may vouch by the Statute of Weſtm. 2. cap. 4. ac ſi eſſet tenens.* And this ſeems to be *where the Tenant pleads the* * *firſt Recovery*; for then he is become Actor, and the Plaintiff Defendant. And ſo note that the one nor the other cannot vouch in this Action; and Thorp ſaid, that if he was *the ſame Perſon againſt whom the Recovery* was had, he ſhall not have the Voucher. Br. Voucher, pl. 27. cites 44 E. 3. 42. 43.——Br. Quod ei deforceat, pl. 4. cites S. C.

2. **In** Quod ei deforceat **for Land which ſhe claims** in Dower, **Voucher does not lie, if it be brought againſt the Recoveror, in the firſt Writ; for this Writ is in Nature of a Writ of Dower.** 44 E. 3. 43.

3. But **otherwiſe it is if this Writ had been** brought againſt the very ſame who recover'd. 44 E. 3. 43.

* He may after the firſt Recovery pleaded, and not before; and this by the Statute; Per Littleton. Br. Voucher, pl. 10. cites 33 H. 6. 46.——Br. Quod ei deforceat, pl. 1. cites S. C.——S. P. Br. Quod ei deforceat, pl. 12. cites 50 E. 3. 12. 25.

The beſt Opinion was, that in *Dower, or Quod ei deforceat*, the Tenant may *vouch the Heir* of full Age, or within Age well enough, without ſhewing Specialty, *unleſs he be in Ward*; and if he be in Ward, he ſhall ſhew Specialty, and otherwiſe not, and this *for the Loſs of the Guardian*; and after the Tenant gratis ſhew'd Specialty, but *not de Rigore Juris.* Br. Voucher, pl. 45. cites 50 E. 3. 25.——Br. Quod ei deforceat, pl. 12. cites 50 E. 3. 12. 25. S. C.

See (R) pl. 2.

4. **Voucher lies in** Writ in Right of Ward. 48 E. 3. 20. 21 E. 3. 11. 22 E. 3. 6. 10 H. 6. 17. b. 30 E. 3. 6. b. 14. 17. b. 39 E. 3. 8. 34 E. 1. Aid 183. 2 E. 3. 42.

5. But **it does** not **lie** in Ejectment of Ward. 48 E. 3. 20.

Br. Voucher, pl. 7. cites S. C.——

6. **In** Quare Impedit **Defendant ſhall not vouch. (It ſeems for the Danger of Lapſe by the Delay.)** 9 H. 6. 56. b. **Curia.**

S. P. But ſhall have Warrantia Chartæ, if it be againſt a common Perſon. Br. Warrantia Chartæ, pl. 2. cites S. C.——Br. Quare Impedit, pl. 7. cites S. C.

* Fol. 745. Br. Warrantia Chartæ, pl. 2. cites S. C.——Br. Quare Impedit, pl. 7. cites S. C.

7. But **in Quare Impedit Defendant** ſhall have Aid of the King in Lieu of *Voucher, **becauſe he has no other Remedy againſt the** † **King; for he cannot have Warranty of Charters againſt him.** 9 H. 6. 56. **adjudged.** 5 H. 7. 16.

† See (S) pl. 1.

8. **A Man may vouch in** Writ of Right of Advowſon. 9 H. 6 56. b.

F. N. B. 135. (A) admitted.——

9. **A Man ſhall not vouch in a** Scire facias to execute a Fine. 18 E. 3. 33. 39 E. 3. 4. b. 16 E. 3. Aid 130. **admitted.**

In Scire facias the Tenant cannot vouch, but ſhall have Warrantia Chartæ. Br. Voucher, pl. 122. cites 42 E. 3. 5.——Tho' the Tenant in the *Scire facias* may have Writ of Warranty of Charters, yet his Feoffor ſhall loſe his Warranty paramount, which he might have by Way of Voucher in a Formedon, which he loſt in a Writ of Warranty of Charters. Br. Scire facias, pl. 125. cites 24 E. 3. 57.

10. If

10. If upon a falſe Office, that B. the Tenant of the King alien'd to C. [and thereupon] C. had a Livery and made a Fine, and by Leave alien'd to another, and retook an Eſtate with Warranty; and after another Office is found for the King, that B. died ſeiſed his Heir in Ward; whereupon a Scire facias iſſued againſt C. to reſeiſe, C. cannot vouch the Alienee in this Action; for the King was deceived in the Licence, and ſo C. in by Abatement. 29 Aſſ. 30. adjudged. 32.

11. In a Writ of Dower againſt the Heir of the Baron, he cannot vouch. 22 E. 3. 3. b. The *Guardian* cannot vouch *in*

Writ of Dower; *Contra of other Tenant in Writ of Ward.* Br. Voucher, pl. 143 cites 48 E. 3. 20. —— See pl. 1.

12. In a Quod permittat for turning of a Water, the Defendant cannot vouch. 30 E. 3. 26. b. Br. Voucher, pl. 149. cites S. C. ——

Br. Quod permittat, pl. 3. cites M. 3 E. 3. That the Defendant cannot vouch in Quod permittat [generally.]

13. In a Writ of Intruſion, ſuppoſing that the Tenant himſelf abated, if the Tenant ſays that he is Tenant for Life, the Reverſion to J. S. yet he ſhall not vouch J. S. becauſe the Writ is brought of his own Wrong. 3 E. 2. Ayd. 162. Adjudged.

14. The Tenant in an Aſſiſe cannot vouch for the Speed and Favour of an Aſſiſe. Com. 89. b. Co. 8. 50. 9 H. 5. 14. F. N. B. 135. (A) S. P. admitted. —

Aſſiſe *againſt H. and two Infants, all plead to the Aſſiſe by Bailiff*, which remain'd, and *at the Day the two came in Perſon and would have vouch'd H who was ready to enter*; ſed non recipitur; the Reaſon ſeems to be that *Voucher is not a Thing of which he may have Certificate, as Recovery, Fine, Releaſe* &c. Br. Aſſiſe, pl. 426. cites 8 E. 3. 39. —— *For* he *ſhall not have other Matter in Perſon* after that he hath pleaded by Bailiff, *but only that of which Certificate lies*; wherefore they pleaded a Releaſe; Quod nota. Br. ibid.

15. The Tenant in a Writ of Entry in Nature of an Aſſiſe cannot vouch, becauſe it is againſt the Suppoſal of the Writ, and the Voucher ought to be granted by the Party, and not by the Court as it is of Aid, and if he ſhould grant it, 'twill abate his own Writ. *21 E. 4. 15. b. 9 H. 5. 14. 5 R. 2. Ayd. 116. Adjudged. * S. P. Br. Aſſiſe, pl. 393 cites 21 E. 4. 18. S. P. For he is ſuppoſed to be in of

his own Wrong. Br. Voucher, pl. 53. cites 9 H. 5. 13. 14. —— S. P. Br. ibid. pl. 121. cites 33 H. 6. 23. Per Priſot; and Brooke ſays that the Law is ſo.

16. In a Writ of Admeaſurement of Paſture a Man may vouch. 14 E. 3. Aid. 23. by Sharde.

17. A Man cannot vouch in *Secta ad Molendinum.* Br. Voucher, pl. 150. cites 4 E. 2. and Fitzh. View, 149.

18. In *Attaint* the Tenant *vouched W. N.* and was ouſted of the Voucher; for *this Suit is only to be reſtored to his firſt Poſſeſſion*, whereof no Meſne Time is adjudged in Law. And it was ſaid there that for the ſame Reaſon a Man may do ſo in *Quod ei deforceat*, and yet Voucher lies there, *and in other Writs in which a Man may loſe by Default.* Br. Voucher, pl. 93. cites 10 Aſſ. 8. Br. Attaint, pl. 55. cites S. C. and 10 E. 3. 21.

19. *In Writ of Right upon Diſclaimer*, the Tenant who diſclaims ſhall not be ſuffer'd to vouch, for he is the ſame Perſon who did the Tort, viz. Diſclaimed. Br. Voucher, pl. 114. cites 12 E. 4. 14. Per Littleton.

20. *In Quo Warranto* a Man ſhall have Aid and vouch. Per Briggs. Br. Franchiſes, pl. 26. cites 20 E. 4. 5. Br. Voucher, pl. 168. cites It. Nott. 2.

21. In Writ of Right *de rationabile parte*, the Tenant cannot vouch. Br. Voucher, pl. 145. cites F. N. B. fo. 9. by the Opinion of Breton.

22. Voucher ſhall not be in *Nuper Obiit.* Br. Voucher, pl. 147. cites F. N. B. F. N. B. 197. (Q)

23. Where

23. In *Mortdanceſter* the Tenant may vouch at large. Br. Mortdanceſter, pl. 61. ſays it appears elſewhere.

24. Where *Writ of Entry en le poſt* is *againſt Tenant for Life to bind the Fee-Simple*, he ought to *pray Aid of him in Reverſion*, *and* then *they to vouch upon the Founder* &c. Br. Recoverie, pl. 27. cites 23 H. 8.

(R) *For what Thing* there may be a Voucher.

1. IF Rent Service be demanded the Tenant cannot vouch. *44 E. 3. 19. † 10 E. 4. 9. b. Quære 18 E. 3. 1.

* Br. Voucher, pl. 26. cites S. C.

† Br. Voucher, pl. 112. cites S. C. —— In Mortdanceſtor of Rent the Tenant vouched to Warranty, the other ſaid that that which he demands is Rent Service; and admitted a good Counterplea. Br. Counterple de Voucher, pl. 40. cites 8 Aſſ. 35. —— Br. Mortdanceſter, pl. 19. cites S. C. —— S. P. in Juris Utrum of Rent. Br. Counterple de Voucher, pl. 49. cites 18 E. 3. 1. Brooke makes a Quære where Pernour of the Rent is impleaded, and vouches.

In Formedon of Rent the Tenant *vouched to Warranty K.* and the *Demandant ſaid that his Demand was Rent Service*; Judgment &c. And the *Tenant ſaid that the Land is Hors de ſon Fee*; Judgment &c. and no Plea, but by Coertion of the Court was compell'd *to ſay that the Land was held of another, abſque hoc that the Demand is Rent Service*, Priſt; and nothing was enter'd in the Roll but whether it was Rent Service or not, notwithſtanding the Prayer of the Parties, and their Matters were given in Evidence. Br. Counterple de Voucher, pl. 12. cites 44 E. 3. 19. —— Br. Voucher, pl. 26. cites S. C.

Entry ſur Diſſeiſin of Rent, the *Tenant ſaid that he was Tenant of the Land out of which* &c. *and that J. S. was ſeiſed of it diſcharged of any Rent, and gave to his Anceſtor in Tail*, and ſo Voucher of the Land diſcharged *by Reverſion*; and per Cur. he ſhall ſhew Cauſe, becauſe he vouches of *another Thing which is not in Demand*, but the Demandant ſhall not have Traverſe to the Cauſe as here, nor the *Tenant ſhall not be compelled to ſhew what Rent it is in his Voucher*, but the Demandant ſhall aver it by Counterplea, that it is Rent Service, and then the Tenant ſhall not vouch where Rent Service is in Demand. And the beſt Opinion was, that he may vouch out of the Degrees, as here, becauſe it is of another Thing than is in Demand, viz. of the Land where Rent is in Demand, and ſo out of the Caſe of the Statute. Br. Voucher, pl. 118. cites 21 E. 4. 26. —— Br. Counterple de Voucher, pl. 46. cites S. C.

Ward of Land and Body; as to the Body, the *Defendant ſaid*, that

2. If the Ward of Body be demanded, the Defendant may vouch. 46 E. 3. 25. Perkin's Sect. 60. 22 E. 3. 13. b. 29 E. 3. 48. b. 30 E. 3. 6. b. 14. 39 E. 3. 8. 25 E. 3. 38. b. 40. 34 E. 1. Aid. 184. 2 E. 3. 42.

a *Stranger leaſed the Ward of the Body* and Marriage to the Defendant, *and vouch'd him to Warranty*, and had it. Quod nota, that he may vouch in this Action *of Chattle*; for the Action is Writ of Right of Seigniory, and yet it is but Chattel in Demand. Br. Voucher, pl. 68. cites 7 H. 6. 14.

* Br. Voucher, pl. 112. cites S. C. per Littleton; quod non negatur. —— F. N. B. 135. (E)

3. If a Rent-Charge be demanded, the Tenant cannot vouch, if he does not vouch as for the Land diſcharged of the Rent. But he may vouch as for the Land diſcharged of the Rent, as that ſuch a one was ſeiſed of the Land diſcharged of the Rent, and infeoffed him. * 10 E. 4. 9. b. Fitzh. Na. 135. † C. Co. 2. *The Archbiſhop of Canterbury*, 47. b. 3 H. 7. 4. 21 H. 7. 10.

S. P. —— See Warrantia Chartæ, (A) pl. 3. S. C.

† This ſeems miſprinted for (E)

4. *Dower* againſt W. who *vouch'd* to warranty *the Heir of the Baron, who* came and *demanded what he had to bind him.* Hill ſaid, Our Father, whoſe Heir we be, *leaſed for Life, rendring to him and his Heirs* 12 s. *yearly*, which Reverſion is in the Heir, and ſo *vouch'd him by the Reverſion and Rent.* Parn ſaid, He need not ſhew any Deed. But per Herle, Then diſclaim the Reverſion or grant it. Parn ſaid, The *Leaſe was upon Condition, rendring Rent with Re-entry*, and ſo his Eſtate deſtroy'd in Law; Judgment. And per Herle, This *is no Plea without Entry in Fact; nor to ſay that he has ceaſed of the Rent, and that he has Writ of Ceſſavit pending.*

And

And becauſe he did not ſay other thing, it was awarded that the *Feme recover againſt the Heir, if he has by Deſcent*; and *if not, againſt the Tenant, and the Tenant over in Value againſt the Vouchee*; and ſo the Feme ſhall recover againſt the Heir, and yet the Tenant has no Eſtate but for Term of Life. Br. Counterple de Garrantie, pl. 7. cites 6 E. 3.

5. It ſeems that in ſuch Caſe, *where the Land is charged in Fact at the Time of the making of the Warranty*, that he who has the Warranty cannot *vouch of the Land diſcharged* &c. for it was charged, in Fact, at the Time of the Warranty. Br. Voucher, pl. 133. As where there were Father and Son, and the *Son had Common out of the Land of W. S.* and the *Father releaſed to W. S. with Warranty*; and after the *Son brought Aſſiſe of the* Common, and the Warranty was pleaded, and the Son recover'd Br. Voucher, pl. 133 cites 22 Aſſ. 38. —— But Brooke makes a *Quære* if the Warranty &c. was *ſuſpended for the Time.* Br. Voucher, pl. 133.

6. *Formedon of* 12 *Acres of Land, and* 20 s. *Rent*; the *Tenant vouch'd to warranty* J. N. *for all*; and good per Cur. For, prima facie, he ſhall be intended Pernour of the Rent. But per Littleton, upon ſuch Voucher, it is a good Counterplea that he is Tenant of the Land, out of which &c. Br. Voucher, pl. 11. cites 35 H. 6. 30.

7. In Treſpaſs the Defendant *pleaded Leaſe for* 60 *Years of the Father of the Plaintiff, and Confirmation of the Plaintiff himſelf with Warranty*, and relied upon the Deed with Warranty. And per Brudnell, It is no Plea, but he ſhall plead it by way of Covenant; for Warranty, as here, is *perſonal*; and he cannot vouch by it, for perſonal &c. But in *Writ of Ward* a Man may vouch; but, as here, he is put to Writ of Covenant, as in Waſte; and Fineux was of the ſame Opinion. And per Tremale J. It is a good Bar. Br. Voucher, pl. 89. cites 21 H. 7. 32.

8. Where a Man is inſeoff'd of a Manor cum Pertinentiis, and *Franchiſe of Aſſiſe of Bread and Beer* is appendant, he may vouch. Br. Voucher, pl. 168. cites Itin. Can. 2. & Itin. Not. 2. Br. Quo Warranto, pl. 1. cites S. C.

(S) Voucher. *What Perſons* may be *vouched*. The *King*.

1. IF the King grants Land with Warranty, and the Tenant is impleaded, he ſhall have Aid of the King in lieu of Voucher. 9 H. 6. 4. Dubitatur 9 H. 6. 56. b. 2 Inſt. 269. S. P. —— Br. Voucher, pl. 159. cites 2 H. 3. that a Man might vouch the King, and that the Parol would have demurr'd for his Nonage; but that the Law is contrary now, and cites 9 H. 6. 56. —— Note a Common Recovery in a Writ of Entry againſt J. S. for the Manor of D. in the County of Buckingham was endeavoured to be drawn, and ſuffer'd at the Bar, wherein the *Tenant pray'd Aid of the King*, by reaſon of a Warranty in [of] the King, whereby he *warranted that Land, and granted to make Recompence upon Eviction*, and this Aid-Prayer was to be inſtead of a Voucher, the Warranty being created by Fine and Recovery drawn in Paper, wherein the Tenant vouch'd the King; and Sir Robert Heath, the King's Attorney, (by a Warrant, as he ſaid, from the King) enter'd into the Warranty, and pray'd that the Demandant might count, and ſo it was drawn that the Demandant, Petit verſus Dominum Regem that Land (as the uſual manner of the Courts in common Recovery is,) and that the Attorney of the King vouches over the common Vouchee: But this being peruſed by the Court, altho' the Attorney ſaid he had Warrant for ſo doing, yet becauſe ſuch a Courſe hath not been ſeen, nor any Precedent ſhewn that any ſhould count againſt the King as Vouchee, and this Courſe is now deviſed to bar a Remainder, expectant upon an Eſtate Tail in the King, (as a Fine by the King is ſufficient to bar an Eſtate Tail in him) and altho' it is uſed to be levied by the King, yet that is done by way of Render, and not by an immediate Writ of Covenant; therefore the Court would not ſuffer this Recovery to paſs; for the King ſhall never render in Value upon Voucher; but in ſuch Caſe they ought to ſue to the King by Petition to have in Value, and not by way of Voucher. Cro. C. 96. pl. 22. Mich. 3 Car. C. B. Anon. cites 9 H. 6. 3. and 56. 25 E. 3. 39. 39 E. 3. 11. —— Pig. of Recov. 74, 75. cites S. C. and ſays that Decency and Order hinder ſome from ſuffering.

ing Common Recoveries, and therefore the King cannot ſuffer a Common Recovery; for if he ſuffer a Common Recovery, he muſt be Tenant or Vouchee; and in both Caſes the Demandant muſt count againſt him, and there muſt be Judgment againſt him, which the Law does not ſuffer, ſo cannot come in as Tenant by Receipt; but if the Party have any Warranty, he muſt pray him in Aid.

Br. Recovery, pl. 22. cites S C.—In this Caſe, and the Caſe above, pl. 1 it was ſaid by the Clerks of the Peace, That if the Tenant be impleaded, and prays Aid of the King by this Cauſe, in lieu of Voucher, *the ſpecial Matter ſhall be enter'd*; or otherwiſe he never ſhall have in Value by Petition or otherwiſe. A good Diverſity. Br. Recovery, pl. 23. cites 9 H. 6. 4.

2. So **if the Grant be** to have in Recompence. **9 H. 6. 4. 56. b.**

A Man cannot vouch the King. Br. Aid del Roy, pl. 41. cites 21 E. 3. 47.

3. **The** Grantee of the King, **with Warranty,** ſhall not vouch the King. **Contra 2 H. 3. Age, 149.**

[4.] If the *King grants Land to me and to my Heirs*, and grants *that if I am impleaded*, or loſe in any manner, otherwiſe than by my own Act, that the King *ſhall render to me in Value of other Land*; this is a good Warranty againſt the King. Br. Garranties, pl. 37. cites 39 E. 3. 12.

Fol. 746.

(S. 2) [What Perſons may be vouch'd.] Other Perſons. *Corporations.*

[1] 4. A Succeſſor Biſhop **may be vouch'd upon Warranty made by Predeceſſor and Chapter.** 40 E. 3. 27. b.

[2] 5. **A Man cannot vouch** him who ſhall be Biſhop of ſuch Biſhoprick; **for this is utterly uncertain.** 38 E. 3. 29. b.

[3] 6. But **a Man may vouch** J. S. Biſhop elect, and confirm'd **of ſuch Biſhoprick,** before that he has the Temporalties delivered to him. 38 E. 3. 30. b.

The Caſe was, In Writ of *Entry ſur Diſſeiſin* againſt T. in which he had not Entry, unleſs by *H. late Biſhop of R.* who wrongfully diſſeiſed his Anceſtor, the *Tenant ſaid that H. Biſhop of R. was ſeiſed in Fee in Jure Eccleſiæ, and gave to the Father of the Tenant in Tail, ſaving the Reverſion*, rendring 10 s. per Ann. *H. died*, and *R. E. was made Biſhop*, who continued till he was *tranſlated to the Biſhoprick of W.* by which the Biſhoprick is void, and Part of the Temporalties in the Hands of the King, and Part in the Hands of the Archbiſhop of Canterbury, *and vouch'd to Warranty him who ſhall be Biſhop of R.* Et non allocatur, by reaſon of the Uncertainty, and he *cannot be ſummon'd till he be known, nor* he ſhall not be ſummon'd *in his own Land*, as here, but in the Land of the Church, *and no Summons* can be made *in them during the Seiſin or Poſſeſſion of the King*; by which he vouch'd one T. T. if he be Biſhop, and if not, he who ſhall be Biſhop; & non allocatur. And it was ſaid there, if the *Warranty* be ſo *ſuſpended that the Tenant cannot vouch when he is impleaded*, but the Demandant recovers, the Warranty *is loſt for ever*; and after he vouch'd T. and pray'd that the Proceſs be ſtay'd till he has ſued the Temporalties out of the Hands of the King. Kirton ſaid, You may ſummons him in thoſe Lands which are in the Hands of the Archbiſhop of Canterbury. But per Knivet, not ſo long as any Parcel of it is in the Hands of the King. Wich ſaid T. T. has enough of other Lands to be ſummon'd; but per Knivet, he ſhall not be ſummon'd unleſs in Lands belonging to the Biſhoprick, nor no other Lands ſhall be put in Value; and after the Voucher was granted, and Summons ſtay'd till the King had declar'd his Will; quod nota. Br. Voucher, pl. 61. cites 38 E. 3. 29.

[4] 7. [But] **a Man cannot vouch J. S.** if he be Biſhop elect, and if not, ſuch who ſhall be Biſhop **for the Uncertainty.** 38 E. 3. 30.

(S. 3) [*In-*

(S. 3) [What Perſons may be vouch'd. *Infant.*]

[1] 8. INfant in ventre ſa mere, **may be vouch'd.** 41 E. 3. 11. 38 E. 3. 29. S. C. cited Hob 222.—Br. Voucher, pl. 61. cites S C. And by Thorpe, the Voucher of him in Ventre ſa mere only is ſufficient, if there be no other Heir; but Finch contra, that he cannot be vouch'd alone; and he ſaid if a Man vouches one in Ventre ſa mere, and the Demandant ſays that the Anceſtor has another Son alive, viz. J. by which the Tenant vouches this J. if he be his Son, and if not, he in Ventre ſa mere, he ſhall not have the Voucher; for he who vouches ought not to be Miſ-conuſant of this Matter.——S. C. cited 7 Rep. 9. a. in the Earl of Bedford's Caſe.——He may be vouch'd if God gives him Birth, and if not, ſuch a one Heir to the Warranty; but he cannot be vouch'd alone without the Heir at the Common Law; for Proceſs ſhall be preſently awarded againſt him. Co. Litt. 390. a. (n)

[2] 9. **If a** Warranty be made by two, whereof one is an Infant, both ought to be vouch'd, **otherwiſe it ſhall abate; for it does not appear that he is Infant in the Deed. (His Deed is but voidable, and he may agree to it.)** 48 E. 3. 12. b. Br. Brief, pl. 80. cites S. C. and ſays that it ſeems that he of full Age ſhall warrant the whole.——Br. Baron and Feme, pl. 43. cites S. C. Per Finch and Belknap; quod non negatur. But of a *Monk* or *Feme Covert* it is otherwiſe, if they are *ſo nam'd in the Writ or Voucher.* And it ſeems here, that he of full Age ſhall be charg'd with the intire Warranty.

(S. 4) [What Perſons may be vouch'd.] *Villein.*

[1] 10. **A Villein cannot be vouch'd, tho' he** becomes Villein after the Warranty created. 48 E. 3. 17.

[2] 11. **If there be not an Heir of the Part of the Father, the** Heir of the Part of the Mother **may be vouch'd.** 49 E. 3. 12. This Plea does not belong to this Head.

(S. 5) [Voucher] of *Himſelf.*

See (D) pl. 1. (E. a) pl. 1. (F. a) per tot.

[1] 12. **A Man may vouch himſelf** to ſave the Tail. 42 E. 3. 15. b. 11 H. 4. 21. 14 H. 6. 2. Br. Voucher, pl. 85. cites 14 H. 6. 4.—In a Formedon the Tenant vouch'd himſelf to ſave the Tail, and ſhew'd that one A. was ſeiſed and *gave the Land* in Demand *to the now Tenant, and to E his Wife, which E. is now alive*; and by Award the Voucher was diſallow'd, becauſe it was there ſaid by Knevet, the Recovery in Value cannot be according to the Gift. 4 Le. 93. pl. 192. in Caſe of **Owen v. Morgan**, cited by Anderſon Ch. J. as 38 E. 3. 5.

[2] 13. **A Man may vouch himſelf** as Heir to the Donor to ſave the Tail; for **if he vouches firſt the Feoffor upon his Warranty of the Fee, he ſhall recover a Fee, and ſo the Tail deſtroy'd; and another Reaſon is for that he could not have the Warranty of the Fee before, he being Tenant in Tail in Poſſeſſion.** 40 E. 3. 13. b. 36. 18 E. 3. 52. **adjudged.** 25 E. 3. 53. **Contra** 18 E. 3. 6. **adjudged.**

[3] 14. **If the** Father makes Feoffment with Warranty **to B. and his Aſſigns,** and retakes **to him** in Tail, **his** Iſſue **may vouch herſelf and**

and her Sister Coparcener, as Assignee of B. 40 E. 3. 22. b. to save the Tail.

[4] 15. He who comes in as Vouchee **may vouch himself** to save the Tail. 41 E. 3. 24.

But to save the Tail, a Man may vouch himself as Assignee. Br. Voucher, pl. 85. cites 14 H. 6. 4.

[5] 16. **A Man cannot vouch himself** as Assignee **to J. S. he** himself being seised in Fee. 18 E. 3. 51. b.

In *Præcipe quod reddat*, if the *Father infeoffs his Son with Warranty*, and the *Son is impleaded*, he may vouch his Father; but if the *Father dies*, and the Son is Heir to him, now if the Son be impleaded, he cannot vouch as Heir of his Father; for by the Death of his Father the *Warranty of his Father is extinct*, and also he cannot vouch himself; for he is Heir to the Father who made the Warranty. Br. Voucher, pl. 124 cites 42 E. 3. 23. Per Cur.

[6] 17. **If the** Father infeoffs his Son and Heir with Warranty, and dies, **the** Son **may vouch** himself and his younger Brother, as Heir in Borough-English. 41 E. 3. 25.

A Man shall *not regularly* vouch himself *as Assignee of a Fee-simple*, and yet if the *Father is infeoff'd with Warranty to him and his Heirs*, and he *infeoffs his Heir* apparent *in Fee, and dies*, he (as it hath been said) shall vouch himself and the Heir in Borough English, by reason that the Act in Law determined the Warranty between the Father and the Son. Co. Litt. 390. a.

* Br. Voucher, pl. 49. cites S. C. Per Skrene. —So that if the *Reversion descends to them*, and she cannot bar her Sister, and afterwards the Reversion falls, she shall recover in Value, and this by Scire facias, as it seems. Br. Voucher, pl. 49. cites 11 H 4. 19.———But such Voucher shall not be suffered, unless the Tenant shews special Cause to the Court, and declares the Mischief that will ensue his not having the Voucher. Br. Recovery, pl. 38. cites 11 H. 4. 20

[7] 18. **If the Father** Tenant in Tail has two Daughters, and infeoffs the one with Warranty, and dies, **if the other Daughter brings Action, the Feoffee shall vouch** herself, and the other, if she herself has not Assets, **for the Mischief, because otherwise she shall not have in Value when Assets descend.** * 11 H. 4. 20. 17 E. 3. 59.

Where *a Man has two Daughters*, and *infeoffs the one and dies*, she may vouch herself and her Sister; for the Warranty *remains for one Moiety*. Br. Garranties, pl. 5. cites 40 E. 3. 13.——*Contra where* the *Vouchee* is *sole Heir*. Ibid.

[8] 19. **If the** Father and J. S. infeoff the Heir of the Father, **and after the** Father dies, **the Heir may vouch** himself and J. S. 29 E. 3. 46.

Fol. 747.

[9] 20. **If** Feoffee with Warranty to him, his Heirs and Assigns, aliens in Fee, and retakes **Estate** to him and his Feme in Fee, **and after they are impleaded, they** may vouch the Baron to deraign the first Warranty. 25 E. 3. 50. **Per Curiam.**

10. In *Dower*, the Tenant cannot vouch himself to save the Tail; *for nothing is to be recover'd* in Writ of Dower, *but Franktenement*, and no Inheritance; but the Reversion and Inheritance shall remain in the Tenant; Quod nota, good Reason. Br. Voucher, pl. 134. cites 2 E. 2.

11. Where 3 *bring Action*, and the *Tenant has Warranty of the one*, he shall rebut for the third Part, and shall vouch himself for two Parts; Per Hank. Br. Voucher, pl. 49. cites 11 H. 4. 19.

(S. 6) [Voucher of] *The Demandant.*

[1.] 21. THE Demandant himſelf cannot be vouched, but ought to be rebutted. 45 E. 3. 23. b. 46 E. 3. 31. b. 11 H. 4. 19.

[2.] 22. Where the Tenant cannot rebut the Demandant by the warranty, there he may vouch him with another to have in Value when he has.

[3.] 23. If a Man has a Daughter, and takes a 2d Wife, and Land is given to them in Tail, and they have Iſſue another Daughter, and alien with Warranty, and die. In Formedon by the 2d Daughter the Tenant may vouch her and the eldeſt. 11 H. 4. 20. 40 Aſſ. 37. by Wich. and Finchd. Br. Voucher, pl. 49. cites S. C. and P. per Hank. —— Ibid. pl. 103. cites S. C. per Wich.

[4.] 24. So in Formedon by the Iſſue in Tail, he may be vouched with his younger Brother, who is Heir by the Cuſtom. 11 H. 4. 21. b.

[5.] 25. So if the younger Brother demands Land tailed, he ſhall be vouched with the elder Brother. 11 H. 4. 22.

[6.] 26. So if 4 Coparceners bring Formedon and the one is ſummon'd and ſever'd, the Tenant may vouch the Demandants with her who is ſever'd, for the Cauſe aforeſaid. 11 H. 4. 21. b. And becauſe he vouch'd only the Feme who was ſever'd where he ought to have vouched all the Demandants; he was ouſted of the Voucher upon the Cauſe ſhewn. Br Voucher, pl. 49. cites 11 H. 4. 19 —— And by vouching one only where the Action is by four, it ſhall be intended of a Lien made by her who is vouched. Ibid. Per Thirn —— And it was ſaid that the Tenant *ought to vouch all* the Demandants *by a ſtrange Name, and when the three appear and the fourth not he ſhall rebut againſt the three, and yet Voucher ſhall ſtand againſt the fourth*, and ſo ought to vouch all by Lien of the Anceſtor. For it may be that *Aſſets hereafter may deſcend to thoſe who are not vouched*; and where the Heir in Tail brings Formedon, and the Tenant pleads Warranty without Aſſets by which the Demandant recovers and Aſſets deſcend afterwards, the Tenant may have *Scire Facias* againſt him, and have in Value; and ſo alſo in Voucher. Ibid. Per Hank. Quod non negatur.

[7.] 27. If Feme Tenant in Tail has 2 Daughters by one Baron, and 1 Daughter by another, and 2d Baron aliens with Warranty and dies, and the 3 Daughters bring Formedon, the Tenant may plead in Bar againſt the Daughter of the 2d Baron the Warranty with Aſſets from her Father for her Portion, and vouch her for the Reſidue. 40 Aſſ. 37.

(S. 7) Who may be vouched. *Stranger.*

1. IN *Dower* the Tenant cannot vouch a Stranger; Per Claymer and Thorp Ch. Juſtices. And therefore Aid was granted of the King to the Aſſignee of the Grantee of the King of a Ward, and alſo this is the Poſſeſſion of the King. Br. Voucher, pl. 81. cites * 29 E. 3. 8. Br. Aide, pl. 61. cites 39 E. 3. 8. —— But if the Stranger is preſent in Court he may be vouched. See (X) pl. 1. cites 22 E. 3. 1. —— * It ſhould be 39.

2. In Præcipe quod reddat, if the *Tenant vouches*, and the *Demandant counterpleads*, and the *Vouchee dies, which appears to the Court*, the Tenant *Contra if he had granted the firſt*

Voucher, and the Vouchee is returned dead, the Tenant shall not vouch a Stranger, but the Heir of the same Vouchee; *Quære* if he shews Cause. Ibid.

Tenant may vouch a Stranger, because the Demandant denied the Voucher. Br. Voucher, pl. 141. cites 12 H. 7. 3. Per Brian.

(S. 8) Voucher *of Baron or Feme by each other.*

1. IN Assise against Baron and Feme, the *Baron made Default*, the *Feme appear'd and* pray'd to be received, and *was received*, and *vouched her own Baron as Assignee*, and shew'd Deed of it, and he enter'd into the Warranty of his own free Will, and pleaded in Bar. Br. Voucher, pl. 91. cites 8 Ass. 33.

2. If a *Man enfeoffs a Woman with Warranty*, and they *intermarry* and are impleaded, and *upon the Default of the Husband the Wife is received*, she shall vouch her Husband &c. notwithstanding the Warranty was put in Suspence. Co. Litt. 390. a.

So if a *Woman infeoffs a Man with Warranty*, and they *intermarry* and are impleaded, the Husband shall vouch himself and Wife by Force of the said Warranty. Co. Litt. 390. a.

(S. 9) Voucher of what Persons. *Parties.*

1. *ASSISE against Baron and Feme and E.* which *E. made Default*, and the Assise awarded by his Default, and the *Baron and Feme pleaded Record in Bar, and failed* at the Day, and the *Feme was received and vouch'd this same E.* and had the Voucher by Award, notwithstanding that he was out of Court by his Default, and such a Person against whom Process shall not be awarded by Reason of Default. Br. Voucher, pl. 95. cites 13 Ass. 1.

2. *Assise against two*, the *one took the Tenancy and vouched the other*, who enter'd into the Warranty and pleaded in Bar. And there it is said that he who vouches shall recover in Value against him who is vouch'd; quod non negatur. Br. Voucher, pl. 98. cites 16 Ass. 19.

3. In Assise the Tenant *vouch'd the Baron and Feme named in the Assise*, who enter'd into the Warranty &c. without Deed &c. and were received by Award; quod nota bene. Br. Voucher, pl. 101. cites 26 Ass. 26.

4. *Præcipe* quod reddat *against J. who vouch'd 2, who* enter'd into the Warranty, and *vouch'd the Tenant by a strange Name*, and shew'd Cause, and the Voucher admitted, and *Process* granted *against the Tenant, tho' he be Tenant in the Action.* But Quære if it appears that he is Tenant, when it is by a strange Name. Br. Voucher, pl. 113. cites 11 E. 4. 7.

(S. 10) Voucher of what Perſons. *Heir, Reverſioner, &c.*

1. *Tenant in Tail has Iſſue two Daughters,* and *infeoffs the one with Warranty, and dies*; the Warranty between her and her Father is determined; and yet, by Cauſe ſhewn, that *Reverſion* is *deſcended to another Daughter*, there, in Formedon brought in Name of both, the Feoffee by this Cauſe ſhall vouch herſelf and her Siſter, and otherwiſe not. Br. Garranties, pl. 21. cites 11 H. 4. 20. Per Skrene & Thirn.

2. *Tenant for Life* may vouch *him in Reverſion.* Br. Recovery, pl. 14. cites 14 H. 6. 25. Br. Voucher, 87. cites S. C.

3. In Formedon the Tenant cannot vouch one who is *Heir to the Donor*; for the Tenant cannot have the general Counterplea, and therefore ſhall ſhew Cauſe. Br. Voucher, pl. 137. cites 21 E. 4. 25, 26. Per Cur.

4. A. makes a *Leaſe for Life by Dedi*, and *grants over the Reverſion*, yet the Leſſee may vouch A. F. N. B. 134. (H) in the new Notes there (a) cites 48 E. 3. 2. 6 H. 7. 2. 14 H. 6. 25. 48 E. 3. 2. Perk. 26.

5. *Tenant for Life, Remainder in Tail, Remainder in Fee; Tenant in Tail levies a Fine.* This has for ever hinder'd Tenant for Life, and Remainder in Tail, from deſtroying the Remainder in Fee; becauſe the Fine has turn'd his Eſtate into a baſe Fee, and has deſtroy'd all Privity of Eſtate; ſo that if *Tenant for Life and Remainder in Tail* would make a Tenant to the Præcipe, yet they *cannot vouch the Remainder-man in Fee*, without he will voluntarily enter into it. 11 Mod. 121. pl. 7. Trin. 6 Ann. B. R. Anon.

(S. 11) Of, or by, what Perſons. *Within the Lien, or Degrees, or not.*

1. 3 *E.* 1. *cap.* 40. *Statute of Weſtm.* 1. ENacts, That *from henceforth in all manner of Writs of Entry, which make mention of Degrees, none ſhall vouch out of the * Line:* Where the Statute is, That (a Man ſhall not vouch out of the [Line or] Degrees in Writ of Entry within the Degrees,) yet the *Tenant by Reſceipt* may vouch out of the Degrees; per Perle. Ad quod non fuit reſponſum. Br. Voucher, pl. 33. cites 46 E. 3. 2.——S. P. in *Writ of Entry* generally; for the *Statute is only of the Tenant who vouches in a Scire Facias to execute an Annuity*;" per Brian. Quod nullus negavit, in a Note. Br. Voucher, pl. 139. cites 2 H. 7. 11.——In Writ of *Entry ſur Diſſeiſin in the Per*, the *Tenant made Default* &c. and he in *Remainder ſhew'd Deed* of Remainder, and *pray'd to be received*, and vouch'd out of the Lien; and good by the Opinion of the Court, becauſe he is a Stranger to the Lien, and ſo out of the Caſe of the Statute. Br. Voucher, pl. 164. cites 11 H. 7. 5.——S. P. 2 Inſt. 243.——*Contra of Feme*, who prays to be *received in Default of her Baron*; for ſhe is Party to the Writ. Br. Voucher, pl. 164. cites 11 H. 7. 5.——S. P. 2 Inſt. 243. in Writ of Entry in the Per, brought againſt Baron and Feme.——*So* of the *Prayee in Aid*; for he ſhall join to the Tenant. Br. Voucher, pl. 164. cites 11 H. 7. 5.——S. P. And therefore ſhall not vouch out of the Degrees. 2 Inſt. 243.——And of the Vouchee, in Caſe of the Per & Cui, Fleta ſays, *Fiat vocatio de Perſona in Perſonam, & de Warranto in Warrantum de Perſonis in brevi nominatis, uſque ad ipſum Diſſeiſitorem*; and the Reaſon may be, becauſe it appears that the Vouchee is within the Degrees mentioned in the Writ. And the Words of the Statute are general, viz. None ſhall vouch out of the Line; in which Words the Vouchee is included. Laſtly, it had been to little Purpoſe to reſtrain the Tenant in the Per, and to let the Vouchee in the Cui at large; ſo as this Branch hath (as you ſee) his ſpecial Reaſon. 2 Inſt. 243.

In Writ of *Entry in the Per, ſuppoſing the Entry by W.* and the *Tenant vouches W. and N.* and becauſe it is ouſted by Statute that a Man ſhall not vouch *out of the Line*, in Writ of Entry, and of Part he is out of the Line, and of Part within; therefore the Tenant ſhall be ouſted of the whole Voucher; Per Wiche.

Wiche. But Belk. contra; and that he ſhall have the Voucher of the one, and he ſhall warrant the Whole, As where a Man *vouches* two, and the *Demandant counterpleads*, and it is *found that the one has, and the other never had, any thing in the Land demanded*, there the one ſhall warrant the Whole. But per Kirton, in this Caſe the Demandant ſhall recover the Moiety of the Land. Quod Belk. omnino negavit. Br. Voucher, pl. 40. cites 48 E. 3. 29.

Entry in the Per of Rent, the Tertenant appear'd, and *ſaid, that J. S. was ſeiſed in Fee of the Land, diſcharged of the Rent, and gave it to his Anceſtor in Tail*, and *vouch'd the Donor, by reaſon of the Reverſion*; and the beſt Opinion was, that he may vouch out of the Degrees of the Land; for this is *another thing than is in Demand*, and therefore out of the Caſe of the Statute; and the *Gift in Tail* above, *with the Reverſion, is ſufficient Cauſe*; but he need not to *ſhew the Deed*; for there the Demandant cannot anſwer to it. Br. Voucher, pl. 138 cites 21 E. 4. 26.

* *Lien is* properly the binding of the Vouchee by Force of the Warranty; for the Vouchee ſays Que aves vous a lier a Garranty; and then the Tenant ſhews the Lien, that is, the Deed or Fine &c. that binds him to warranty. Here it is taken for the Degrees. 2 Inſt. 243.

In a Writ of *Entry in the Per & Cui againſt B of the Feoffment of A — A dies*, B. ſhall vouch the Heir of A. for the Heir is within the Intention and Meaning of this Law, leaſt he ſhould loſe his Warranty (ſo much favour'd in Law) by the Act of God, viz. the Death of A. 2 Inſt. 243.

* That is, Writs of Entry in the Poſt. 2 Inſt. 243.

*Or in * other Writs of Entry, where no mention is made of Degrees, which Writ ſhall not be maintain'd, but in Caſes where the other Writs of Degrees cannot lie nor hold Place.*

2. Ingreſſu *ad Terminum qui præteriit, ſuppoſing the Entry by J. and R.* the *Tenant ſaid that he enter'd by J. only*, and not by J. and R. Judgment of the Writ, & non allocatur; becauſe it is out of the Caſe of the Statute, and is no Miſchief of Voucher, by which he vouch'd him alone, and well, by Award. Quod nota. *Contra*, it ſeems, *where the Entry is ſuppoſed by two, where he enters by* 3 *or* 4; for there he cannot have the Voucher out of the Degrees. Br. Enter en le Per &c. pl. 4. cites 44 E. 3. 31.

3. Entry againſt T. in which he had not Entry, unleſs *by R. of M. to whom T. demiſed it, who wrongfully, and without Judgment, diſſeiſed the Demandant*; and the *Tenant ſaid, that he enter'd by W.* and not by R. and M. Judgment of the Writ; by which the *Demandant*, by Coertion of the Court, *was compell'd to maintain that he enter'd by R.* Priſt; and the others econtra; for this *Plea goes in falſifying the Entry*; and alſo the Voucher ſhall enſue accordingly; for he *cannot vouch out of the Degrees*, and therefore he cannot vouch W. in this Caſe, and conſequently of Neceſſity *ſhall plead it to the Writ.* Nota. Br. Enter en le Per &c. pl. 5. cites 44 E. 3. 39.

4. A *Bargainee* cannot vouch *by Force of a Warranty, annexed to the Eſtate of the Lands*; for he that is in by the Statute [of Uſes,] is in En le Poſt; for he *is not in the Poſſeſſion by the mere Contract of the Party, but by the general Law of the Land*; and therefore, by the Writs of Entry, cannot be ſaid to be En le Per, that is, by ſuch a one; and *he that is in the Poſt cannot vouch*; for a Warranty is a Covenant annexed to the Freehold, whereby the Party agrees to take it up when controverted, and to defend it: It can therefore only extend to thoſe that claim the Freehold from him, and not thoſe that come to it any other way; *but he may rebut*; for tho' he has not covenanted to defend the Lands to him, yet he cannot claim them, becauſe when any Man covenants to defend the Lands, be it to whom it will, it appears thereby that the Warrantor can have no Right to claim them, unleſs a new Title appears after the Warranty. G. Law of Uſes and Truſts, 102, 103.

(T) *How*

(T) *How* it ſhall be *made*. *As Heir*.

See (U) pl. 1.

1. A Baſtard **may be vouch'd as Heir**, if he enters into the Inheritance **deſcended from the Father, becauſe he may be Heir by Continuance.** 21 E. 3. 46. Br. Voucher, pl. 67. cites S. C.—

2. So **he may be vouch'd** as Couſin and Heir. 27 E. 3. 84. **Quære.** S. P. But if the *Mulier dies without Heir*, now the Baſtard ſhall not be vouch'd as Heir, nor the Heir of the Baſtard, if he be in by Deſcent; for now the Warranty is determin'd, nor the Lord cannot enter upon ſuch Heir; and then it ſeems that he has gain'd the Land there, not only againſt the Mulier and his Heirs, who are privy, but againſt all others. Br. Voucher, pl. 154. cites 5 H. 7. 2.—Br. Garranties, pl. 88. cites S. C.

And it was ſaid there, that where the Baſtard is vouch'd, the *Mulier ſhall be vouch'd with him* alſo, and therefore if the Mulier dies without Heir, the Warranty is loſt. And Brooke ſays, it ſeems, that the *Baſtard may be vouch'd alone without the Mulier*; becauſe he, by Continuance of Poſſeſſion, may gain the Land as Heir. Contra of the youngeſt Son. Quære. Br. Voucher, pl. 154. cites 5 H. 7. 2.——Br. Garranties, pl. 88. cites S. C.

3. **If the** younger Son enters into the Land deſcended from the Father, **he ſhall not be vouch'd as Heir to the Father, but** becauſe of the Poſſeſſion. 21 E. 3. 46. If ſuch younger Son be vouched within Age, the Parol ſhall not demur; for he cannot be Heir by any Continuance of Poſſeſſion. Br. Voucher, pl. 67. cites S. C.

4. **If a Man** vouches himſelf and another as Couſin and Heir **to J. S. ſhewing Cauſe, he need not to** ſhew How Couſin. 27 E. 3. 84.

5. **If the** Father aliens **with Warranty,** and dies ſeiſed of other Land, **and his** eldeſt Son enters **into the Land** and dies without Iſſue. **In a Writ of** Dower **brought againſt the Alienee, the** Alienee may vouch the 2d Son as Heir **to the Father; for he has not any Warranty from the eldeſt Son.** 27 E. 3. 87. **Adjudged.**

6. Præcipe quod reddat; the *Tenant vouched T.* Proceſs continued till he was *return'd Dead*, and the Tenant *vouch'd K. Siſter and Heir of T.* For per Thorpe, when a Man vouches one and he dies, the Tenant cannot vouch a Stranger to the Blood, nor any other but the Heir of the firſt Vouchee. Quod nemo negavit. Br. Voucher, pl. 18. cites 41 E. 3. 28.

7. *Formedon in Remainder of a Manor*, the *Tenant as to two Acres Parcel of it, ſaid that R. Duke of E. was ſeiſed of the Manor of which* the two Acres are Parcel, *and infeoffed E. M. And the Duke had Iſſue King E. 4. who had Iſſue the Queen, Cicele, and Anne, and* the ſaid *E. M. infeoffed J. S. who infeoffed J. B.* who *infeoffed T. W.* who *infeoffed the Tenant*, and ſo *as Aſſignee* E. M. *vouched* to Warranty *the Queen, and C. and Anne her Siſters*, as Heirs of the Duke. And ſo ſee tho' *the eldeſt Siſter ſhall be Heir to the Crown*, yet ſhe is *not* ſole Heir *to the Land of another Anceſtor, nor to the Warranty*, but ſhe with her Siſters, and by the Nonage of C. and A. pray'd that the Parol Demur, & adjornatur. Br. Voucher, pl. 104. cites 3 H. 7. 14.

8. If one have *divers Warranties*, and they *fall by Deſcent upon a Perſon Heir unto them both*, yet *he muſt be vouched only as Heir unto one*; and the Reaſon is apparent (whether you regard the Demandant or the Vouchee) for as to the Demandant it is a kind of Plea in Bar, and therefore ought to be ſingle; for the Demandant may counterplead the Poſſeſſion of the Vouchee and his Anceſtors, which they cannot do if they be divers. Per Hobart Ch. J. Hob. 29. in Caſe of Sir H. Roll. v. Sir Ro. Osborn. cites 31 E. 3. Fitzh. Voucher 25.

(U) Voucher. *Who* may be vouched. *In Reſpect of the Poſſeſſion.* [*Gavelkind. Burough Engliſh. Baſtard.*]

If the Warrantor hath Lands in Gavelkind, the eldeſt

1. IF Land deſcends to two Brothers in Gavelkind who enter, **they may be vouched to Warranty** as one Heir. 43 E. 3. 19. 17 E. 3. 61. 25 E. 3. 38. 19 E. 2. Ayd. 172. 1 E. 3. 13.

Son ſhall be vouch'd alone. But the Tenant may alſo vouch the others for the Poſſeſſion. Per Hobert Ch. J. Hob. 31. cites 38 E. 3. 22 —— S. P. Per Hobert Ch. J. Ibid. 25. in Caſe of Roll v. Osborn cites S. C.

Fol. 748.

If a Man *vouches three as Heirs in Gavelkind*, if

2. But **if the Land in Demand be Gavelkind, yet the Tenant can** not **vouch the 2 Brothers as one Heir** without alleging that they have Gavelkind Land by Deſcent; (**for the Warranty deſcends only upon the eldeſt.**) 43 E. 3. 19. **Curia** 17 E. 3. 61. **For the youngeſt is vouched becauſe of the Poſſeſſion.**

he does not *the vouch eldeſt as Heir, and the eldeſt and the two others for the Poſſeſſion*, he ſhall not recover in Value againſt the Heir of the Land which he has out of Gavelkind. Br. Recovery, pl. 43. cites 4 E. 3. 55.

If a Man vouches by Warranty made by Anceſtor in Gavelkind, he

3. If no Land deſcends to the Heir at Common Law but Gavelkind **Land, yet the Heir at Common Law** may be ſolely vouched without the other Brothers; **becauſe the *Warranty deſcends ſolely upon him. Contra** 38 E. 3. 22. b.

ſhall firſt vouch the eldeſt as Heir at Common Law, and that Land in Gavelkind is deſcended to the Heir and his Brothers, and vouch them by Reaſon of the Poſſeſſion. Per Suliard. Br. Voucher, pl. 119. cites 22 E. 4. 10.

* S. P. Br. Garranties, pl. 44. cites 21 E. 3. 21.

4. **If Land deſcends to** 2 Coparceners in Gavelkind, **and the** eldeſt enters, **yet the** youngeſt cannot be vouched with the eldeſt before her Entry; (**for ſhe has not Poſſeſſion for which ſhe is vouched.**) 43 E. 3. 19. **Curia** 17 E. 3. 61. **Admitted.**

A Man *vouch'd M.* and *Day was given by the Roll*, and *pending this M. died*; the *Tenant revouched J. Son and Heir of M. within Age*, and the Parol demurred, the *Demandant ſaid that J. is youngeſt Son*, the *Tenant ſaid that he enter'd as Heir*, and becauſe the *Demandant could not deny it*, the Voucher ſtood notwithſtanding that there was an elder Son. Br. Voucher, pl. 60. cites 38 E. 3. 27.——Br. Counterple de Voucher, pl. 25. cites S. C.

5. **If the** youngeſt Son enters into the Land deſcended, **he may be vouched becauſe of the Poſſeſſion.** 21 E. 3. 46. 38 E. 3. 27. b. **Adjudged.**

Br. Counterplea, de Voucher, pl. 5. cites 40 E. 3. 14.

6. **The** youngeſt Son having Land by Deſcent in Borough Engliſh **may be vouched** with the Heir at Common Law. 1 E. 3. 13.

—— S. P. Br. Voucher, pl. 119. cites 22 E. 4. 10. —— Jo. 361. pl. 3. Trin. 11 Car. B. R. in the Caſe of **Reeve v. Walſter**; it was agreed by all the Court that the youngeſt Son in Borough Engliſh ſhall be vouch'd and charg'd for the Debt of the Father, but that he ſhall not be bound by Warranty, nor vouch upon Warranty made to the Father and his Heirs.

The Baſtard may be vouch'd

7. **If a** Baſtard enters into the Inheritance after the Death of his Father, **he may be vouched becauſe of his Poſſeſſion.** 21 E. 3. 46.

alone without vouching the Mulier, becauſe the Baſtard is Heir in Appearance, and ſhall not diſable himſelf. Co. Litt. 376. b.——Where a Man has *Baſtard eigne and Mulier puiſne*, and the *Baſtard enters*, a Man ſhall vouch the Mulier as Heir at Common Law, and *ſhew how the Baſtard has enter'd* into certain

tain Land of the Father, who made the Warranty, and vouch him by the Poſſeſſion. Br. Voucher, pl. 119. cites 22 E. 4. 10.

8. If 3 Siſters, whereof one is a Baſtard, enter into Land deſcended as Coparceners, they may be all vouched by the Warranty of the Anceſtor becauſe of the Poſſeſſion. 17 E. 3. 59.

9. In Dower the Tenant vouch'd to Warranty *himſelf and his Brother*, and ſhew'd for Cauſe that the *Land was departible*; but this was adjudg'd ill, unleſs he ſays more, becauſe in ſuch Caſe he ſhall only have Aid Prayer, and afterwards he ſhew'd Cauſe by Feoffment, and then it ſtood. Fitzh. Tit. Voucher, pl. 113. cites Mich. 12 E. 3.

(X) Voucher. In what Caſes it lies, where the *Vouchee* is *preſent*, tho' it does not lie in the Action.

See (P) the Note on pl. 8.

1. THE Tenant may vouch a Stranger in a Writ of Dower, if the Stranger be preſent in Court. 22 E. 3. 1.

2. So the Voucher lies in this Caſe, tho' the Vouchee demands the Lien, and the Tenant ſhews it. 22 E. 3. 1.

3. In Aſſiſe the Tenant may vouch a Stranger who is not nam'd in the Writ, if the Vouchee be preſent. Com. Aſſiſe of Freſh Force 89. b. Co. 8. 50. 25 Aſſ. 14. admitted.

In an Aſſiſe of *Novel Diſſeiſin*, a Man ſhall not vouch any one, unleſs he be nam'd in the Writ, and preſent when he is vouch'd,

4. In Aſſiſe the Tenant may vouch another nam'd in the Writ, if he will enter of his own good Will. 22 Aſſ. 19. 26 Aſſ. 26. adjudg'd. 9 H. 5. 14. Co. 8. 50.

5. But the Voucher does not lie in this Caſe, if the Vouchee will not of his own good Will immediately enter into the Warranty. Co. 8. 50.

and would preſently enter into the Warranty, and warrant the Land; but in an Aſſiſe of *Mortdanceſtor* he may vouch at large. F. N. B. 178. (E) (F)——Br. Voucher, pl. 146. cites F. N. B. accordingly.

6. In a Writ of Entry in Nature of an Aſſiſe, the Tenant may vouch another named in the Writ. 9 H. 5. 14.

(X. 2) Voucher *in Dower*.

1. IF the Heir be in Ward to the Mother, as Guardian in Socage, and ſhe brings Writ of Dower againſt an Alienee of the Baron with Warranty, the Alienee, upon ſhewing of the Warranty, cannot vouch the Heir in Ward of the Demandant, becauſe he may bar her by this Matter, and cauſe her to be endow'd of the Pluis belle part. 21 E. 3. 28. b. (Quære; for perhaps the Warranty is falſe, and therefore it ſhall be tried upon the Voucher.)

Br. Voucher, pl. 64. cites S. C.——But by Wilby J. the Voucher lies in this Caſe well, where the

2. But

Tenant has Warranty of the Anceſtor

2. But **otherwiſe it is in this Caſe, if the** Demandant be Guardian by Service of Chivalry. * 21 E. 3. 28. b.

tho' the Feme has in Ward Tenants in Socage; it may be that the Heir has alſo Tenants in Chivalry; and it is not Reaſon that ſhe ſhall take Dower of thoſe Tenants, becauſe of Dower due from no other Tenancy unleſs of thoſe which the Heir is bound to warrant; and tho' the Tenant produces Deed with Warranty, the Feme cannot be Party to try it; and therefore it is Reaſon that the Heir ſhall be vouch'd who is privy to the Deed, and who may try it. Br. Dower, pl. 42. cites 21 E. 3. 30.

* Br. Voucher, pl. 64. cites S. C.

Fol. 749.

3. **In Writ of** Dower, **if the Tenant vouches the** Heir, **who** has a Rent reſerv'd upon an Eſtate Tail, **the** Demandant ſhall not be compell'd to take this Rent in Lieu of Dower, **becauſe ſhe ought to have an Eſtate during her Life, and this may determine before.** 17 E. 3. 12.

4. If the *Feme of the Father brings Dower againſt the Feme of the Grandfather Tenant in Dower*, who *vouches the Heir*, it is no *Counterplea that ſhe herſelf may plead her elder Dower in Bar*, by which the Heir enter'd into the Warranty, and pleaded it. Br. Counterplee de Garrantie, pl. 8. cites 5 E. 3. and Fitzh. Voucher 249. and M. 3 E. 2. ibid. 209.

Br. Dower, pl 98. cites S. C.

5. In *Dower* the *Tenant vouch'd the Heir* of full Age, and ſhew'd Deed, as he ought. Quære; but it is ſaid there that he muſt. Br. Monſtrans, pl. 152. cites 48 E. 3. 5.

(X. 3) Voucher in *Ward*. [*How.*]

1. **If a Man be** in Ward for his Land, **he cannot be** vouch'd generally, **but he ought to be vouch'd in Ward, otherwiſe the Writ** ſhall abate. 17 E. 3. 47. b. **becauſe the Land in Ward ſhall be render'd in Value.** 25 E. 3. 51. b. 52.

2. So **it ſeems, if he be in Ward** for his Body only, **and not for any Land at the Time of the Voucher, yet he** ought to be vouch'd in Ward. **Contra** 17 E. 3. 47. b.

3. **If he who is to be vouch'd be** in Ward of the King, **he ſhall be vouch'd in Ward of the King.** 26 E. 3. 58. b. 1 E. 3. 13. b.

4. **If a Man** deviſes Land **deviſable** to another during the Nonage of his Heir, **and dies, the Heir may be vouch'd in the Ward of the Deviſee.** 27 E. 3. 79. **adjudged.**

5. In Dower if the Tenant vouches the Heir within Age, he ſhall vouch him in Ward of ſuch a one, if he be in Ward. Br. Dower, pl. 98. cites 48 E. 3. 5.

(Y) Voucher.

(Y) Voucher in Ward. When an Infant is vouch'd in Ward, *in whose Ward he ought to be vouch'd.* See (X. 3) pl. 4.

1. **If the** King grants over the Ward of the Body, and Land **of a Ward, the Heir may be vouch'd in Ward** of the Grantee. 46 E. 3. 19. b. * 3 H. 6. 17. b. 18 E. 3. 38. b. 26 E. 3. 58. 1 E. 3. 13. b. * Br. Voucher, pl. 4. cites S. C.— In *Dower* the *Tenant vouch'd the Guardians, becauſe the Baron held ſome Land of the King in Chief, and ſome in Socage*, and died, the Heir within Age, and the King *granted the Ward of the Body to one, and the Ward of the Land to another*; and therefore he *vouch'd the Guardians*, and pray'd Aid of the King, and could not have the Aid, becauſe the King had amoved his Hands, and therefore had the Voucher without the Aid, and Summons iſſued againſt all; *and he vouch'd the Heir alſo, by reaſon of Socage*, and had Summons againſt all. Br. Voucher, pl. 37. cites 47 E. 3. 18.

2. **If there are** diverſe Lords by Service of Chivalry, to whom he is in Ward, **he ought to be vouch'd in Ward** of all, **becauſe the Charge ought to be equally upon all.** 46 E. 3. 20. 21 E. 3. 53. 22 E. 3. 1. b. 3. b. 25 E. 3. 52. b. 1 E. 3. 16.

3. So **he ſhall be vouch'd in Ward** of the King, and of the other Lords, **where he is in Ward to all.** 1 E. 3. 16. Dower brought againſt E. M. who *vouch'd* to warranty *the Son and Heir in Ward of the King, and diverſe other Lords, Guardians of other Lands* of the ſame Heir in their Hands, and was ouſted of the other Lords, and they ſurceaſed, and *awarded that he ſue againſt the King*; and after *Procedendo* came; and upon this he *vouch'd, as above*, the ſame Heir in Ward of the King and the other Lords, and was ouſted of the other Lords, becauſe when the Heir is in Ward of the King, all his Land ſhall be awarded into the Hands of the King, and out of his Hands Livery ſhall be ſued; to which all the Juſtices agreed. Br. Voucher, pl 46. cites 2 H. 4. 23.

4. So **if the Heir be in Ward** to a Lord by Knight-Service for ſome Land, and **in Ward** to his next Friend for Socage-Land, **and the Heir is vouched by a Stranger, he ought to be vouched in the Ward** of both, **becauſe the Charge ought to be equal.** 25 E. 3. 51.

5. So **if a Writ of** Dower **be** brought againſt the Alienee of the Baron, who vouches the Heir, **he ought to vouch him in Ward of the Guardian in Chivalry, and alſo of the Guardian in Socage, if the Demandant be not Guardian in Socage.** 25 E. 3. 50. b. 51.

6. **The** ſame Law, tho' the Demandant be Guardian in Socage; **for the Alienee cannot pray that the Demandant endow herſelf of the Pluis Belle Part; But the Guardian in Chivalry may, when he comes in.** 27 E. 3. 79. **Admitted. Dubitatur** 25 E. 3. 50. b. 51. b. **Contra** 21 E. 3. 28. b. **Adjudged.**

7. **If** Baron and Feme bring Writ of Dower, **the Tenant may vouch the Heir of J. S. in Ward** of the Baron, **tho' he be Demandant.** 22 E. 3. 3.

8. **If an** Heir **be** vouch'd in Ward of diverſe Lords, **and after** it abates by Return of the Death of one of the Lords, **he ought to be vouch'd in Ward** of the Lords, and of the Executor of him who is dead. 22 E. 3. 3. b. * * Fol. 750.

9. And **in this Caſe, if** another of the Lords had alien'd his Eſtate after the firſt Voucher, **yet he may be vouch'd** in his Ward with the others; **for he ſhall have his Recovery againſt him of the Land which he had the Day of the firſt Voucher.** 22 E. 3. 3. b.

10. But **in this Caſe he may vouch him in Ward** of the Aſſignee with the others, **if he will.** 22 E. 3. 3. b.

(Y. 2) Voucher *by the Statute.*

1. IF Baron and Feme, ſeiſed in Fee in Right of the Feme, give to another in Tail, **and after** they die, **the Heir of the Feme ſhall not be** rebutted by the * Statute de Bigamis by the Reverſion with Aſſets from the Baron; **becauſe now, by the Diſagreement of the Heir, it is only the Gift of the Baron, by which he has made a Diſcontinuance and gain'd a new Reverſion, which the Heir is to defeat by this Action, and therefore this ſhall not be any Bar.** 38 E. 3. 33. **Adjudged.**

* See (B. 2) pl. 2.

2. In *Formedon of* certain *Land and Rent*, the Entry into Part ſhall abate the whole Writ; for he has falſify'd his own Writ by his own Act. Br. Voucher, pl. 109. cites 5 E. 4. 116.

(Z) Voucher. *Judgment.* In what Caſes the Judgment ſhall be *final. Upon Pleading between the Tenant and Vouchee.*

1. IN Right of Ward againſt Baron and Feme, who vouch J. S. he demands the Lien, **and** they ſhew the Deed **of Lien, which ſhews his Deed of Grant of the Ward to the Feme, whereupon the Vouchee demands Judgment whether he ſhall be bound by it, becauſe the Baron is a Stranger to the Deed; upon which the Parties demur, and it is adjudged againſt the Vouchee, the Judgment ſhall be peremptory againſt him, ſcilicet, That the Plaintiff ſhall recover againſt the Tenant, and the Tenant over againſt the Vouchee.** 30 E. 3. 6. b. Adjudged, 14. b.

2. **So it had been peremptory, if it had been adjudged againſt the Tenant.** 30 E. 3. 6. b.

3. In Dower the Tenant *vouch'd the Heir in Ward of one E. who* came and *ſaid that he had nothing in Ward*, and ſo to Iſſue; and the Demandant recover'd immediately. Br. Counterplee de Garrantie, pl. 5. cites 10 E. 3. and Fitzh. Judgment, 209.

(A. a) Voucher. Judgment. *Againſt whom* Judgment final ſhall be.

1. IF **Tenant in** Writ of Right **vouches, and** Vouchee enters into the Warranty, and makes Default after the Miſe join'd, **Judgment final ſhall be given for the Demandant againſt the Tenant.** 10 H. 6. 2. **adjudged.**

2. And **in this Caſe the** Tenant ſhall have a common Judgment to have in Value **againſt the Vouchee, but not final, ſcilicet,** * Quit **for perhaps he has loſt but for Life or in Tail.** 10 H. 6. 2. **adjudged.** 26 H. 8. 8. b.

* To hold Quit; but common Judgment in Value was given for the Tenant againſt the Vouchee.

Br. Droit de Recto, pl. 57. [54] cites S. C.

3. If

3. If *Tenant for Life vouches a Stranger*, the *Demandant counterpleads*, and it is *found for him*, there he in *Reverſion has no Remedy but by Writ of Right*. Br. Voucher, pl. 110. cites 5 E. 4. 2.

So if the *Vouchee enters into the Warranty, and loſes* by Action tried or by Default. Br. Voucher, pl. 110. cites 5 E. 4. 2.

4. Where *two make Warranty, and the one dies*, the *Lord and the Heir* of the other ſhall be vouch'd, and ſhall have *Judgment of the whole againſt the one*, and againſt the other; *but* he ſhall *not* have *Execution of the whole againſt each of them*, and the Cauſe is, becauſe each warranted the whole by himſelf, and both the whole in Common. Br. Voucher, pl. 165. cites 16 H. 7. 12. 13.

Br. Recovery, pl. 63. cites S. C.

(B. a) *Recovery in Value. How* the *Judgment* ſhall be given *in Dower.*

Fol. 751.

1. IN Writ of Dower, if the Heir of full Age be vouch'd by the Tenant in the ſame County, the Judgment ſhall be conditional, that is to ſay, againſt the Heir, if he has Aſſets, and that the Tenant ſhall hold in Peace; and if he has not Aſſets, then againſt the Tenant, and the Tenant over againſt the Heir, when he has. * 48 E. 3. 5. Co. 9. 17. b. 2 H. 4. 8. 17 E. 3. 20. 18 E. 3. 36. b. 38. b. 43 Aſſ. 32.

Br. Recovery, pl. 44. cites 6 E. 3. 11.——Br Sequatur ſub ſuo periculo, pl. 2. S. P. cites 2 H. 4. 8.——* Br. Voucher, pl. 38. cites S. C. and P. But when the Heir is vouch'd in Ward, there every one ſhall anſwer for his Portion, and the Demandant ſhall recover againſt the Tenant, and he over againſt every of them for his Portion; ſo that before the Tenant has recover'd in Value againſt them, he ſhall have their Portion extended; for tho' one has Aſſets to anſwer in Value, yet every one ſhall render according to his Portion; and afterwards *Grand Cape ad Valentiam* was awarded *againſt each for his Portion, and* Writ of *Extent to the Sheriff*.

2. If the Heir be vouch'd by other than him who is Tenant in Demeſne, the Judgment ſhall not be conditional. 18 E. 3. 36. b.

3. [As] in Writ of Dower, if the Tenant vouches J. S. who vouches the Heir of the Baron in the ſame County who makes Default, the Judgment ſhall not be conditional, ſcilicet, againſt the Heir of the Baron &c. becauſe the Heir is not vouch'd by the Tenant in Demeſne; but the Judgment ſhall be againſt the Tenant, and he over &c. 18 E. 3. 36. b. adjudged. 28 E. 3. 99. b. adjudged.

4. But if the Vouchee vouches the Heir of the Baron in Ward of the Demandant, the Judgment ſhall be that the Demandant ſhall recover of the Land in Ward, and the others ſhall go in Peace. 56 E. 3. Itinere Litchfield. Rot. 14. adjudged.

5. If in Dower the Heir be vouch'd in other County, who enters into the Warranty, and ſays that he has not by Deſcent, and Tenant avers that he has Aſſets, the Demandant ſhall recover immediately againſt the Tenant generally, and ſhall leave him to ſue over, to have in Value againſt the Heir. 17 E. 3. 40. b. 41. adjudged.

6. If the Heir of the Baron in Writ of Dower be vouch'd in Ward in the ſame County, and in other Counties, the Judgment ſhall not be conditional, but againſt the Tenant &c. 18 E. 3. 38. b.

In Dower the *Tenant vouch'd the Heir of the Baron in Ward of the King, and pray'd that he be ſummon'd in the ſame County*; and therefore the Feme could not recover

recover her Dower immediately. But contra where he vouches the Heir, and prays that he be *ſummon'd in a foreign County*. Note the Diverſity. Br. Voucher, pl. 4. cites 3 H. 6. 17.

7. [But] **if the Heir of the Baron in Writ of Dower be** vouch'd in the ſame County, and in other Counties, **the Judgment ſhall be conditional, that is to ſay, againſt the Heir,** if he has Aſſets in the ſame County, if not, againſt the Tenant &c. 18 E. 3. 55. **adjudged.**

8. **In a Writ of Dower, if the Tenant vouches** the Heir in Ward of the Grantee of the King, **the Judgment ſhall be againſt the Heir in Ward of the Grantee, and that the Tenant ſhall hold in Peace.** 26 E. 3. 58. b. **agreed.**

9. So **if the** Heir **be** vouch'd in the Ward of the King, **the Judgment ſhall be againſt the Heir in Ward of the King, and that the Tenant ſhall hold in Peace.** 26 E. 3. 58. b. **ſaid to be adjudged, and there it is ſo held alſo.** 1 E. 3. 16. b. **adjudged.**

10. *Grandfather, Father, and Son.* The *Grandfather and the Father died.* The *Feme of the Father was endow'd* of the third Part of the Tenements. The *Grandmother brought Dower againſt her*, and *ſhe vouch'd the Heir*, and the *Demandant recover'd* againſt the Feme of the Father, and ſhe recover'd over againſt the Heir the third Part of the remaining two Parts, and did not recover in Value of the third Part; for the firſt Endowment was more than ſhe ought to have, and ſhe ſhall not recover over. Quod nota. Br. Recovery, pl. 5. cites 5 E. 2. and Fitzh. Voucher, 249.

11. In Dower the Demandant had Judgment to recover, and to have Execution of the Land of the Heir in his Ward, if he has Aſſets; and if not, againſt the Tenant, and he over in Value; and if he has not to the Value, then *that ſhe ſhall retain for the Portion which ſhe has*, and *for the reſt that ſhe recover againſt the Tenant, and he over in Value.* Br. Recovery, pl. 47. cites 2 E. 3. and Fitzh. Voucher, 213.

See (B. a) (C. a) Voucher. Judgment. How it ſhall be given.

And the Tenant over in Value againſt the Vouchee.

1. **IN Writ of** Dower, **the Judgment ſhall be that the Demandant ſhall** recover againſt the Heir if he has, **if not againſt the Tenant.** 17 E. 3. 20.

Br. Counterplee de Garranty, pl. 7. cites 6 E. 3. and Fitzh. Vouch. 246. and M. 3 E. 2. ibid. 209.

Brooke ſays, And ſo ſee that if the *Vouchee at the Sequatur be return'd ſummon'd in Land by Deſcent and does not come*, there the *Tenant ſhall recover in Value againſt him; but if he be not well ſummon'd*,

2. In Dower, the *Tenant vouch'd two as Heirs*, viz. the *one as Heir in Chivalry, and the other as Co-heirs in Socage*, and *the one was return'd ſummon'd and did not come*, nor at the Grand Cape ad Valentiam, and *the other was return'd Nihil at the Summons*, and the like at the *Alias*, *and* at the *Pluries*, and *at the Sequatur he was return'd Nihil in Land by Deſcent, and that he ſummon'd him in Land which he had purchaſed*; and Judgment was given that the Demandant *recover the Moiety againſt him who was return'd Summon'd, and did not come at the Grand Cape, if he had* &c. and *if not, to recover the Whole againſt the Tenant*; and the Tenant loſt his *Warranty againſt the other, becauſe the Summons was not ſerved in the Land deſcended*, but in the Land purchaſed, which is not well. Br. Sequatur, pl. 4. cites Fitzh. tit. Judgment, 170. Anno. 13 E. 3.

as he was not here in Land purchaſed by him, *or if* he be *return'd Nihil*, there the Tenant ſhall loſe his Warranty, and ſhall not recover in Value; and therefore ſee that thoſe Words of Sequatur ad Periculum of the Tenant is ſuch, that if the Tenant cannot cauſe him to be return'd ſummon'd in

in Land by Deſcent, he ſhall loſe his Warranty; quod nota. Br. Sequatur, pl. 4 cites Fitzh. tit. Judgment, 170. Anno 13 E. 3.

3. The Demandant demanded *Dower*, and the *Tenant vouched the Heir who did not appear at the Alias Sequatur*; but it did not appear what Return was upon the Sequatur, and the *Demandant recover'd againſt the Vouchee if he had in the ſame County*, and the Tenant to hold in Peace, *and if the Vouchee has not Aſſets there, then that the Demandant ſhall recover againſt the Tenant, and the Tenant over* in Value againſt the Vouchee; and yet the *Vouchee never appear'd*, nor *was Party to the Record*; therefore quære Legem. Br. Recovery, pl. 20. cites 2 H. 4. 7. Br. Voucher, pl. 147. cites 2 H. 4. 7. S.

(D. a) *Voucher.* At what Time. [*After Aid.*]

Fol. 752.

1. IN Præcipe, if Tenant in Tail prays in Aid of her Siſter Coparcener, and has it, ſhe may after vouch **her ſelf and her Siſter as Aſſignees of the Donor, upon Warranty of their Father to the Donor, and aſſigns**, to ſave the Tail, **becauſe before the Aid Prayer ſhe could not have the Voucher.** 40 E. 3. 22. b. Br. Voucher, pl. 14. cites S. C. Quod nota, Aid and Voucher, of one and the ſame Perſon one after another.——See (E. a) pl. 29. S. C. and the Note there.

2. **If the Tenant has** Aid granted, and Prayee is ready to join, and Tenant will not accept him, **he ſhall not vouch.** 9 H. 6. 3. b. **Curia.** Br. Voucher, pl. 6. cites S. C. Per Cur.

3. After Aid Prayer and Default made by Reverſioner, the Leſſee **cannot vouch him, becauſe he has delayed him once before.** 6 H. 4. 3. b. * 7 H. 4. 15. 18 E. 3. 51. b. **Contra** 11 H. 4. 59. b. **Adjudged.** * Br. Voucher, pl. 47. cites S. C. accordingly. —S. P. Br. Voucher, pl. 73. cites 22 H. 6. 39. By the Opinion of the Court; for a *Man ſhall not be delay'd twice for one and the ſame Cauſe*; for the firſt Aid Prayer was by Reverſion, and it ſhall be intended that the ſame Reverſion is the Cauſe of Voucher. Br. Counterple de Voucher, pl. 33. cites S. C. —— But Br. Voucher, pl. 51. cites 11 H. 4 59. That in Dower the *Tenant for Life pray'd Aid of him in Reverſion*, who was ſummon'd, and *would not join*, by which he vouch'd him, and had the Voucher. Per Cur. notwithſtanding the Aid Prayer before; contra M. 40 E. 3. but if he *ſhews other Cauſe*, he may have the Voucher; and the ſame if he ſhews no Cauſe; Contra if he ſhews the ſame Cauſe; Quod nota.——— *If* the Prayee *will not join*, there, the Tenant may vouch Per Cur. Br. Voucher, pl. 6. cites 9 H. 6. 3.

4. But **he might have** vouch'd a Stranger **after the Aid and Default by Reverſioner.** 11 H. 4. 59. b. 9 H. 6. 3. b. 18 E. 3. 51. b.

5. So **after Aid granted and Default by Reverſioner, the** Leſſee cannot vouch him in Reverſion for other Cauſe than **for the Cauſe**, for which he had the Aid, unleſs the Cauſe be ariſen after the Aid granted. 18 E. 3. 51. b. **Dubitatur.**

6. [But] **After Aid granted and Default by Reverſioner, the Leſſee** may vouch a Stranger as Aſſignee to the Reverſioner. 11 H. 4. 59. b.

7. **If** Tenant for Life has Aid of him in Reverſion, **they both may vouch afterwards.** * 9 H. 6. 3. b. 18 E. 3. 51. b. * Br. Voucher, pl. 6. cites S. C. per Cur.

8. **If Tenant for Life** has Aid of the King in Reverſion generally, and after a Procedendo comes, **he cannot vouch the King (that is to ſay, to have Aid in Lieu of Voucher) becauſe the Leaſe was with Warranty, and therefore he might have ſhewn it before.** 9 H. 6. 3. b.

9. But in this Caſe, after the Procedendo the Tenant ſhall have Aid in Lieu of Voucher for a new Cauſe happening ſince the firſt Aid. 9. H. 6. 3. b.

10. [But] If Tenant for Life has Aid of the King in Reverſion generally, and after Procedendo comes, he ſhall * not vouch a Stranger after, becauſe it appears that he is to have in Value of the King, therefore not of both. Alſo peradventure the Prayer in Aid was in Lieu of Voucher, for the Entry is all one where it is for Feebleneſs of Eſtate, and where in Lieu of Voucher, and therefore ſhall not have other Voucher, and he has once delayed the Demandant, and no Judgment may be before other Procedendo comes, and therefore the Plea ſhall not be put in the Mouth of a Stranger. 9 H. 6. 3.

* Br. Voucher, pl. cites S. C. but Brooke makes a Quære thereof; for the Entry is all one, be the Aid in Lieu of Voucher, or for Feebleneſs of Eſtate, by all the Clerks, quod nota. And Brooke ſays, it ſeems becauſe the Entry is all one that the Tenant is at large to vouch a Stranger.

Br. Aid. pl. 6. cites S. C.

11. After Aid and Default by him in Reverſion the Leſſee cannot vouch the Reverſioner as Aſſignee of the Reverſion upon a Warranty made by J. S. whoſe Heir the Reverſioner is, and ſo vouch him as Heir to J. S. tho' it be a new Cauſe; for he is the ſame Perſon who made Default before. 18 E. 3. 51. b.

(D. a. 2) *In what Caſes* a Man may vouch *where he cannot have Aid.*

Br. Aid. pl. 6. cites S. C.

1. IN Right of Advowſon the *Tenant alleg'd Gift in Tail to the Mother of the Tenant, and that A. the Donor had Iſſue another Daughter, and the ſaid Mother of the Tenant, and died,* and the two *Siſters died, and* that *his Aunt had Iſſue P.* by which he *pray'd Aid of P.* as his *Coparcener of the Reverſion* of the Premiſſes which is deſcended to them by the Grandfather, who was the Donor, & non allocatur; for he is *not Party to the Tail,* and ſo is as a Stranger to this Eſtate, by which he *vouch'd himſelf and the other* Coparcener of the Reveſion *by Reaſon of this Reverſion*; Quod nota bene. Br. Voucher, pl. 3. cites 2 H. 6. 16.

2. Per Markham, in the Time of R. 2. If it might appear *that he who pray'd in Aid could vouch,* he was always ouſted of the Aid, and put to the Voucher, *except the Tenant by the Curteſy,* who might pray in Aid, but cannot vouch. Quod non negatur. Br. Voucher, pl. 73. cites 22 H. 6. 39.

Fol. 753.

(E. a) Voucher. *How* the Voucher is *to be made.* In what Caſes. *Without Cauſe ſhewn,* and in what not.

Br. Counterplea de Voucher, pl. 5. cites 40 E. 3. 14.

1. A Man ſhall not vouch himſelf without Cauſe ſhewn. 32 H. 6. 13. b. 40 E. 3. 36. 50 E. 3. 3. 11 H. 4. 21. 42. 10 H. 6. 18. 14 H. 6. 4. 21 E. 3. 37. 29 E. 3. 29. 38 E. 3. 4. b. 27 E. 3. 89.

Where the *Tenant in Tail vouches himſelf* to ſave the Tail, he ſhall ſhew Cauſe; Per Hank. Br. Voucher,

Voucher, pl. 49. cites 11 H. 4. 19.—— S P. becauſe it is out of the common Courſe; and the Demandant ſhall have a Counterplea to the Cauſe.——So it is when he vouches himſelf and his Brother as Tenant in Borough Engliſh. 2 Inſt. 246.

2. **A Man ſhall not vouch** himſelf and a Stranger, **without Cauſe.** * 40 E. 3. 14. 22. b. 29 E. 3. 46. 27 E. 3. 84. * Br. Counterplea de Voucher, pl. 5. cites S. C.

3. **One** Coparcener **ſhall not** vouch herſelf after Severance, and her Siſter, **who is Demandant, without ſhewing Cauſe.** 11 H. 4. 20.

4. So before Partition **one Coparcener ſhall not vouch herſelf and her Siſter Coparcener, without ſhewing Cauſe. Admitted.** 2 H. 6. 16. **becauſe of the Reverſion deſcended to them.**

5. **One** Coparcener **ſhall not vouch** her Siſter **Coparcener** and herſelf, **without ſhewing Cauſe.** 17 E. 3. 46. b. 59.

6. **If** 2 Coparceners bring Formedon, **and the** one is ſummoned, and ſevered, **and Tenant** vouches her, who is ſever'd, as Heir to the common Anceſtor, **ſhe ought to ſhew Cauſe, becauſe ſhe was a Demandant before Severance.** 11 H. 4. 19. **Curia. And if ſhe counterpleads by the Statute, ſhe will abate her own Writ.** 20 H. 6. 3. Br. Voucher, pl. 49. S. P. cites S. C.—If a *Præcipe* be brought *by* 4, and 2 *are ſummon'd and ſever'd*, the Tenant cannot vouch them that be ſummon'd and ſever'd, without ſhewing Cauſe, becauſe it is out of the common Courſe; and the Cauſe being ſhewed, the Demandant ſhall counterplead the ſame. 2 Inſt. 246.

The Demandant cannot have the *general Counterplea* where the one of the Demandants is vouch'd, and therefore the Tenant muſt ſhew Cauſe. Br. Voucher, pl. 49. cites 11 H. 4. 19. Per Thirn.

7. **A Man ſhall** vouch the Demandant and a Stranger, **without Cauſe ſhewn.** 11 H. 4. 21. b. **Contra** 20 H. 6. 2. b.

8. But in Writ againſt 2, **the** one makes Default after Default, **and** the other pleads ſole Tenancy in himſelf, **he may** vouch the other, **who made Default without Cauſe ſhewn.** 11 H. 4. 20. **becauſe he may vouch at large, and the other is out of Court.**

9. **If he in** Reverſion **be** received upon Default of the Leſſee for Life, **he cannot** vouch the Leſſee, **who had before loſt the Franktenement, to ſave it now, without Cauſe ſhewn.** 17 E. 3. 68. b. **Adjudged** 18 E. 3. 30.

10. **In** Action againſt Baron and Feme, **if they** vouch the Baron, **they ought to ſhew Cauſe.** 39 E. 3. 9. b. Br. Voucher, pl. 82. cites S. C.

11. [So] **In Action againſt Baron and Feme, if the** Feme, received upon Default of the Baron, **ſhall** vouch the Baron, **ſhe ought to ſhew Cauſe.** 25 Aſſ. 14. **Curia.** Br. Voucher, pl. 100. cites S. C.

12. [So] **In Action againſt Baron and Feme they** vouch J. who vouches the Baron, **he ought to ſhew Cauſe.** 43 E. 3. 7. 17 E. 3. 47. b. 74.

13. So **if the** Baron makes Default, and Feme vouches J. who enters, and vouches the Baron, **he ought to ſhew Cauſe; for when he warranted to the Feme, he warranted to the Baron.** 43 E. 3. 7. Br. Voucher, pl. 22. cites S. C That J. enter'd, and vouch'd *and the ſame* the *Baron by a ſtrange Name*; and the *Demandant ſaid, that the Vouchee and the Baron are one Perſon*, Judgment if without Cauſe, and he was compell'd to ſhew Cauſe.

14. **In Action againſt Baron and Feme** they vouch, and Vouchee vouches the Baron and Feme, **he ought to ſhew Cauſe.** 44 E. 3. 38. b.

15. **If one or two** Vouchees vouch his Voucher, **he ought to ſhew Cauſe; for the Voucher cannot ſtand with common Intent.** 11 H. 4. 42. Br. Voucher, pl. 50. cites S. C.—— S. P. Br. Voucher, pl. 166. cites 16 H. 7. 13.

16. But

Br. Voucher, pl. 50. cites S. C.

16. But if two Vouchees vouch another, who **enters into the Warranty, and** vouches one of his Vouchors, **he ought to shew Cauſe, tho' a good Warranty may be between them upon a Feoffment.** 11 H. 4. 42.

Fol. 754.

17. **A Man may** vouch two Brothers as one Heir, **without ſhewing Cauſe, as to ſay that they have Gavelkind Land by Deſcent.** 43 E. 3. 19.

Br. Voucher, pl. 23. cites S. C.——Br. Counterplea of Voucher, pl. 11. cites S. C.——*But* in a *Præcipe* the Tenant *vouch'd two Brethren as one Heir, and that the youngeſt was within Age*; and becauſe it was out of common Courſe, he was rul'd to ſhew Cauſe, and ſhew'd that the Father was ſeiſed of Lands in Gavelkind, and that the ſame deſcended to them; and the Demandant counterpleaded the Cauſe. 2 Inſt. 246.

18. **In** Writ of Right of Ward of the Body and Land, **if the Defendant vouches** for the Body, **he ought to ſhew Cauſe.** 7 H. 6 20. b.

19. **If a Man** prays in Aid of 3, becauſe of a Reverſion to them, & hæredibus of 2 of them, whereof one who had Fee is dead, and the others make Default, **by which the Tenant is adjudged to anſwer, he cannot** vouch the other who has Fee, **without ſhewing Cauſe.** 4 H. 4. 3. b. **adjudged.**

20. **If** Leſſee has Aid, and Reverſioner makes Default, **he cannot** vouch the ſame Reverſioner **without Cauſe ſhewn. Contra, admitted** 11 H. 4. 59. b.

S. P. Per Cur. And the Cauſe ſhewn was, that the Anceſtor of the Heir held of the King in Capite, and died his Heir within Age, by reaſon whereof the King made &c. And ſo ſee that he *ſhall not ſhew Cauſe of Warranty, but the Cauſe why the King ſhould have the Ward.* Br. Voucher, pl. 4. cites S. C.

21. **A Man ſhall not** vouch another in Ward of the King, **without ſhewing Cauſe.** 3 H. 6. 17. b. **adjudged.**

Br. Voucher, pl. 8. cites S. C. contra, that by the beſt Opinion he cannot vouch without ſhewing Cauſe, becauſe the Demandant cannot have the general Counterplea that the Vouchee nor any of his Anceſtors &c. for he has affirm'd it by the bringing of his Action, and by the Admittance of the Aid-Prayer.

22. **If** one Coparcener has Aid **granted** of the other, who makes Default **at the Summons return'd, if ſhe** vouches afterwards a Stranger, who vouches the ſame Coparcener who made Default, **ſhe ſhall not ſhew Cauſe.** 20 H. 6. 2. **for it may be by her Releaſe.**

23. **In** Dower, **the Tenant may** vouch the Heir of the Baron **without ſhewing Cauſe.** 4 H. 6. 24. b. 3 H. 6. 17.

24. When the Vouchor ought to ſhew Cauſe, it ought to be a ſufficient Cauſe **of Voucher, otherwiſe it is not good.** 11 H. 4. 20. b. 21. **Adjudged** * 14 H. 6. 4. b.

* See (F. a) pl. 1.

25. **If it** appears **by the Cauſe ſhewn,** that the Vouchee had nothing but a Poſſeſſion which is defeated **by Recovery or lawful Entry, the Voucher does not lie.** * 19 H. 6. 39 b. **And the Cauſe is traverſable.** 11 H. 4. 21. **Curia.** 9 H. 6. 50. b. 14 H. 6. 4. b. 10. b.

* See (F. a) pl. 3.

26. **If** Baron and Feme vouch J. S. **J. S. cannot** vouch the Baron **without Cauſe ſhewn.** 29 E. 3. 49. **adjudged.**

27. **If a Man** vouches another who vouches over, who vouches a third, and the third vouches the firſt Vouchee, **he ought to ſhew Cauſe of Duſter of him, * becauſe the Demandant cannot counterplead him by the Statute, he having granted the Voucher of him before.** 20 H. 6. 2. b.

* Orig. is (Et per ceo quant Demandant)

28. But **the** Donee **in this Caſe cannot** revouch the Donor **without Cauſe ſhewn, becauſe by his Feoffment in Fee the Warranty in Fee, which he had before, is determined.** 20 H. 6. 2. b.

29. So

29. So **she may** vouch herſelf, and a Stranger her Siſter Coparcener, as Aſſignee, **without ſhewing Deed of Aſſignment; for they may be Aſſignees without Deed.** 40 E. 3. 22. b. To. 3. *Lincoln College* 63.

The Caſe was, that in Præcipe quod reddat the Tenant pray'd in Aid of A. her Siſter, and had it, and after vouch'd herſelf and one A. her Siſter, by a ſtrange Name, and ſhew'd for Cauſe of Voucher, that T. her Father gave the Land to W. in Fee, and retook Eſtate to him and his Heirs of his Body begotten, and ſo vouch'd to Warranty herſelf, and A. her Siſter, as Daughters and Heirs of T. as Aſſignee of W. and this was to ſave the Tail. And tho' it was objected that a Deed of Aſſignment ought to be ſhewn, yet this was waiv'd afterwards.——See (D. a) pl. 1.

30. **If a** Leſſee had Aid of him Reverſion, **they both cannot** vouch the Prayee **without ſhewing Cauſe, becauſe this is a Voucher of himſelf by the Prayee.** 29 E. 3. 29.

31. **A Man may** vouch a Baron and Feme **without ſhewing Cauſe, tho' he vouches a Feme Covert.** 25 E. 3. 43. b. **adjudged.**

32. *Tho' the Demandant cannot counterplead the Lien nor the Warranty, yet* where the Party who vouches ſhall be compelled to ſhew Cauſe, *he may* counterplead *the Cauſe*; Quod nota. Br. Counterple de Voucher, pl. 5. cites 40 E. 3. 14.

33. Formedon of the Gift of J. P. the *Tenant vouch'd W.* who came, and after *vouch'd T. P. Couſin and Heir of J. P.* which J. P. was the Donor, and therefore per Cur. he cannot vouch him without ſhewing Cauſe; for the *Demandant cannot have the General Counterplea there*; for the Reverſion is not in the Heir of the Donor; by which he vouch'd him by a ſtrange Name, and had the Voucher; but it was ſaid that the *Demandant may aver that he is the Heir of the Donor.* Br. Voucher, pl. 117. cites 21 E. 4. 25. 26.

34. *Entry in the Per of Rent*, the Tertenant appear'd, and *ſaid that J. S. was ſeiſed in Fee of the Land diſcharged of the Rent, and gave it to his Anceſtor in Tail*, and *vouch'd the Donor by Reaſon of the Reverſion*; And per Cur. he ſhall ſhew Cauſe, becauſe he vouches of the Land diſcharg'd, where Rent is only in Demand, and the Demandant ſhall not have *Traverſe* to the Cauſe, as here, and the Tenant ſhall not be compelled to *ſhew what Rent it is in his Voucher*; *but* the *Demandant ſhall have for Counterplea that he demands Rent Service.* And the beſt Opinion was that he may vouch out of the Degrees of the Land, as here; for this is *another Thing than is in Demand*, and therefore out of the Caſe of the Statute, and the *Gift in Tail* above *with the Reverſion is ſufficient Cauſe*, but he need not *ſhew the Deed*; for there the Demandant cannot anſwer to it. Br. Voucher, pl. 138. cites 21 E. 4. 26.

35. In Præcipe quod reddat againſt two, if they *confeſs Tenancy in Common*, they cannot *vouch ſeverally* without ſhewing Cauſe. Br. Voucher, pl. 20. (bis.) cites 12 H. 7. 1. 2.

S. P. becauſe it is out of common Courſe, that *Jointenants* ſhould vouch ſeverally without ſhewing of Cauſe; which Cauſe the Demandant ſhall counterplead by the Common Law. 2 Inſt. 246.

36. In all Caſes where one vouches *out of common Courſe*, there the Tenant ought to ſhew Cauſe. 2 Inſt. 246.

(E. a. 2) *What* ſhall be *ſufficient Cauſe.*

See (E. a) pl. 24, 25. 29. in the Note there.

1. IN Formedon in Deſcender the Tenant vouch'd himſelf, and he *ſhew'd for Cauſe that his Father was ſeiſed of the Land in Demand, and thereof infeoffed S. which S. gave the ſame Land to this ſame Tenant and to the Heirs of his Body*, and ſo as Aſſignee he vouched himſelf to ſave the Tail. And admitted for good Cauſe; and ſo ſee that Tenant in Tail may vouch as Aſſignee, as it ſeems here. Br. Voucher, pl. 85. cites 14 H. 6. 4.

2. Formedon againſt S. who *vouch'd P. who* enter'd, and *vouch'd this ſame S. by a ſtrange Name*, the *Demandant ſaid that* S. the Tenant, and S. whom P. vouched, *are one and the ſame Perſon*, and therefore the ſaid P. *ſhew'd Cauſe*, viz. *that the Father of S. infeoffed him in Fee with Warranty, and he gave the Tail to the ſaid Father of S.* and ſo he vouch'd S. the Tenant to ſave his *Reverſion*; and good Cauſe, and he ſhew'd Deed. Br. Voucher, pl. 166. cites 16 H. 7. 13.

(E. a. 3) *Counterplea. In what Caſes.*

1. IN Mortdanceſtor, the Tenant *vouch'd J. who* enter'd into the Warranty and *vouch'd the Tenant*, and was compell'd to ſhew Cauſe, and *ſaid that the Tenant infeoffed him, and after he leaſed to him for Term of Life*, the *Demandant ſaid that before the Leaſe made to the Tenant, the Tenant had nothing*, Priſt, and the others e contra. And ſo ſee where the Party is compell'd to ſhew Cauſe, the Demandant may have Traverſe to the Cauſe. Br. Voucher, pl. 94. cites 12 Aſſ. 10.

But where he is not compelled to ſhew Cauſe there the Demandant cannot counterplead the Lien.

2. *Where the Tenant is compelled to ſhew Cauſe*, there the Demandant ſhall have Counterplea to the Cauſe, tho' this Matter goes to the Lien and not to the Cauſe of Voucher. Br. Voucher, pl. 49. cites 11 H. 4. 19. Per Thirn and others.

Br. Voucher, pl. 49. cites 11 H. 4. 19. ——Br. Counterple de Voucher, pl. 21. cites S. C.——S. P. 2 Inſt. 246.

Fol. 755.

(F. a) Voucher. *Counterplea of the Cauſe.* What ſhall be *good* Counterplea of the Cauſe ſhewn.

Hob. 22. in Caſe of Roll v. Osborn Hobart Ch. J. cited 24 E. 3. 35. where the Plaintiff in Warrantia Chartæ

1. WHEN the Vouchor ought to ſhew Cauſe of Voucher, it ought to be a ſufficient Cauſe, otherwiſe it is not good. 11 H. 4. 20. b. 21 Adjudged. 14 H. 6. 4. b.

2. As if he ſhews Cauſe of Voucher becauſe of a Deed which he ſhews forth, if it appears that he cannot vouch by this Deed he ſhall be ouſted of the Voucher; for he cannot bind the Vouchee by other Deed. Contra 30 E. 3. 17. b.

counted that the Defendant enfeoffed him by the Charter with Warranty, to which the Defendant *pleaded Riens paſſa by the Deed.* And Bracton in his Treatiſe of Warranty, cap. 9 S. 5. ſays that Excipere poteſt Warrantus

Warrantus quod licet Charta de Feoffamento ſufficiens fuit tamen Donum fuit inſufficiens, quia nunquam habuit ſeiſinam in Vita Donatoris, ſed poſt mortem ſuam intruſit.

3. If it appears by the Cauſe ſhewn that the Vouchee had nothing but a Poſſeſſion which is defeated by Recovery or lawful Entry the Voucher does not lie. 9 H. 6. 39. b. Br. Counterplea de Voucher, pl. 2. cites 9 H. 6. 49.

4. If a Man vouches one ſhewing Cauſe, and it appears by the Cauſe ſhewn that he ought to have vouch'd another with him, he ſhall be ouſted of the Voucher. 19 R. 2. Aid of the King 113. Curia.

5. If a Man will vouch himſelf to ſave the Tail, and ſhews Cauſe for that his Grandfather levied a Fine to B. who render'd it to the Grandfather for Life, the Remainder to his Father in Tail, and ſo vouches himſelf as Aſſignee of B. and as Heir to his Father in Tail, this is good Cauſe of Voucher, tho' he does * not allege any Warranty made to B. whoſe Aſſignee he ſuppoſes himſelf to be; for tho' the Cauſe is not good to vouch as Aſſignee, yet there is ſufficient Cauſe of Voucher ſhewn for Cauſe of the Reverſion. 50 E. 3. 3. adjudged. Br. Voucher, pl. 43 cites S. C. & P. tho' there be no Warranty in the Fine.

6. If a Man vouch himſelf as Heir to J. S. and vouches J. D. with himſelf, and ſhews for Cauſe that J. S. and J. D. were ſeiſed, and infeoff'd him with Warranty, this is good Cauſe, without ſhewing what Eſtate the Feoffors had, nor what Eſtate he himſelf took by the Feoffment. 29 E. 3. 46. adjudged.

7. When Cauſe is to be ſhewn upon Voucher, the Cauſe ſhewn is traverſable. 11 H. 4. 21. Curia 9 H. 6. 50. b. 14 H. 6. 4. b. 10. b. 17 E. 3. 46. 59. 29 E. 3. 29. 25 Aſſ. 14. 27 E. 3. 89.

8. [So] the Cauſe ſhewn is traverſable, tho' the Traverſe be but a Counterplea of the Voucher. 29 E. 3. 29.

9. If the Tenant vouches herſelf, and M. her Siſter, and ſhews for Cauſe a Feoffment made to her by K. their Siſter, whoſe Heir they are, it is a good Counterplea of the Cauſe, that they never had any thing of the Feoffment of K. their Siſter. 17 E. 3. 46.

10. So if Baron and Feme vouch the Baron, and ſhew for Cauſe that the Baron infeoff'd J. who infeoff'd the Baron and Feme, it is a good Counterplea that J. had never any thing of the Feoffment of the Baron. 39 E. 3. 9. b. Br. Counterplea de Voucher, pl. 35. cites S. C.

11. If the Tenant vouch B. her Siſter, ſhewing for Cauſe that Land deſcended to them in Coparcenary, and ſhe herſelf enter'd in the Name of both, and after B. releas'd to her in Fee with Warranty, it is a good Counterplea of the Cauſe, that the Tenant upon her Entry claim'd it to her alone, without that that B. had any thing after the Death of their Anceſtor; for if the Eſtate of B. was turn'd to a Right at the Time of the Releaſe, then the Releaſe does not enure by way of Mitter l'Eſtate, but by Extinguiſhment, and ſo no Voucher can be. 21 E. 3. 27. adjudged. Br. Counterple de Voucher, pl. 29. cites S. C. but that if ſhe, who enter'd, did enter in the Name of both, then the Releaſe countervailed Entry and Feoffment. ——— Br. Voucher, pl. 63. cites S. C.

12. If the Tenant vouches himſelf as Heir to A. his Siſter, and ſhews for Cauſe that A. gave to him in Tail, it is a good Counterplea that he never had any thing of the Gift of A. tho' it be to the Warranty, becauſe he may traverſe the Cauſe alleged. Fol. 756. It was objected that Counterplea did not lie to the Warranty, but to the Poſſeſſion only; but it was ſaid by Green, that when Cauſe is ſhewn it may be counterpleaded. And Wilby ſaid that ſo it may in ſome Caſes, as to counterplead the Seiſin &c. but not the Warranty. Br. Counterple de Voucher, pl. 51. cites 21 E. 3. 37.

13. Contra 21 E. 3. 37. adjudged; but it is there ſaid that it was adjudged contrary to this in Parliament. The contrary was adjudged in Parliament, Mich. 13 E. 3. Br. Counterplea de Voucher, pl. 31.

14. But

Br. Counterplea de Voucher, pl. 31. cites S. C.

14. But **in this Case it is clear, that it is a good Counterplea** that A. had never any thing in the Land, nor ever gave it to the Tenant. 21 E. 3. 37. **admitted by Issue.**

15. **If a Man** vouches himself, and J. D. as Heir to J. S. and shews **for Cause** that his Father and J. S. were seised, and infeoff'd him with Warranty, and so he vouches himself as Heir to his Father, and J. D. as Heir to J S. **it is a good Counterplea of Voucher of himself,** that the Father of the Vouchor had not ever any thing **in the Land, tho' it is no Counterplea by the Statute, because he has not counterpleaded the Possession of his Ancestors; for this is a Traverse of the Cause alleged.** 29 E. 3. 46. **adjudged.**

16. So **in this Case, it is a good Counterplea** of the Cause of Voucher of J. D. **who is vouch'd with him as Heir to J. S.** that J. S. had never any thing in the Land, without taking any Counterplea of the Possession of the Ancestors of J. S. by the Statute; **for he may traverse the Cause alleg'd, tho' in this Case the Cause of Voucher alleg'd was only because he vouch'd himself, and not because he vouch'd J. D.** 29 E. 3. 46. b. **adjudg'd**; for the Cause cannot be sever'd.

17. **If a** Lessee has Aid of him in Reversion, and they both vouch him in Reversion, and shew **for Cause** that J. was seised, and gave it in Tail, and that **he in** Reversion is Heir in Tail, and Heir to the Donor, **and so he** vouches himself as Heir to the Donor, **it is no good Counterplea** that it appears **by the Cause shewn, that he in** Reversion only ought to have the Voucher, and not the Lessee, **because the Warranty does not extend to him.** 29 E. 3. 29.

Br. Voucher, pl. 54. cites S. C.——The Voucher was disallowed, because, as Knevet said, *the Recovery in Value cannot be according to the Gift.* 4 Le. 93. 94. cites 38 E 3. 5.——Br. Counterplea de Voucher, pl. 22. cites S. C. And per Morrice, Voucher to save the Tail is for the Advantage of the Issue, and not of the Tenant who vouches; for he shall have Judgment to recover in Value immediately, but Cesset Executio during his Life; for his Issue shall have Execution, and not he who vouches.——Br. Voucher, pl. 54. cites S. C.

18. **In an Action against J. S. if he** vouches himself, and shews **for Cause** a Gift by his Ancestor to him and his Feme in Tail, and that the Reversion is descended to him **by Death of the Donor, it is a good Counterplea** that the Feme is yet alive, and so the Voucher contrary to the Plea, **inasmuch as he has admitted himself sole Tenant, and therefore cannot have the Voucher by Force of a Tail to him and his Feme; for this Voucher is to save the Tail, which cannot be saved here, inasmuch as the** Feme is not Party to the Voucher. 38 E. 3. 4. b. **adjudged.**

* Br. Voucher, pl. 100. cites S. C. & P. but not the Counterplea here mentioned.

19. **If a** Feme received upon Default of the Baron vouches the Baron, because the Ancestor of the Baron, whose Heir he is, infeoff'd her and the Baron with Warranty, **it is a good Counterplea of the Cause,** that they had never any thing of the Feoffment of the Ancestor; **for * the Cause shewn is traverlable.** 25 Ass. 14. **Curia.**

20. 20 *Ed.* 1. *Stat.* 1. *S.* 3. Enacts, That *where the Tenant, in a Plea of Land, vouches to warranty, and the Demandant will aver that he, nor none of his Ancestors, (since the Time that the Ancestor of the Demandant was seised) was in Possession of the Lands, his Averment shall be admitted whether the Party vouched be absent or present.*

21. In Præcipe quod reddat the Tenant vouch'd. The *Vouchee demanded* what he has to bind him to the Warranty; and the *Tenant shew'd Deed of his Father, whose Heir* &c. and *he said, that his Father had no Land but in Gavelkind, which descended to him and to others,* and held no Plea; by which he *said that he had nothing by Descent* &c. *the Day of the Voucher*; and the other econtra. Br. Counterplea de Garrantie, pl. 2. cites 38 E. 3.

22. The

22. The *Demandant ſaid, that the one who is vouched is the ſame Perſon who vouch'd*, Judgment if without Cauſe; by which he *ſhew'd Cauſe, that his Father infeoff'd him*; and the Demandant *counterpleaded* the Cauſe, *becauſe he re-infeoff'd his Father again*, to the Father and his Heirs, and that he was eldeſt Son of the Father, who is dead; and a good Counterplea to the Cauſe; for by this his firſt Warranty is extinct. Br. Counterplea de Voucher, pl. 5. cites 40 E. 3. 14.

23. Præcipe quod reddat againſt Baron and Feme. The *Feme* was *received in Default of the Baron*, and *vouch'd J.* to warranty, who enter'd, and *ſaid that the Father of the Baron infeoff'd J. in Fee, who gave in Tail to the Baron and Feme*; and good, notwithſtanding he enter'd generally into the Warranty upon the Voucher of the Feme; yet he *ſhall ſay now, that he did not warrant that Fee Tail.* Br. Voucher, pl. 22. cites 43 E. 3. 7.

24. If a Man *vouches 2 Brothers as one Heir, and by the Nonage of the youngeſt prays that the Parol demur*, he ſhall not have the Voucher, without ſhewing Cauſe; by which the Tenant *ſaid that the Land is partable between Males.* And per Cur. This is no Cauſe; by which he *ſaid that the Anceſtor died ſeiſed of Land departable* between Males, after whoſe Death *they are in as Heirs* &c. And the *Demandant* anſwer'd to the Cauſe, and *ſaid that the youngeſt is not ſeiſed of any Land by Deſcent of the Part of his Father*, Judgment if by his Nonage the Parol ſhall demur? &c. and a good Plea, notwithſtanding that the other alleg'd that the Entry of the one Coparcener is the Entry of both; and upon this both ſhall have Aſſiſe, and this ſeems to be where it is for their Profit; contra where it is for their Diſprofit, as here, and in the Aſſiſe Anno 1 H. 6. 5. Note the Diverſity. Br. Voucher, pl. 23. cites 43 E. 3. 19.

Br. Counterplea de Voucher, pl. 11. cites S. C.—— Br. Parol Demur, pl. 7. cites S. C.

25. Formedon againſt *Baron and Feme*, who *vouch'd N. who revouch'd the Baron and Feme*; and the Demandant ſhew'd it, and demanded Judgment if he ſhall ſo vouch without ſhewing Cauſe; and he *ſhew'd that the Baron and Feme infeoff'd him, and he gave to them in Tail, ſaving the Reverſion*; by which the *Demandant ſaid that they had nothing of their Feoffment*, priſt; and the others econtra. And ſo ſee the Cauſe traverſed &c. Br. Counterplea de Voucher, pl. 13. cites 44 E 3. 38.

26. Formedon by 4 Barons and their Femes, of whom the one Baron and Feme made Default, and were ſummon'd and ſever'd; and the Tenant, after the View, vouch'd this ſame Baron and Feme who were ſummon'd and ſever'd, and ſaid *that the Anceſtor of the Feme infeoff'd him with Warranty*, and for this Cauſe vouch'd her; and becauſe he vouch'd the one Feme where he ought to have vouch'd all the Demandants, therefore, upon the Cauſe ſhewn, he was ouſted of the Voucher. Br. Voucher, pl. 49. cites 11 H. 4. 19.

27. In *Formedon in Reverter*, before Appearance, but *after Eſſoign caſt, the Tenants, who were Baron and Feme, levied a Fine, and then they appear'd*; and the Demandant counts againſt them, who plead to Iſſue; and upon Default of the Baron, at the Return of the Venire, the *Feme prays to be received; for the Land was her Right*, and the *Fine was pleaded as a Counterplea to the Receipt.* But non allocatur; for *jus Uxoris ſhall be referr'd* always to her Right, which ſhe had at the Time of the Writ purchaſed. D. 315. b. pl. 1. Mich. 14 & 15 Eliz. Vernon v. Stonely & Manners.

And. 18. pl. 37. S. C. Adjudged that the Counterplea was not good.—— Bendl. 198. pl. 236. S. C. accordingly. —Dal. 107. pl. 59. S. C. accordingly.——See Reſceipt (M) pl. 15.

28. There *ſhall not be any* Counterplea, *but where* it is thereby *proved that Vouchee had not ſuch an Eſtate whereof he could make a Feoffment*; and therefore it is no Counterplea that the *Feoffor was Jointenant* with another; for one Jointenant may make a Feoffment of the Entierty with Warranty, becauſe he is ſeiſed *per my & per tout.* And tho' it be a Diſſeiſin of the Moiety, yet the Feoffment is good, and the Warranty well

annex'd; and when they join in a Feoffment with Warranty, every one warrants the Whole, and that may be a Counterplea to the Warranty, but not to the Voucher. Cro. E. 689. Paſch. 36 Eliz. Piper v. Wider.

Fol. 757. (G. a) *Voucher. How* it is to be *made.* In what Caſes *without ſhewing a Deed* of the Lien. [*Or what Deed ought to be ſhewn.*]

Br. Monſtrans, pl. 168. cites 10 H. 7. 21. S. P. per all the Juſtices.

1. IF a Man vouches himſelf to ſave the Tail as Aſſignee, and ſhews Cauſe, (as he ought) he ought to ſhew the firſt Deed, becauſe his Cauſe ought to appear to be ſufficient. Dubitatur * 14 H. 6. 4.

Contra Keble, and ſhew'd ſeveral Books to the contrary.

* Br. Monſtrans, pl. 139. cites S. C and Hill. and Paſch. 4 E. 3. that he need not ſhew Deed of *Aſſignment of the Reverſion*; for the Defendant is a Stranger to it.——But Brooke makes a Quære, and ſays that this is a Cauſe to ſhew it, and therefore it ſeems that the Demandant may have Anſwer to it. Br. Ibid.

He, who *vouches himſelf to ſave the Tail*, ſhall ſhew Lien and Deed of the Warranty. Br. Voucher, pl. 163. cites 11 H. 7. 4——Br. Monſtrans, pl. 169. cites S. C.

2. If a Man vouches himſelf as Tenant in Tail, by Force of a Remainder limited to him, which is now come into Poſſeſſion, to ſave the Tail he ought to ſhew a Deed of the Remainder. 25 E. 3. 54.

Br. Voucher, pl. 49. cites 11 H. 4. 19.

3. If a Man be vouch'd as Heir to B. upon a Releaſe, with Warranty made by B. the Releaſe ought to be ſhewn. 11 H. 4. 22. b.

4. The ſame Law it is if the Voucher be upon a Confirmation with Warranty, the Confirmation ought to be ſhewn. 11 H. 4. 22. b.

S. P. and that for want of ſhewing it the Tenant was compell'd to make other Anſwer; but that it is ſaid to be *otherwiſe in another Term*; for that then he ſhall loſe Seiſin of the Land, as it was held by ſeveral, becauſe out of the Caſe of the Statute.

Br. Monſtrans, pl. 5. cites 3 H. 6. 20.

5. He who vouches as Aſſignee * ought to ſhew the firſt Deed, upon the Voucher. 3 H. 6. 21.

——S. P. Br. Deputy, pl. 10. cites 3 E. 6. 21. per Coteſmore, to which it was not anſwer'd; [but it ſhould be 3 H. 6. 21. as in Roll.]——And Br. Voucher, pl. 5. cites S. C.

* Br. Monſtrans, pl. 106. cites 3 H. 7. 13 contra, that he ſhall not ſhew Deed; per Hank. Brian, and Townſend.——S. P. between common Perſons; per Townſend. Ibid. pl. 107. cites 3 H. 7. 14.—— *But* if he *prays Aid of the King as Aſſignee*, he ſhall ſhew Deed; per Townſend; which Hankf. and Brian denied. Br. Monſtrans, pl. 106. cites 3 H. 7. 13.

In Aſſiſe the *Defendant pleaded* in Bar, *that the Father of the Plaintiff infeoff'd A. and warranted to him, his Heirs, and Aſſigns, which A infeoff'd him*, and pleaded the Warranty as Aſſignee; and becauſe he did not ſhew Deed proving him to be Aſſignee, the Aſſiſe was awarded; for, by the Juſtices, he ſhall not plead the Warranty as Aſſignee, no more than he ſhall vouch as Aſſignee without ſhewing Deed. But ſee elſewhere, that if he had pleaded it *by a Que Eſtate of A.* there he need not ſhew Deed of Aſſignment. Br. Deputy, pl. 14. cites 22 Aſſ. 88.

6. If Tenant in Tail vouches as Aſſignee, he ought to ſhew the firſt Deed which creates the Warranty, tho' the Deed does not belong to him, but to him in Reverſion, becauſe he claims under the firſt Deed. Dubitatur 14 H. 6. 4.

7. In Real Action againſt Tenant in Dower, if ſhe vouches the Heir of the Baron ſhe ought to ſhew what ſhe has to bind the Heir to the Warranty, to wit, an Endowment in Chancery or ſuch like. 17 E. 3. 8.

8. In

8. In Aſſiſe **the Tenant may** vouch the Baron and Feme named in the Aſſiſe **without ſhewing any Deed.** 26 Aſſ. 26. **adjudged.**

9. **If the** Grantee of a Ward **be impleaded he may** vouch the Grantor **without ſhewing any Deed.** 25 E. 3. 38. b. 39. **adjudged. Contra** 25 E. 3. 40. b. **Contra** 26 E. 3. 65. b.

10. The beſt Opinion was, that in * *Dower, or Quod ei deforceat*, the Tenant may *vouch the Heir* of full Age or within Age, well enough, without ſhewing Specialty, *unleſs he be in Ward*, and if he be in Ward he ſhall ſhew Specialty, and otherwiſe not; and this *for the Loſs of the Guardian*, and after the Tenant gratis ſhew'd Specialty, but *not de rigore juris*. Br. Voucher, pl. 45. cites 50 E. 3. 25.

Br. Monſtrans, pl. 27. cites S. C. — * In *Dower* the *Tenant vouch'd* to Warranty the *Heir of the Baron*, and had the Voucher without ſhewing Specialty or other Cauſe proving that he had Cauſe to vouch; nota. Br. Voucher, pl. 79. cites 4 H. 6. 24.

11. In Formedon the *Tenant vouch'd one of the Demandants by a ſtrange Name*, the *other Demandant ſaid that the Vouchee was one of the Demandants*, Judgment if without Cauſe ſhewn; and was compell'd to *ſhew Cauſe by Confirmation, and did not ſhew the Deed*; and therefore the Cauſe adjudg'd inſufficient, by which he was awarded to anſwer over, becauſe it was *in the ſame Term*; contra upon Adjournment in another Term by ſeveral there; and ſo ſee that it is peremptory. Br. Peremptory, pl. 9. cites 11 H. 4. 22.

12. If a Man *loſes the Deed* by which he was infeoffed, yet the Feoffment remains good; but then he cannot vouch or bind the Feoffor to Warranty without ſhewing of the Deed. Br. Leaſe, pl. 16. cites 4 H. 6. 17. Per Rolfe.

(H. a) Voucher. *How* to be made *as Aſſignee.* In what Caſes *without ſhewing Deed of Aſſignment.*

1. **FOR ſuch a** Thing which may be aſſign'd without Deed, **a Man may vouch as Aſſignee without ſhewing Deed of Aſſignment.** Co. 3. *Lincoln College*, 63. 26 E. 3. 75. b.

Cro. E. 373. pl. 1. in Caſe of Moke v. Alder, S. P. by Popham Ch. J. that if he ſhews the Deed of Warranty it is ſufficient, and that ſo is the better Opinion of the Books. And to that Opinion the other Juſtices inclined. ——— Ibid. 436. pl. 52. S. C. and S. P by Popham and Fenner, and that it is to no Purpoſe to ſhew the Deed of Aſſignment; for if it be ſhewn, it is not traverſable by the Vouchee.

2. Feme may vouch herſelf and her Siſter Coparcener for Land **without ſhewing Deed of Aſſignment; for they may be Aſſignees without Deed.** 40 E. 3. 22. b.

See (E. a) pl. 19. S. C.

3. For Land **the** Aſſignee **may vouch without ſhewing a Deed of Aſſignment.** 3 H. 7. 14. **Dubitatur** 2 E. 3. 57.

4. **Alſo a Man may** vouch A. upon a Feoffment with Warranty to B. and his Aſſigns Que Eſtate he has **without ſhewing how. Contra** 42 E. 3. 19. b.

5. **A Man** may ſay that A. enfeoffed B. with Warranty to him, his Heirs and Aſſigns, and B. infeoffed him, and ſo **he may** vouch A. as Aſſignee, **without ſhewing a Deed of Aſſignment. Contra** 17 E. 3. 68. b. **Contra** * 22 Aſſ. 88.

* Br. Monſtrans, pl. 93 cites S. C.

6. In Aſſiſe the *Tenant pleaded a Feoffment of the Grandfather of the Plaintiff with Warranty*, whoſe Heir the Plaintiff is, and 'twas by Deed, and he pleaded as Aſſignee, and ſhew'd * both Deeds; and 'tis ſaid elſewhere that he ought ſo to do, where he vouches as Aſſignee, or pleads as

* In Brooke it is (ſans) but in the Year-Book it is (Ambideux)

as Aſſignee; for Warranty cannot be but by Deed or Record, and therefore Aſſignment thereof cannot be but by Deed, &c. Br. Monſtrans. pl. 87. cites 9 Aſſ. 11.

7. Præcipe quod reddat the Tenant vouch'd as Aſſignee of another *by the Warranty of the firſt Feoffor*, he ſhall ſhew the firſt Deed of Feoffment and alſo a Deed of Aſſignment by the firſt Feoffee to him; and ſo ſee that he cannot be Aſſignee to a Warranty but by Deed. Br. Monſtrans, pl. 164. cites 11. E. 3.

* S. P. For the Plaintiff cannot Counterplead it; but in Dower if the *Vouchee counterpleads the Lien* the Demandant ſhall recover immediately. Br. Voucher, pl. 35. cites S. C.

8. In * *Ward*, the Tenant vouched one to Warranty without ſhewing any Deed, and had the Voucher by Award contrary to the Opinion of Kirton; but in *Dower* if the Tenant *vouch'd the Heir within Age*, he ſhall not have the Voucher without ſhewing Deed; Quod nota. Br. Monſtrans. pl. 23. cites 46 E. 3. 25.

Br. Monſtrans, pl. 155. S. P. cites 22 Aſſ. 88.

9. *He who vouches as Aſſignee ſhall ſhew the firſt Deed* which comprehends the Warranty, and ought to ſhew the Deed which proves him Aſſignee. Br. Monſtrans pl. 5. cites 3 H. 6. 20.

Ibid. pl. 93. cites 42 E. 3. 19. accordingly; but cites 22 Aſſ. 88. Contra as to the Rebutter.

10. *But* if he *rebuts by the firſt Warranty, and ſhews the Deed thereof*, he may do it *by a Que Eſtate*, without ſhewing how he had the Eſtate. Contrary where he vouches as aſſignee by it. Br. Monſtrans, pl. 5. cites no Book, but ſays Vide alibi.

11. In Formedon the *Tenant vouch'd the Queen and her two Siſters, as Heir to the Duke of York*, by Feoffment by the Duke to M. who infeoff'd B. who infeoff'd C. who infeoff'd the Tenant, and ſo vouch'd as Aſſignee, and Exception taken becauſe he does not ſhew Deed. Per Townſend, the Tenant may vouch as Aſſignee *betwcen common Perſons*, without ſhewing Deed; but it was not ſaid what the Law is, where the Aid or Voucher is of the Queen, or of the King. Br. Monſtrans, pl. 107. cites 3 H. 7. 14.

Br. Voucher, pl. 163. cites S. C.

12. *Formedon againſt Baron and Feme*; they *vouch'd the Baron*, and ſhew'd Cauſe that the *Father of the Baron infeoff'd two, who gave to the Baron and Feme in Tail, and as Aſſignees vouch'd the Baron to ſave the Tail.* And per Brian and Townſend, they ought to ſhew Deed of Warranty; for tho' the Poſſeſſion be good Cauſe of Voucher as to the Demandant, and he ſhall not ſhew Lien but to the Vouchee, in this Caſe he ſhall ſhew it; for he who is *vouch'd is the Tenant himſelf*, by which Keble ſhew'd Warranty. Br. Monſtrans, pl. 169. cites 11 H. 7. 4.

(I. a) Voucher *in Ward*. *How* it ſhall be made.

Fol. 758.

Br. Voucher, pl. 46. cites S. C. See (Y) pl. 2. 3.

1. IF Infant be in Ward to the King for Capite Land, he ſhall be vouch'd only in Ward of the King, and not of other Lords; for the King has all by his Prerogative. 2 H. 4. 23. b.

(K. a) Voucher.

(K. a) Voucher. How it is to be made. [*In what Place.*] See (O. a) S. P.

1. A MAN cannot vouch a Man in other County than where the Original is brought. 29 E. 3. 3. b.

(L. a) Voucher. How to be made. *Who* ought to be *vouch'd jointly. Coparceners.* See (N. a)

1. Upon Warranty by the Anceſtor, the one Coparcener cannot be vouch'd without the other. 11 H. 4. 20. b.

(L. a. 2) Joint-Voucher *of whom. Survivor and Heir.*

1. TWO *Jointenants make a Feoffment in Fee by* this Word *Dedi*; the *one dies*, the Survivor ſhall be vouch'd, and render in Value for the whole; for tho' *the State paſs'd from both*, and the Statute ſays Ratione doni proprii, yet each of them did warrant the whole by this Word Dedi, otherwiſe the Survivor ought not to have yielded the whole in Value, as it hath been adjudged; and the Reaſon is, for that the *Heir* of the Jointenant that dies, *cannot* be *bound by* the Warranty created by this Word *Dedi*. 2 Inſt. 276.

2. *But if* 2 Jointenants make a Feoffment in Fee, *with an expreſs Warranty for them and their Heirs, to the Feoffee and his Heirs*, and the one of them dies, the Survivor ſhall not be vouch'd alone, but the Heir alſo of the other, and the Recompence in Value ſhall be equally upon them. 2 Inſt. 276.

(M. a) Voucher. How to be made. *Who* may *vouch jointly.*

1. TWO Tenants in Common cannot vouch jointly. 28 E. 3. 90. b. *Præcipe* quod reddat *againſt* 2, however post. N. a.

they *took the Tenancy in Common*, and the *one vouch'd J. as to that which to him belong'd*, and *the other* vouch'd *P. as to that which to him belong'd*. And the beſt Opinion was, that where they confeſs the Tenancy in Common, they cannot vouch ſeverally; by which the Tenant, according to the Opinion of the Court, pleaded Ne dona pas &c. Br. Voucher, pl. 20. (bis) cites 42 E. 3. 16.

(N. a) Voucher. How to be made. *Where jointly* [*or severally.*]

See Page v. Maynard in Fig. on Recov. 176.

1. IF Baron and Feme levy a Fine with Warranty for them and the Heirs of the Feme, after the Death of the Feme, **the** Baron only **may be vouch'd without the Heir of the Feme**; **(for the Baron is to warrant all during his Life)** 22 E. 3. 1. **Curia.**

Where severally.

2. **If** Præcipe **be brought** againſt ſeveral, **if** they ſhew ſeveral Cauſes of Voucher, as that they are Tenants in Severalty, **they may, and ought to vouch ſeverally.** 41 E. 3. 20. 12 H. 7. 2. 42 E. 3. 16.

3. But **if the Action be brought** againſt 4, and 2 make Default at the Grand Cape, and the other 2 accept the Tenancy of the Entierty, and that the others had not * any thing, and abate the Writ by Gager of Non-ſummons; **in a** new Writ by Journeys Accounts **againſt thoſe** 2, **they ſhall be eſtopp'd to plead ſeveral Tenancies, and to vouch ſeverally; for it is againſt their Acceptance; nor may they vouch ſeverally without taking the ſeveral Tenancy, becauſe they have** accepted the Tenancy jointly. 42 E. 3. 16. b. 17. **Curia.**

* Fol. 759.

4. **If a** Warranty be made to 2 jointly, * **one alone cannot vouch without the other, unleſs the Warranty be** divided by Act in Law. 48 E. 3. 17.

* Br. Dilatories, pl. 8. cites S. C. and ſays, that the Reaſon ſeems to be inaſmuch as Voucher is in Lieu of Action, and one ſhall not have Action which pertains to two.——In Formedon, the Tenant *pleaded Jointenancy with J. N.* not named, Judgment of the Writ; and the *Demandant ſaid that J. N. is his Villein*, Judgment &c. and pray'd Seiſin of the Land. And by the Opinion of the Court that is no good Replication; for the Tenant ſhall not be ouſted of his Jointenancy, by Reaſon that he ſhall *loſe his Voucher*; for of Warranty made to two Jointenants, the *one ſhall not vouch alone ſo long as the Jointure continues*; and this is the Folly of the Demandant, that he had not enter'd into the Moiety, and brought an Action of the other Moiety; for then *by the Severance of the Jointure the other may vouch alone*; Quod nota. Br. Jointenancy, pl. 9. cites 48 E. 3. 16.——Br. Garranties, pl. 18. cites S. C.——Br. Voucher, pl. 39. cites S. C.

In Præcipe quod reddat againſt two, they cannot vouch ſeverally without ſhewing Cauſe, becauſe it is out of the common Courſe. 2 Inſt. 246.

5. **If** Præcipe **be brought** of a Manor and 40 Acres, **Tenant vouches, and** Vouchee enters and vouches himſelf for the Manor and 40 Acres alſo, as Parcel of the Manor, **tho' it was not Parcel, yet if he was infeoff'd as Parcel, he ought to vouch accordingly.** 41 E. 3. 23. b.

Where there are 2 *Tenants*, **6. In Action againſt** 2, one may plead a Releaſe, and the other vouch. 42 E. 3. 17.

one ſhall vouch, and the *other may plead a Plea which goes to the whole*, becauſe one ſhall not be bound by the Plea of the other. Arg. Kelw. 16. in Caſe of Lord Brook v. Nevill.——*But one Defendant* ſhall *not plead in Abatement of all the Writ, and alſo vouch* or plead in Bar. Arg. Ibid.——Contra per 3 againſt 2. Ibid. and 16. b. 17.——*Nor* he ſhall not plead a *Bar which goes to all for Parcel, and vouch another for other Parcel*, becauſe he is not at any Miſchief, if his Plea, which goes to all, be true; for then this diſcharges him of the whole. Arg. ibid.——Contra per 3 againſt 2. Ibid. and 16. b. 17.——*But* it is otherwiſe where there are 2 *Jointenants*. Arg. Ibid. 16.

Br. Jointenants, pl. 52. cites 31 E. 3. and Fitzh. Counterplea de Voucher, 88. and 22 E. 3. that the Feoffee may vouch the other, and the Heir of the Deceaſed; Per Finch.

7. Where 2 *make a Feoffment with Warranty*, and *one dies*, the Charge ſhall not run upon the Survivor, but upon him, and the *Heir of the other*. Br. Jointenants, pl. 59. cites 17 H. 3. and Fitzh. Voucher, 90.

Finch ——*But* ſee Fitzh. Voucher, 104. 30 E. 3. 31. in Præcipe quod reddat, the Tenant *vouch'd* 2, and *one was return'd dead*, by which he *revouch'd him who ſurvived only*; and well by Award; and he was not compell'd to vouch him and the Heir of the other. Quod nota. Br. Jointenants, pl. 59.

8. Mortdanceſtor *againſt W. and A.* which *A. ſaid that ſhe had nothing* &c. and *W. anſwer'd as ſole Tenant, and pleaded in Bar the Warranty of the Mother of the Demandant to his Father, whoſe Heir he is* &c. The *Demandant ſaid that W. had nothing, unleſs jointly with the ſaid A.* Judgment if he may plead the Warranty ſole without A. and the Demandant was awarded by the Court to *anſwer to the Bar.* Quod nota; & econtra of Voucher; for the one cannot vouch without the other. Econtra of Rebutter, as here. The Reaſon ſeems to be inaſmuch as *Voucher is in lieu of the Action; contra of Bar.* Br. Bar, pl. 58. cites 9 Aſſ. 18. Br. Voucher, pl. 92. cites S. C.

9. Præcipe *againſt Lord and Villein.* The *Villein by Sufferance* of the Lord, ſaving to him his Seigniory, *vouch'd to warranty*, and was warranted. Quod nota bene. Br. Voucher, pl. 99. cites 17 Aſſ. 19. and ſays, ſee 33 H. 6. 1. where the Lord and Villein joined in Voucher.

10. *All that are intitled* to the Voucher, *ought to be joined in the Voucher*; for otherwiſe he fails of his Voucher. Br. Voucher, pl. 54. cites 38 E. 3. 4.

11. If 2 *Coparceners are*, and the *one aliens her Part*, and the *other is impleaded*, ſhe cannot have Aid, by reaſon of the Alienation; and therefore ſhe ſhall vouch alone for her Part, and ſhall have Warranty alone. Br. Voucher, pl. 58. cites 38 E. 3. 20. Per Knivet & Finch. If 2 *Coparceners* be, and *one* of them *aliens with Warranty, and comes in as Vouchee*, now he ſhall pray in Aid of his Fellow, and either have Pro rata upon the Loſs, or vouch over with him upon the Warranty paramount. Hob. 26. in Caſe of Roll v. Osborn.

When *Lands and Warranties deſcend to* 2 *Parceners*, and they *make Partition*, and *one of them is impleaded*, he ſhall not vouch alone, but *ſhall pray Aid of his Fellow, and ſo* ſhall *put themſelves in Repreſentation of one Heir, and then vouch together*; Per Hobart Ch. J. Hob. 26. in Caſe of Roll v. Osborn.—— *But if one* Parcener *aliens his Part, or makes Default upon Aid pray'd*, the other ſhall vouch alone; Per Hobart Ch. J. Hob. 26. in Caſe of Roll v. Osborn, cites 27 H. 8. 58. 4 H. 7. 20 H. 6. 2. and 43 E. 3. 23.

12. *In Warranty of Charters againſt* 2, and he *ſhews ſeveral Deeds* of them, the Writ ſhall abate; for he cannot join them. Br. Warrantia Cartæ, pl. 14. cites 39 E. 3. 26.

13. *But* it ſeems that in Warrantia Chartæ againſt 2, and the *one is an Infant at the Time of the making of the Deed, it ſhall bind the other.* But Quære if by this Writ, or by another Writ againſt him only. Br. Warrantia Cartæ, pl. 14. cites 39 E. 3. 26.

14. If *three* are *jointly infeoffed* with Warranty, and *two releaſe or ſurrender to the third*, he ſhall not deraign the firſt Warranty by Voucher or Writ of Warrantia Chartæ, becauſe he is *in by the firſt Feoffor*, and not by him who releaſed or ſurrendered. Quære if the Surrender be good. *But* it ſeems if *one releaſes to the one*, there the one is in by the other, and he ſhall not deraign the firſt Warranty, as the Caſe is in Anno 33 H. 6. Br. Garranties, pl. 6. cites 40 E. 3. 41. Br. Warrantia Carte, pl. 3. cites S. C.

15. *And* where *all die except one*, he who is in by the *Survivor* ſhall deraign the firſt Warranty. Br. Garranties, pl. 6. cites 40 E. 3. 41.

16. If *two bring Formedon*, and the *Tenant has Warranty againſt the one*, and not againſt the other, the Tenant *may vouch* the Demandant *for the one Moiety, and plead in Bar for the other Moiety.* Br. Voucher, pl. 16. cites 41 E. 3. 7.

17. When a Man has *Iſſue* 2 *Sons by diverſe Venters*, and has *Land tail'd in Burgh-Engliſh*, and *diſcontinues with Warranty, and dies*, and the *youngeſt brings Formedon*, the Tenant may vouch the eldeſt and the youngeſt, and when they appear he ſhall plead in Bar for one Moiety, and the Voucher ſhall ſtand for the other Moiety. Br. Voucher, pl. 49. cites 11 H. 4. 19.

18. If

18. If a Man *infeoffs A. and B.* with Warranty, *who infeoff W. N. who* is impleaded, and *vouches the two, who vouch the firſt Feoffor*; and after the *one of the two makes Default*, and the *other appears*, he ſhall have the Warranty againſt the firſt Feoffor; and ſo is the Opinion in 11 E. 4. 8. Br. Garranties, pl. 67. cites 5 H. 5. 7.

But per Aſcue, if two Jointenants are, and the *one infeoffs a Stranger of his Part*, the Warranty is gone; which Luddington did not deny. Br Garranties, pl. 67. cites 5 H. 5. 7.

19. If *two Jointenants are impleaded*, and the *one appears*, and the *other will render, or makes Default*, he who appears ſhall have the whole Warranty. Br. Garranties, pl. 67. cites 5 H. 5. 7. Per Luddington.

20. If *Feoffment* with Warranty is made *to two*, and the *one alone is impleaded*, and vouches, the *Vouchee may extort him from the Lien, inaſmuch as he might have abated the Writ by Jointenancy, and did not*; for he is not compell'd to warrant one, where the Warranty is made to two. Br. Voucher, pl. 16. cites 21 H. 6. 49.

So where 2 *ſeveral Tenants are* of my Feoffment, and they are *jointly impleaded, where they may abate the Writ by ſeveral Tenancy*, and they *vouch* me, it is good Counterplea to the Lien, that I made two Warrants, and not one and the ſame Warrant, and the Vouchee cannot abate the Writ, which the Tenant has affirm'd. Quod nota. Br. Ibid.

21. Where 2 *Jointenants* are, and the *one is impleaded*, and *he vouches the Feoffor*, this Matter is good Counterplea to the Lien. Br. Counterplea de Garrantie, pl. 4. cites 22 H. 6. 13.

For if I *infeoff* 2 *with Warranty*, and the *one infeoffs a Stranger of his Part*, and he is impleaded, and vouches me, I ſhall not warrant this Part. Br. Voucher, pl. 113. cites 11 E. 4. 7.——S. P. Br. Jointenants, pl. 35. cites 12 E. 4. 2.

22. Where the *one Vouchee is by Protection*, this *ſhall ſerve for both*; for both warranted ſince the Whole, therefore the one ſhall not be compell'd to warrant the Moiety by himſelf. Br. Voucher, pl. 113. cites 11 E 4 7.

23. B. brought *Formedon againſt D. C. and W.* which *D. as to that which to him belong'd, vouch'd to Warranty A.* and *C. as to that which to him belong'd, vouch'd B.* and the ſaid *W. as to that which to him belong'd, vouch'd N.* upon which Vouchers the Demandant demurr'd in Judgment; and by Yaxley, Kingſmill, Frowyke, Conſtable, Vaviſor and Davers, they ſhall have their ſeveral Vouchers, for it may *ſtand with their Tenancy* well enough; *for two may make Feoffment to two or three, and the one may make Warranty to the one, and the other to the other, by one and the ſame Deed*; or the Feoffors may make Warranty to the one, and a Stranger may releaſe or confirm with Warranty to the other, and this Releaſe or Confirmation with Warranty is ſufficient to vouch, and good Lien againſt the Feoffor if the Demandant will not counterplead the Poſſeſſion, and that the one may vouch and the other plead in Bar; for the Warranty and Voucher is Inheritance, but they ought to agree in Dilatories, as in View, Aid Prayer, or the like. But Conningsby, Mordant, Wood and Brian Ch. J. Contra, and that they ſhall not have the ſeveral Vouchers by the Manner; for when they have accepted the Tenancy, and vouch'd, it ſhall be intended that they are Jointenants or Coparceners, and therefore ſhall not have ſuch ſeveral Vouchers without ſhewing Cauſe, but by *Cauſe ſhewn* they may have it; Quære, for afterwards they join'd in Voucher. Br. Voucher, pl. 108. cites 12 H. 7. 1. 2.

Br. Counterple de Voucher, pl. 64 cites S.C.

24. In Formedon, the *Tenant vouch'd* 3 *as ſeveral Heirs to the* 3 *ſeveral Perſons*, and for the Non-age of the one pray'd that the Parol demur; and the Voucher good of the three ſeveral Heirs. Br. Voucher, pl. 165. cites 16 H. 7. 12. 13.

Br. Barre, pl. 32. cites S.C.

25. In *Formedon againſt* 2 *Feoffees of Truſt*, the *one Confeſſes or pleads in Bar*, and the *other will vouch*. Fitzherbert Juſtice ſaid the one cannot vouch

vouch unleſs both will vouch, which Brooke Juſtice denied; for the one may confeſs and render the Action, and the other may vouch. Br. Voucher, pl. 77. cites 14 H. 8. 24.

26. *Tenant in Tail and Remainder-man* may be vouch'd jointly, but it is not ſo regular. Per Holt Ch. J. 2 Salk. 571. pl. 6. Trin. 3 Ann. B. R. Page v. Hayward.

(N. a. 2) Voucher. How. *At large*, in what Caſes.

See (A. b)

1. IT was ſaid that it is adjudg'd 11 E. 3. that in Aſſiſe of *Darreign Preſentment* the Tenant ſhall not vouch *out of the Writ*, no more than in Aſſiſe of Novel Diſſeiſin, quære inde; for in Aſſiſe of * *Mort-danceſtor* the Tenant may vouch at large, and this Aſſiſe of Darrein Preſentment is much of the ſame Nature. Br. Voucher, pl. 129. cites 21 H. 6. 50.

* S. P. F. N. B. 178. (F).

2. It ſeems that the *Tenant in* Writ of *Dower* may vouch at large. Br. Voucher, pl. 74.

As in Dower of 4 Acres of Land, the Tenant as to one Acre vouch'd to Warranty, which the *Demandant counterpleaded, that he who is vouch'd nor none of his Anceſtors ever had any thing* &c. after the Seiſin of the Baron. Br. Voucher, pl. 74. cites 22 H. 6. 42.

(O. a) Voucher. *In what Place* Voucher may be.

1. A Man cannot vouch another in other County than where the Original is brought. 29 E. 3. 3. b.

2. But a Man may vouch generally, and pray that he be ſummon'd in other County. 29 E. 3. 3. b.

3. So a Man may vouch and pray that he be ſummon'd in the County of * Lancaſter or Cheſter, and the Writ ſhall go there, tho' generally the Writ of the King does not run there. 26 E. 3. 59. b. adjudged.

* S. P. And Proceſs ſhall be made to them immediately. *But* if he prays Summons into Wales, *we will not write to Wales, but to the Sheriff of the County next adjoining.* Br. Cinque Ports, pl. 8. cites 19 H. 6. 12. Per Fulthorp.

Where a Man *vouches in Bank, and prays that he be ſummon'd in the County Palatine of Cheſter*, Lancaſter or Durham, Summons ad auxiliandum ſhall not iſſue there, but *Special Writ to the Lord of the Franchiſe* to ſummon him. Br. Cinque Ports, pl. 12. cites 36 H. 6. 33.

4. [So] a Man may vouch and pray that he be ſummon'd in Ireland if he ſhews a ſpecial Deed, which teſtifies an Exchange of Land in England for Land in a foreign Realm, Voluntate etiam Regis & aſſenſu interpoſito. Time of E. 1.

5. But a Man cannot vouch generally and pray that he be ſummon'd in Ireland, without ſhewing a Special Deed of Exchange. Time E. 1.

6. Aſſiſe of *Mordanceſtor*, the Tenant *vouch'd in another County*, and becauſe the *Demandant teſtified that he had Aſſets in the ſame County to be ſummon'd*, therefore Proceſs iſſued in the ſame County. Br. Voucher, pl. 96. cites 13 Aſſ. 3.

Br. Proceſs, pl. 93. cites S. C. —— *So of foreign Voucher before Juſtices aſſign'd*, where the Demandant teſtifies as here, Proceſs ſhall iſſue in the ſame County. Br. Voucher, pl. 96. cites 13 Aſſ. 3. —— Br. Proceſs, pl. 93. cites S. C.

7. In Mortdanceſtor, the *Tenant vouch'd* to Warranty *A. and pray'd that he may be ſummon'd in another County*, Fiſh *counterpleaded that the Vouchee nor none of his Anceſtors never had any Thing* &c. Upon which the Aſſiſe was taken, and *found for the Tenant*, by which it was *awarded that the Voucher ſtand*; and then the Demandant ſaid that the Vouchee had *Aſſets in the ſame County*, and pray'd that he be ſummon'd in this County; & non allocatur by Reaſon of the *Iſſue tried againſt him before*. Br. Voucher, pl. 102. cites 36 Aſſ. 6.

8. *Præcipe* quod reddat, the *Tenant* vouch'd and *pray'd that the Vouchee be ſummon'd in the County of York, and in the County of Durham*, which is a County Palatine, and yet the Voucher ſtood; for per Cotton, if he be ſummon'd in the County of York, he is ſummon'd in all Counties of England, and therefore it ſeems by him that Summons ſhall iſſue there only; Quære inde, for in ſpecial Caſes they may *award Proceſs to* the County Palatine. Br. Voucher, pl. 151. cites 10 H. 6. 20.

(P. a) Voucher. *Counterplea by Tenant [or Demandant.]* Counterpleas *to the Perſons of the Vouchor [or Vouchee.]*

Arg. Keb. 30. in Caſe of Plunket v. Holmes — A Man cannot vouch a *Clerk attaint*, *nor* a Man *outlaw'd*; but rather ſhall have Writ of Warrantia Chartæ. *Contra of an Ideot.* Quod nota bene; and Quære if it be Law at this Day. Br. Warrantia Cartæ, pl. 23. cites 8 E. 2. and Fitzh. Voucher, 237.

1. **If the Tenant vouches, it is a good Counterplea** that he is outlaw'd; **Judgment if he ſhall be anſwer'd.** 21 E. 4. 54. Curia. 25 E. 3. 43. b. by *Willy*. **But Quære.**

See pl. 23. 2. **It is a good Counterplea, by the Common Law,** that the Vouchee is dead. 25 E. 3. 43. b. **Per Curiam.**

Of the Vouchee.

And this was a good Counterplea at Common Law. Br. Counterple de Voucher, pl. 39. cites 7 Aſſ. 4. Per Herle.

3. * No ſuch in Rerum Natura **is a good Counterplea.** 40 E. 3. 37. 28 E. 3. 96. b.

* The Iſſue was received, notwithſtanding that it be in a manner a Pregnancy. Br. Counterple de Voucher, pl. 8. cites 40 E. 3. 36. —— 2 Inſt. 245. S. P.

This Statute was in Affirmance of the Common Law. 2 Inſt. 245. —— And ſee pl. 23.

4. And **this Counterplea** is given alſo by 14 E. 3. cap. 18.

Fol. 760. Br. Counterplea de Voucher, pl. 5. S. P. cites 40 E. 3. 14.

5. **It is a good Counterplea** that he who is vouch'd by a ſtrange Name is the ſame Perſon who is Tenant; Judgment if, without Cauſe ſhewn, he ſhall be received to vouch. 10 H. 6. 18.

6. **If** 2 Siſters are vouch'd, **whereof the** one **is vouch'd** within Age, **it is a good Counterplea** that they are both Baſtards, **for Cauſe of the Delay by the Age.** 17 E. 3. 59.

7. If

7. **If a Man be** vouch'd as Son and Heir within Age, and prays Parol to demur, **it is a good Counterplea** that Vouchee is Baſtard; for he cannot be bound by his own Deed. * 48 E. 3. 28. b. 10 H. 6. 15. 18. **See** 11 E. 3. **Age** 3.

So where the Tenant, in Præcipe quod reddat, *vouch'd one within Age as Couſin and Heir of J. of G.* viz. *Son of W. Brother of J.* And the *Demandant ſaid, that W. the Father of the Vouchee was a Baſtard*; and a good Counterplea, per Belk. But Finch ſaid, that he *may take the general Counterplea, That he nor none of his Anceſtors* &c. For if the Father was a Baſtard, J. is not his Anceſtor; and after the Tenant confeſs'd that W. was a Baſtard. Br. Counterple de Voucher, pl. 6. cites 40 E. 3.

* Br. Counterplea de Voucher, pl. 19. cites S. C——2 Inſt. 245. S. P.

8. But **otherwiſe it is, if he be vouch'd** as Son and Heir only; **for there he may be bound by his Deed.** * 48 E. 3. 28. b. 10 H. 6. 18. b. 14 H. 6. 10. b.

* Br. Counterplea de Voucher, pl. 19. cites S. C.

9. **If a Man be vouch'd** as Son and Heir to B. **it is good Counterplea** that B. was attainted **of Felony or Treaſon,** if the Parol be pray'd to demur **upon the Voucher; for then he cannot be bound by his own Deed.** 9 H. 6. 50. 14 H. 6. 10. b.

10. But **otherwiſe it is if he** does not take Advantage of the Nonage; **for there he may be bound by his own Deed.** 9 H. 6. 50. 14 H. 6. 10. b.

11. So **if a Man be vouch'd** as Son and Heir to another, and prays the Parol to demur **for his Nonage, it is a good Counterplea** that he himſelf is Heir to him, **or** that another is Heir; **that is to ſay, elder Brother.** 14 H. 6. 10. b. 25 E. 3. 43. b. by *Wilby*. **Quære.**

In Writ of Entry within the Degrees, the *Tenant vouch'd one* to warranty, *and by his Age pray'd that the Parol demur*; and the *Demandant ſaid that he had an elder Brother of full Age*, and pray'd that he be ouſted of the Voucher; and ſo he was. Br. Counterplea de Voucher, pl. 3. cites 27 H. 6. 1.

12. But **otherwiſe it is if he** be vouch'd of full Age; **ſo that the Parol is not to ſtay for his Nonage.** 14 H. 6. 10. b.

13. **If a Man** vouches J. S. within Age, as Heir to J. D. and prays the Parol to demur, **it is a good Counterplea** that he is not Heir to him; but **that** W. D. is Heir. 38 E. 3. 27. b.

Demandant ſaid that J. S. is younger Son, and W. is the eldeſt; to which the Tenant ſaid *Proteſtando* that J. is Heir, and *Pro placito that he enter'd as Heir after the Death* of the Anceſtor, and pray'd the Voucher; and becauſe the Demandant could not deny but that J. enter'd as Heir, the Voucher ſtood. Br. Counterplea de Voucher, pl. 25. cites S. C.——Br. Voucher, pl. 60. cites S. C.

14. So **it is a good Counterplea,** tho' J. S. had enter'd **into the Land** as Heir to J. D. **for the Delay by the Demurrer of the Parol. Contra** 38 E. 3. 27. b. **Adjudged.**

15. **If a Man** vouches another as Son and Heir of J. S. within Age, and prays that the Parol demur, **it is a good Counterplea** that he is of full Age. 17 E. 3. 78. b.

16. [But] **if a Man vouches another as Son and Heir of J. S. within Age, and prays the Parol to demur, it is not any Counterplea** that J. S. nor any of his Anceſtors, were ever ſeiſed of the Land &c. **for tho' the Heir cannot in this Caſe be bound by his own Deed, yet he may be bound by the Deed of other Anceſtor than of J. S.** 21 E. 3. 9. **Curia.**

Br. Counterple de Voucher, pl. 27. cites S. C. and that it is no Counterplea by the Common Law or Statute; and becauſe the Tenant may bind him by Deed of other Anceſtor; therefore the Counterplea extends not to all thoſe whom the Tenant may bind, when the Vouchee comes, and ſo is no Counterplea. And yet it is agreed, that where he prays that the Parol demur, as in the principal Caſe he cannot bind him by his own Deed. Quod nota.——Br. Voucher, pl. 62. cites S. C.

17. **In a Writ of** Dower, **if the Tenant** vouches 3, **it is not a good Counterplea** that in another Writ they all were vouch'd, and the Demandant recover'd a 3d Part upon Default after Default of one, and after

after the Writ abated againſt the others, and how the Heir of him that made Default is vouch'd within Age, and the Warranty is determined againſt him by the firſt Recovery; **for this Counterplea is but to the Warranty, and the Demandant is not at any Delay thereby; for the Parol ſhall not demur in this Writ.** 26 E. 3. 59. **adjudged.**

18. **The** ſame **Law,** tho' the Heir of him that made Default be vouch'd in Ward of the King; **for it is but a** Petit Delay, **that is to ſay, to have Aid of the King.** 26 E. 3. 59. **adjudged.**

19. But **otherwiſe it would be, if it had been** in a Præcipe quod reddat; **for there this Matter ſhould be a good Counterplea, inaſmuch as in this Writ the Parol ſhould demur for his Nonage, which the Law will not ſuffer upon a** Falſe Voucher. 26 E. 3. 59.

Fol. 761.

20. **In an** Action againſt Feme ſole, **if the Tenant will vouch, it is a good Counterplea for the Demandant to ſay** that pending the Writ the Tenant has taken Baron, **becauſe otherwiſe the Demandant ſhall be delay'd; for ſhe and her Baron ought to vouch.** 26 E. 3. 68. b.

For when he is *vouch'd within Age, Writ ſhall not iſſue to ſummon him,* by which the Death may be return'd, *nor the Demandant cannot ſay that he is of full Age, and pray that he may be view'd*; for there is no ſuch, and the Vouchee never will be of full Age where he is dead; and therefore good Counterplea. And at Common Law it was a good Counterplea that he never had any ſuch who was vouch'd, but here was ſuch a one in Eſſe, but now is dead. Ibid.

21. In Mortdanceſtor the *Sheriff return'd the Vouchor dead,* and the *Tenant vouch'd his Heir within Age, and pray'd that the Parol demur*; and the *Demandant ſaid that he had no ſuch* &c. for he died in the Life of his Father. And Herle awarded this a good Counterplea. Br. Counterplea de Voucher, pl. 39. cites 7 Aſſ. 4.

22. In Præcipe quod reddat, if the Tenant *vouches a Biſhop* to Warranty, it is no *Counterplea that he nor his Anceſtors never had any thing* &c. but ſhall ſay that he nor his Predeceſſors &c. never had any thing &c. Br. Counterple de Voucher, pl. 51. cites 12 E. 3. and Fitzh. Voucher 27. 105. 110. 112.

In Præcipe quod reddat the Tenant vouch'd, the Demandant may ſay by this Statute that the Tenant is dead; but otherwiſe if he *permits the Voucher, and at the Summons* ad Warrantizandum the *Sheriff returns Nihil*, there he ſhall not have the Averment; for now it ſhall come in by the Return of the Sheriff; by which a Summons Sicut alias iſſued. Br. Voucher, pl. 66 cites 21 E 3. 36.—S. P. 2 Inſt. 246.—S. P. And there the Demandant took the Averment immediately at the firſt Day, but the Sheriff return'd it, and the *Tenant ſaid that he was alive*, and pray'd Alias, and the *Demandant ſaid that he is dead*; and there, notwithſtanding the Demandant was paſs'd this by Award of Proceſs, yet now becauſe the *Tenant has taken the Averment that he is alive*, the Demandant may aver the Death; and ſo he did, by which the Tenant was compell'd to vouch over. Br. Counterple de Voucher, pl. 8. cites 40 E. 3. 36.—Br. Voucher, pl. 15. cites S. C. and 21 E. 3. 36. accordingly.—5 Le. 134 in Caſe of **Wroth v. the Counteſs of Suſſex**, cites 21 E. 3. 36. And ſays, that tho' it was inſiſted that the *Statute did not preſcribe any Time for making the Averment*, but left the ſame generally, yet it was the Opinion of the whole Court, that he ſhould have the Averment at the Time of the Voucher, or not at all.

23. 14 *E.* 3. *cap.* 18. *Becauſe the Demandants in Plea of Land have been often delay'd, for that the Tenants have vouch'd to Warranty a dead Man, againſt which Voucher the Demandants before this Time, might not be receiv'd to aver that the Vouchee is dead, to their great Delay and Miſchief,*

It is accorded and eſtabliſhed, that from henceforth, if the Tenant vouch to Warranty a dead Man, and the Demandants will aver that the Vouchee is dead, or that there is none ſuch, their Averment ſhall be received without Delay.

In Præcipe quod reddat, if the Tenants *vouch'd two*, the *Demandant ſaid that one is dead.* Fencot objected that they ought to ſay that both are dead; for otherwiſe it is no Counterplea by the Statute, nor by the Common Law; but Belke and Thorpe held it well enough, whereupon he vouch'd the one alone. Br Voucher 135. cites 39 E. 3. 32.—Br. Counterple de Voucher, pl. 37. cites S. C. That it is a good Counterplea by the beſt Opinion; by which he *vouch'd the one and the Heir of the other.*—2 Inſt 246. ſays it is a good Counterplea for preventing of Delay.—*So* if the Tenant *vouches A.* who enters into the Warranty, and *vouches B.* the Demandant may allege in Advantage of himſelf, that the *firſt Vouchee is dead*, and pray a *Reſummons againſt the Tenant*, becauſe this cannot come in by the Return of the Sheriff; Per Finch, & non negatur. Br. Voucher, pl. 158. cites 40 E. 3. 37.—Br. Counterple de Voucher, pl. 8. cites 40 E. 3. 36. S C.— *And* the *ſecond Vouchee ſhall ſhew this Matter, and pray Reſummons*, and have it, becauſe otherwiſe Error ſhall be of the Judgment. Br. Voucher, pl. 158. cites Fitzh. Voucher 4. 18 E 3. 37.

The Demandant may aver the Life of the Vouchee by the Equity of this Statute. Jenk. 122. pl. 47.

24. In

24. In Formedon it was agreed, that where the Tenant vouches, it is good Counterplea *that the Vouchee is Villein to the Demandant*; for if the Demandant pleads with him he ſhall be infranchis'd. Br. Counterple de Voucher, pl. 18. cites 15 E. 3. and * 48 E. 3. 17.

* Br. Voucher, pl. 39. cites S. C.

25. In Mortdanceſtor, the Tenant *vouch'd the Baron and Feme*, and the *Demandant ſaid that the Baron and Feme, nor the Anceſtor of the Feme, never had any thing in Demeſne, nor in Services, after the Seiſin of our Anceſtor, of whoſe Seiſin we demand*; and a good Counterplea, that is to ſay, the Anceſtor of Feme, and no Mention of the Anceſtor of the Baron; for it ſhall be intended that the Warranty came of the Part of the Feme. Br. Counterple de Voucher, pl. 42. cites 22 Aſſ. 30.

So in Eſcheat the Tenant *vouch'd* to Warranty the *Baron and Feme*, and the Demandant *counterpleaded that the Feme nor her Anceſtors whoſe Heir* &c. *never had any thing*; and a good Counterplea Per Knivet and Wich, for it ſhall be *intended that he vouch'd by the Feme*. But Belknap contra; for he might be infeoff'd by both before the Coverture; and at laſt the Demandant *counterpleaded the Poſſeſſion of the one and the other*; therefore quære. Br. Counterple de Voucher, pl. 19. cites 48 E. 3. 28.

26. In Cui in Vita in the Poſt, the Tenant *vouch'd Walter Son and Heir of W. of S. who was the Baron that alien'd*; and the *Demandant ſaid that he was Couſin and Heir of W.* abſque hoc *that Walter, or any of his Anceſtors, had any thing after the Title &c.* and a good Counterplea, by which the Tenant pleaded in Bar by Exchange. Br. Counterple de Voucher, pl. 24. cites 38 E. 3. 15.

27. In Præcipe quod reddat, the Tenant *vouch'd J. Son and Heir of T. and pray'd that the Parol demur by his Nonage*, and ſo it did; and after *J. died*, and upon Reſummons againſt the Tenant, he vouch'd as Couſin and Heir of J. To which the Demandant ſaid that *J. who was vouch'd, had a Siſter in full Life*; Judgment, if to vouch another he ſhall be received; and the Opinion of the Court was with the Plaintiff. Br. Counterple de Voucher, pl. 10. cites 43 E. 3. 3.

28. In Præcipe quod reddat it is a good *Counterplea* of the Lien to ſay, *that he who vouch'd is not Tenant, but another; ſo that he cannot have any Loſs*. Br. Counterple de Garrantie, pl. 3. cites 26 H. 6. 49. Per Danby and others.

29. In Præcipe the Tenant vouch'd, the *Demandant counterpleaded by the Statute*, by which the *Tenant pleaded Outlawry in the Demandant after the laſt Continuance* in Debt, *and ſhew'd the Record*. And by all the Juſtices, except Brian, it is a good Anſwer, tho' it is not in Bar; for the Statute ſays that if the Tenant vouches and the Demandant counterpleads, and the Tenant will not attend, he ſhall be put over to another Anſwer, and *does not ſay to the Anſwer in Chief*; and therefore any Anſwer ſuffices. Br. Counterplea de Voucher, pl. 47. cites 21 E. 4. 54.

30. In Dower it is a good Counterplea to ſay, *that the Tenant enter'd by her Husband*. 2 Inſt. 246.

31. It is a good Counterplea of the Voucher to ſay, *that the Tenant hath formerly pray'd in Aid of him*, in reſpect of the Delay. 2 Inſt. 246.

(Q. a) *Counterplea by Demandant.* What ſhall be a *good* Counterplea.

1. IF an Heir be vouch'd in Ward of the King, **it is not a good Counterplea** that J. S. has ſued in the Chancery to the King for the ſaid Ward, where his Right was found, and by Judgment has the Ward, and ſo the King has nothing in the Ward, **without ſhewing any Thing to maintain it.** 26 E. 3. 60.

2. [But] **If an Heir be vouch'd in Ward of the King, it is not a good Counterplea** that the King has nothing in the Ward by Nonage of him; **for between them the Poſſeſſion of the King ſhall not be tried.** 17 E. 3. 65. b. **Contra** 21 E. 3. 53. **Adjudged.**

3. So **if a Man be vouch'd** in Ward of a common Perſon, **it is not a good Counterplea** that he has nothing in the Ward. 22 E. 3. 21. **Contra** 26 E. 3. 60. 27 E. 3. 82.

4. **If an Heir be vouch'd** in Ward of diverſe Lords, **it is not a good Counterplea** that ſome of them, **who are ſuppoſed Guardians,** have nothing in the Ward; **for if he vouches ſome Guardians, and others with them who have nothing, this is nothing to the Demandant.** 17 E. 3. 65. b. 27 E. 3. 82. **Adjudged. Contra** 21 E. 3. 53.

5. **If Tenant in** Dower vouches the Heir of the Baron in Reverſion, **it is a good Counterplea** that the Tenant has Fee; **for ſhe cannot bind the Heir to warranty for any other Cauſe but for the Reverſion.** 29 E. 3. 41. b.

6. **If the Tenant** vouches B. as Couſin and Heir to G. **it is a good Counterplea** that he who is vouch'd is the Son of one J. without that That he is of the Blood of G. 28 E. 3. 99.

The Miſchief before this Statute was,

7. *By* 3 *E.* 1. *cap.* 40. *Statute of Weſtm.* 1. *Foraſmuch as many People are delay'd of their Right by falſe Vouching to Warranty*;

that every Tenant in a Real Action was permitted to vouch any of the People, tho' he or any of his Anceſtors had never any thing in the Land, whereof he might infeoft the Tenant or any of his Anceſtors; and again, that Vouchee might vouch another in like manner; and upon every Summons ad Warrantizandum, there muſt be 9 Returns &c. ſo as the Delay was in manner infinite, and all upon falſe Vouchers; whereupon this Act of Parliament for Remedy was made. 2 Inſt. 240.

In ancient Time it ſeem'd ſtrange, when the original Præcipe was brought againſt the Tenant of the Land, that the Court, upon that Original, ſhould hold Plea between the Tenant and the Vouchee; but it is more ſtrange to make a Queſtion of that which hath received an ancient, continual, and conſtant Allowance; and the Vouchee comes in In loco Tenentis, and in Judgment of Law is a Tenant to the Demandant; and our Act does allow of true Vouchers, but provides againſt falſe Vouchers, as it ſpeaks, for Delay only. 2 Inſt. 241.

* So called becauſe either the Anceſtor, of whoſe Seiſin he demands, was in Poſſeſſion the Day he died, or the Demandant himſelf was in Poſſeſſion, as Mordaunceſter, Coſinage, Aiel, Nuper obiit, Intruſion, and other like Writs, as Beſaile &c. 2 Inſt. 241.

*It is provided, That * in Writs of Poſſeſſion, firſt in Writ of Mordaunceſter, of Coſinage, of Aiel, Nuper obiit, of Intruſion,*

* Ward againſt E.

*And * other like Writs, whereby Lands or Tenements are demanded,*

The Defendant *vouch'd R.* who was *ſeiſed of the Ward, and leaſed to E. who vouch'd him.* Norton ſaid *E. was the firſt who got the Ward after the Death of our Tenant,* and this Eſtate continued till the Day of the Writ purchaſed, Judgment if the Voucher &c. And the beſt Opinion was, that it is a good Counterplea; by which the Defendant claim'd by Priority. And this Counterplea ſeems to be by the Equity of the Statute of Weſtm. 1. cap. 38 given in Actions Poſſeſſory. Br. Counterplea de Voucher, pl. 28. cites 21 E. 3. 11.——S. P. 2 Inſt. 241. That in Writ of Right of Ward of the Body and Land, ſuch Counterplea was adjudg'd good; for albeit it is named a Writ of Right, and ſo in Letter is out of this Branch, yet is it in Nature of a Writ of Poſſeſſion; and the Words are Per Mortdaunceſter ou d'auter, and tho'

no

no Lands or Tenements be demanded, which regularly is intended of an Eſtate of Freehold, yet this Caſe being *within the ſame Miſchief*, is taken within the Remedy. 2 Inſt. 241.

In *Dower* the *Tenant vouch'd C. Couſin and Heir of T. A.* the *Demandant ſaid, that her Husband died ſeiſed, and the Vouchee was the firſt that abated*; and a good Counterplea within theſe Words (other like Writs;) but that Plea is not [good] in Caſe of the Heir. 2 Inſt. 241.

An Aſſiſe of *Novel Diſſeiſin*, and an Aſſiſe of *Darrein Preſentment*, are within this Branch, if the Tenant vouch any named in the Writ; and the Demandant may counterplead the Voucher, as well when the *Tenant is preſent* in Court, as when he is abſent. 2 Inſt. 241.

*Which ought to * deſcend, revert, remain, or † eſcheat by the Death of any Anceſtor, or otherwiſe;*

* A *Formedon in the Deſcender* is

out of this Branch; for it is a Writ of Right in his Nature, and not a Writ of Poſſeſſion, and he *demands not the Land of the Seiſin of his Anceſtor*, as the Statute ſpeaks, *but of the Gift*. 2 Inſt. 241.

A *Formedon in Reverter* is not within this Branch; for that is a Writ of Right in his Nature. 2 Inſt. 241.

A *Formedon in the Remainder* is not within this Branch; for it is no Writ of Poſſeſſion, but a Writ of Right in his Nature; and the Demandant *doth not demand the Land of the Seiſin of his Anceſtor*, as the Statute ſpeaks, *but by the Remainder*. 2 Inſt. 241.

† Lord Coke ſays, that the Engliſh Tranſlation of the French Word (Eſchier) in this Place is wrong; for (Eſchier) ſignifies to fall, and a *Writ of Eſcheat* is not within this Branch, for that it *ſounds in the Right*; and Reverter, Remainder, or *Eſchier, is to be intended after the Death of his Anceſtor, or Tenant for Life, Tenant in Dower, or by the Curteſy*. 2 Inſt. 241.

*If the * Tenant vouch to warranty, and the Demandant counterpleads him, and will aver by Aſſiſe, or by the Country, or otherwiſe, as the Court will award, that the † Tenant,*

* *A. dies ſeiſed in Fee. B. abates, and makes a Leaſe for Life,*

and *grants the Reverſion to C. in Fee, and dies. C. grants the Reverſion to D. the Heir of B. Tenant for Life is impleaded in a Writ of Coſinage, and makes Default after Default. D. is received*, and *vouch'd to warranty C.* The *Demandant counterpleads the Voucher, for that B. was the firſt that abated after the Death of his Anceſtor, of whoſe Seiſin he makes his Demand.* And two Objections were made that this Counterplea was not within this Statute; 1ſt, That D. claim'd the Reverſion by Purchaſe, and ſo *B.* was not his Anceſtor within this Statute, for he claimed not the Land as Heir. 2. That this Statute ſpeaks of the Tenant, which muſt be underſtood of the Tenant for Life, who is the Tenant to the Præcipe in Deed, and not of the Tenant by Reſceit, who is Tenant in Law. As to the Firſt it was anſwer'd and reſolv'd, That inaſmuch as the Abatement is confeſs'd, albeit that divers Eſtates be made, yet for that D. is Heir to the Abator, and B. his Anceſtor within the Letter of the Statute, and *Injuria per Circuitum non tollitur*, and ſo is within the Meaning. But *if the State of the Abator had been avoided by a Title paramount, and the Heir of the Abator had been infeoff'd*, there the Heir had not claim'd under the Abatement; and therefore, altho' he were within the Letter of this Act, yet had he been out of the Meaning. 2 Inſt. 242.

† Albeit *Tenant by Receipt* be but Tenant in Law, yet *is* he *in Lieu of the Tenant*, and ſo within this Branch; for otherwiſe the Abator may make a Leaſe for Life, and by his Default after Default be received, and ſo by Covin between them make this Branch of none Effect, which ſhould be againſt Reaſon, & in Fraudem Legis; and Tenant in Law by Warranty is within this Act, albeit he be not preſent in Court. 2 Inſt. 242.

*Or his * Anceſtor, (whoſe Heir he is) was † the firſt that enter'd after the Death of him, of whoſe Seiſin he demands; the Averment of the Demandant ſhall be received, if the Tenant will abide thereupon:*

* *Predeceſſor* is taken by Equity of this Word Anceſtor.

2 Inſt. 242. —— As in Mortdanceſtor againſt the Prior of D. the *Tenant vouch'd* to warranty. *Belk. ſaid* that B. your *Predeceſſor, Prior of D. was the firſt who abated after the Death of him, of whoſe Seiſin* &c. *and this Eſtate continued, and died ſeiſed, after whoſe Death you was in, continuing the ſame Tort*, Judgment if he ought to have the Voucher. And the other *demurr'd*, and after was ouſted of the Voucher by Award. And ſo ſee that it is a good Counterplea; and this ſeems to be by the Equity of the Statute of Weſt. 1. cap. 39. Br. Counterplea de Voucher, pl. 43. cites 40 Aſſ. 2. —— S. P. And yet the Statute ſpeaks only of Heir. Br. Parliament, pl. 34. cites S. C. —— S. P. by Brooke Ch. J. Pl. C 178 b. Mich. 4 Mar. in the Caſe of Hill v. Grange. —— 2 Inſt. 242. S. P. For Acts of Parliament made for Suppreſſion of Falſhood practiced for Delay, as theſe falſe Vouchers be, ſhall have a benign Interpretation.

† If *A. and B. do abate to the Uſe of B.* the whole State is in *B.* if *B. infeoffs A.* This Coadjutor is within this Act, and yet he gain'd no Freehold; but this Statute ſays, Le primer que enter; and tho' he *enter'd not at the firſt ſolely*, yet he is within this Statute. 2 Inſt. 242.

But if the *Abator makes a Feoffment in Fee*, and *takes back an Eſtate to him and a Stranger*, and they both be impleaded in a Writ of Aiel, and vouch their Feoffor for the Benefit of the *Stranger*, (who *is out of the Statute*) the Voucher cannot be counterpleaded within this Branch. 2 Inſt. 242.

But if the Stranger releaſes to the Abator, and he be impleaded, and vouches, this Voucher may be counterpleaded by Force of this Branch. 2 Inſt. 242.

* *And*

* So as this Clauſe gives *no Benefit to the Tenant, unleſs he gives over his Voucher*, and then he ſhall be received to anſwer; but if he ſtand to his Voucher, and demurs in Law upon the Counterplea, and it be adjourned to another Term, it is peremptory to the Tenant in reſpect of the Delay, in ſuch ſort as if Iſſue had been taken, and a Trial had. 2 Inſt. 242.

* *And if not, he ſhall be further compell'd to another Anſwer, if he have not his † Warrantor preſent, that will warrant him freely, and incontinent enter into the Warranty; ſaving unto the Demandant his Exceptions againſt him, if he will vouch further, as he had before againſt the firſt Tenant.*

By the Words (he ſhall be compell'd to another Anſwer,) he *may as well vouch as anſwer in Chief.* Br. Counterplea of Voucher, pl. 5. cites 40 E. 3 14. and ſays it is admitted there clearly.——S P. 2 Inſt. 242.

Tho' the Act does not ſay in chief, ſo as any Anſwer ſuffices, and therefore the Vouchee *may plead Outlawry* in the Plaintiff in an *Action of Debt, after the laſt Continuance.* But if the Counterplea be adjudged for the Demandant in the ſame Term, he may plead in Bar, but he cannot vouch. 2 Inſt. 243.

A *Demurrer* in Law *upon a Voucher, adjourned to another Term*, is peremptory; for the Demurrer is in Lieu of an Anſwer: otherwiſe in caſe of Counterplea the ſame Term. 2 Inſt. 243.

† In a Writ of Right of Ward the Defendant vouch'd; and for that the Vouchee was preſent in Court, and enter'd into Warranty, the Plaintiff could not counterplead. 2 Inſt. 243.

This is not only *underſtood* of a Writ of Right, but *of all Writs of Right* in this Nature, or which touch the Right, as this Law hereafter ſpeaks, *as* the Writ of *Eſcheat*, Writs of *Formedon* in Reverter, Remainder, Diſcender &c. 2 Inſt. 243.

And in a Writ of Right it is provided, that if the Tenant vouch to Warranty and the Demandant will counterplead him,

* If the Tenant *vouches A. as Aſſignee to B.* the Demandant may *counterplead the Seiſin of B.* within the Meaning of this Branch; for that overthrows the Voucher, which is the End of this Law. 2 Inſt. 244.

*And be ready to aver by the Country, that * he that is vouch'd to Warranty,*

If an *Infant is vouch'd as Heir to A* it is not ſufficient to counterplead the Seiſin of A. the Anceſtor, for that the Infant cannot make a Feoffment; but he *muſt counterplead the Seiſin of the Infant and his Anceſtors*, and the Infancy ſhall come upon the Lien. 2 Inſt. 244.

Here is implied

Nor his Anceſtors

(*whoſe Heir he is*) but yet this extends as well to the ſpecial Heir of the Poſſeſſion (as the Heir in Borough Engliſh or in Gavelkind) as to the general Heir at the Common Law. 2 Inſt. 244.

Where a *Biſhop or* an *Abbot is vouch'd*, the *Counterplea muſt not be of the Biſhop or Abbot and his Anceſtors*, according to the Letter of the Law; *but* of him and his *Predeceſſors*, according to that Capacity whereby the Land is demanded. And ſo it is of the Body Politick and Corporate. 2 Inſt. 244.

If a *Baron and Feme be vouch'd*, the *Seiſin of the Feme and her Anceſtors may be counterpleaded*, unleſs ſpecial Matter be ſhew'd to the contrary; and *ſo* it is, *if two others be vouch'd*, it is a good Counterplea to *counterplead the Seiſin of one of them*, for ouſting of Delay by Eſſoin, Protection, Death, and his Heir within &c. 2 Inſt. 244.

* Yet if he hath but an *Eſtate for Years*, it *is ſufficient*; for by the Livery he gains Seiſin, and both the Feoffments de jure & de facto are within this Statute; but *otherwiſe* it is *of an Eſtate at Will.* 2 Inſt. 244.

*Had never * Seiſin of the Land or Tenement † demanded.*

If the Vouchee hath but an *Eſtate for Life*, ſo as his Feoffment ſhould be a Surrender, yet hath he ſuch an Eſtate as within this Statute. 2 Inſt. 244.

Huſband Ceſty que Uſe in the Right of his Wife, *or ſeiſed in the Right of his Wife*, hath a Seiſin whereof he may make a Feoffment. 2 Inſt. 244.

A *Feoffment for Maintenance*, though the Statute of 1 R. 2. makes it void, yet ſeeing it is not void until Entry, it is a ſufficient Seiſin to make a Feoffment. 2 Inſt. 244.

One *Jointenant* cannot enfeoff another, yet hath he ſuch a Seiſin as is within this Act; for (to make Feoffment) is ſpoken but for Example; but a *Fine*, *Releaſe*, *or any other Conveyance which gives an Eſtate*, is within this Law. 2 Inſt. 244.

If a Vouchee or any of his Anceſtors had any *Seiſin*, though it were *avoided or determined*, it is ſufficient. 2 Inſt. 244.

† If a *Rent is demanded*, and the *Tenant vouches by Reaſon of a Feoffment of the Land diſcharged of the Rent with Warranty*, the Demandant may *counterplead the Seiſin of the Vouchee* &c. *of the Land*; albeit the Rent is only in Demand. 2 Inſt. 244.

Nor

Nor Fee or * *Service by the Hands of his Tenant, or his Anceſtors,* * For in Reſpect of ſome *Tenure* and Service, the Tenant may vouch to Warranty; as *Frankalmoigne, Homage Auncestrell, Reverſion* &c. 2 Inſt. 244.

Since the Time of him, on whoſe * *Seiſin the Demandant declares,* * Here [Seiſin] is taken for the Title of the Demandant in his Writ; for it is a Maxim in Counterpleas, that the Demandant is *not to counterplead any Seiſin, but after the Title of his Writ*; and where the Seiſin is in the Title, there the Counterplea muſt be after that Seiſin: As for Example, in a Writ of Right after the Seiſin of him of whoſe Seiſin he demands. 2 Inſt. 244.

Here *is implied* (*and before the Writ purchaſed*) for if it be pendente brevi it ought not to be allow'd. 2 Inſt. 245.

Until the Time that the Writ was purchaſed and the Plea moved, whereby he might have infeoffed the Tenant, or his Anceſtors then let the Averment of the Demandant be received, if the Tenant will abide thereupon; if not, the Tenant ſhall be further compell'd unto another Anſwer, if he be not preſent that will warrant him freely, and incontinent enter in Anſwer, ſaving unto the Demandant, his Exceptions againſt him as he had afore againſt the firſt Tenant. For *no Warranty created after the* Purchaſe of *the Writ ſhall delay the Plaintiff unleſs upon that Conveyance the Writ be made good*; as if a Præcipe be brought againſt A. of Land whereof B. is ſeiſed, and B. infeoff A. hanging the Writ, he ſhall vouch by Force of his Warranty, otherwiſe not. 2 Inſt. 245.

And the ſaid Exception ſhall have Place in a Writ of Mortdanceſtor, and in the other Writs before named, as well as in Writs that concern Right. By this Clauſe, the *Demandants in Writs of Poſſeſſion, as* the *Mortdanceſtor, Coſinage, Aiel, Nuper Obiit, Intruſion*, and the like, *have a greater Privilege* and Advantage, *than Demandants in Actions which touch the Right*; for this Act gives the Demandants in Writs of Poſſeſſion, not only the firſt Counterplea, that is, that the Tenant of his Anceſtor was the firſt that enter'd &c. but alſo the laſt Counterplea, which is given in Writs touching the Right, viz. that neither the Vouchee, nor any of his Anceſtors had ever any Seiſin &c. 2 Inſt. 245.

And if per caſe the Tenant have a Deed that compriſes Warranty of another Man, which is bound in none of theſe Caſes beforemention'd to the Warranty of an elder Degree, his Recovery by a Writ of Warranty of Charters out of the King's Chancery, ſhall be ſaved to him at what Time ſoever he will purchaſe it; howbeit the Plea ſhall not be delay'd therefore. If any Man be *cuſted of his Voucher by* this Statute, yet if he hath a Charter of Warranty, he *may have* his Writ of *Warrantia Chartæ*. 2 Inſt. 245.

As if a Man that never had any Thing in the Land, nor any of his Anceſtors before him, releaſes to the Tenant of the Land with Warranty, if the Tenant vouch him, and the Demandant counterplead the Voucher by the laſt Branch of this Act, viz. that the Vouchee nor any of his Anceſtors had ever any Seiſin &c and the Vouchee is not there preſent to enter into Warranty; in that Caſe the Tenant ſhall be ouſted of his Voucher, but he may have his Writ of Warrantia Chartæ. 2 Inſt. 245.

So if *a Man after the Death of my Anceſtor, abates and makes a Feoffment in Fee*, and after *purchaſes* the Land again *with Warranty*, and after is impleaded in Aſſiſe of Mortdanceſtor, he ſhall be ouſted of his Voucher by the firſt Branch of this Act, becauſe he was the firſt that enter'd &c. but he may have his Warrantia Chartæ. 2. Inſt. 245.

So if a *Diſſeiſor makes a Feoffment in Fee to A. who inſeoffs B. and* after *repurchaſes* the Land *of B. with Warranty*, againſt whom the Diſſeiſee brings a Writ of Entry in the Per, as he may do, he cannot vouch B. by the 2d Branch of this Statute, but the Diſſeiſor only, and is driven to his Writ of Warrantia Chartæ againſt B. 2 Inſt. 245.

8. In Coſinage, the *Tenant made Default after Default*, and *J. came and ſaid that A. was ſeiſed in Fee and leaſed to the Tenant for Life, and after granted the Reverſion to him*, and the Tenant attorn'd, and pray'd to be received, *and was received and vouch'd*, and the *Demandant counterpleaded becauſe the Father of the Tenant by Receipt*, who vouch'd, *was the firſt who abated after the Death of his Anceſtor*, and the *Tenant by Receipt ſaid as above, and that his Anceſtor had nothing at the Time of his Death, and this Tenant by Receipt in by Purchaſe*; and demanded Judgment, and pray'd the Voucher. And per Finch, he ſhall not have the Voucher, tho' he be in as Purchaſor and not as Heir; but Wich contra, therefore quære. Br. Counterple de Voucher, pl. 15. cites. 46 E. 3. 2.

9. In Formedon, the Tenant vouch'd &c. the *Demandant ſaid that at another Time he brought ſuch a Writ againſt the Tenant, which was abated by Ley Gager of Non-Summons, and that he who is vouch'd, nor none of his Anceſtors, whoſe Heir &c. ever had any Thing after the Gift, and before the firſt Writ purchaſed*; and the others e contra. And ſo it is admitted that the Writ lies by Journeys Accounts, and that the Counterplea is good upon the Matter &c. Br. Counterple de Voucher, pl. 54. cites 11 H. 6. 34.

10. In *Dower* the Tenant vouch'd, the Demandant *counterpleaded that he who was vouch'd nor none of his Anceſtors had ever any Thing* &c. *after the Seiſin, of the Baron.* Br. Counterple de Voucher, pl. 34. cites 22 H. 6. 49.

11. If a Man leaſe Lands for Life, and the *Leſſee* thereof *infeoff a Stranger* and makes a *Letter of Attorney unto his Leſſee* to make Livery of Seiſin accordingly, *and he makes Livery*; in this Caſe it hath been ſaid by ſome Perſons, that the Leſſor may enter upon the Feoffee for a Forfeiture, notwithſtanding the Livery of Seiſin made by him; for they ſay that the *Feoffee took nothing* by him; for the Leſſor had nothing to do upon the Land, if not to ſee whether Waſte were done or to diſtrain for his Rent and Services, if they were behind. And if the Leſſor be vouch'd, and he hath *not other Poſſeſſion* in the ſame Land *after the Title of the Writ* in which Writ he is vouch'd, *but by making of Livery* of Seiſin by Force of the Letter of Attorney, the Demandant may well counterplead the Vouchee. Perk. S. 200.

(R. a) Counterplea by Demandant. Counterplea *to the Warranty.*

1. DEmandant cannot **plead ſuch Plea which ſhall be a Counterplea of the Warranty.** 40 E. 3. 14. 11 H. 4 21. 9 H. 6. 50.

2. As **if** Vouchee vouches himſelf to ſave the Tail, **Demandant ſhall not ſay** that the Tenant **of the Land** was ſeiſed of the Land in Fee, and ſo no Reverſion in you by the Tail, **for this refers to the Warranty.** 41 E. 3. 24.

S. P. For this is to the Lien between the Tenant and the Vouchee.

3. So **it ſhall not be a Counterplea, if a Man vouches** as Tenant to ſave the Tail. 41 E. 3. 24. Br. Counterple de Garrantie, pl. 14 cites 41 E. 3. 8.

4. So **it is not a Counterplea** that he is in of a Fee by a Stranger. **Dubitatur** 9 H. 6. 50. **b.**

5. **If** Voucher **be** upon a Fine, **it is not a Counterplea** that no Warranty is comprized therein. 44 E. 3. 39.

6. So **if Voucher be** of Baron and Feme upon their Feoffment, **it is not a Counterplea** that the Feme cannot warrant it by Deed, **tho' the Feme ſhall be diſcharg'd thereof.** 44 E. 3. 38. **b.**

7. **If a** Feme **be** vouch'd as Daughter and Heir to A. **it is no Plea to ſay,** that there is another Coparcener who ought to be vouch'd; **for this is to the Warranty.** 11 H. 4. 21.

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8. **It is not any Counterplea to ſay,** that he who vouches is in of other Eſtate of Fee than of him of whom he vouches; **for this is a Counterplea of the Lien. Contra** 9 H. 6. 50.

9. But

9. But **if a Man vouches, and is** compell'd to ſhew Cauſe of his Voucher, **this** Cauſe is traverſable, and the Warranty counterpleadable. 11 H. 4. 21. **Curia; for his Cauſe ought to be ſufficient.** 9 H. 6. 50. b. 10 H. 6. 18. **Contra** 21 E. 3. 37. Br. Counterple de Voucher, pl. 41. cites 12 Aſſ. 10.

10. As **if** Tenant in Tail vouches himſelf to ſave the Tail, **it is a good Counterplea** that he is in of a Fee by a Stranger, **tho' it be to the Warranty, becauſe it is a Traverſe to the Cauſe.** 9 H. 6. 50. b.

11. **It is not any Counterplea,** that he who is vouch'd had not ever any thing but by Diſſeiſin, upon whom the Tenant re-enter'd; **for this is only a Counterplea of the Warranty.** 9 H. 6. 49. b.

12. **In Writ of** Dower of a Rent, **it is not a good Counterplea** that the Baron died ſeiſed of the Rent. **Contra** 56 H. 3. **Itinere Stafford, Rot.** 9.

13. **It is not any Counterplea,** that the Feoffment was made by the Vouchee to the Vouchor, and one B. who does not vouch, and to the Heirs of B. which B. is yet alive, **becauſe it is but to the Warranty.** 17 E. 3. 74.

14. **In a** Præcipe quod reddat, **if the** Tenant vouches 3, **it is a good Counterplea,** that in other Writ they were vouch'd, and the Demandant recover'd a 3d Part upon Default after Default of one, and now his Heir is vouch'd within Age; **for otherwiſe by his falſe Voucher the Parol ſhall demur.** 26 E. 3. 59.

15. **In a Writ of** Dower, or Præcipe quod reddat, **if the** Tenant vouches 3, **it is not a good Counterplea,** that at another Time the Demandant brought other Writ againſt them, and upon Default of one after Default the Demandant recover'd the 3d Part, and after the Writ abated againſt the other two; and ſo demands Judgment if the Tenant ſhall vouch all; **for this is a Counterplea to the Warranty, and not to the Voucher.** 26 E. 3. 59.

16. **The** ſame **Law in Writ of** Dower, tho' the Heir of the Vouchee againſt whom the Recovery was, be vouch'd within Age; **for the Parol ſhall not demur in this Writ.** 26 E. 3. 59.

17. **The** ſame **Law,** tho' **the ſaid Heir** be vouch'd in Ward of the King; **for it is not any great Delay.** 26 E. 3. 59.

18. **It is not any Counterplea for Demandant to ſay,** that the Tenant has alien'd the Tenement pending the Writ; **for it is but to the Warranty.** 25 E. 3. 38. b. **adjudged.** Br. Counterplea de Garrantie, pl. 17. cites 1 H. 6. 2. con-

tra, That in Præcipe if the Tenant vouches, *it is good* Counterplea to the Lien, that the Tenant has alien'd to a Stranger pending the Writ; for now he can loſe nothing, and yet the Writ is good as to the Demandant.

It is no good Counterplea to the Voucher, *that the Tenant by Reſceit pending the Writ has levied a Fine to a Stranger*; for the Demandant is *eſtopp'd* by the bringing his Writ againſt them, to ſay that they are not Tenants. D. 341. a. b. pl. 51. Paſch. 17 Eliz. Anon.

19. So **if he ſays,** that **the Tenant has alien'd pending the Writ, and** re-purchas'd it to himſelf alone, or to him and others; **for this is but to the Warranty.** 25 E. 3. 43 b. **adjudged.** 26 E. 3. 68. b. **Curia.**

20. So **if he ſays,** that the Tenant has nothing in the Land but by Diſſeiſin pending the Writ; **for it is but to the Warranty.** 26 E. 3. 68. b.

21. So **if he ſays** that **the Tenant has nothing in the Land** but by the Feoffment of J. S. pending the Writ, **inaſmuch as he has made the Writ good by the Purchaſe. Contra** 26 E. 3. 68. b.

22. There was not any **Counterplea** to the Poſſeſſion at the Common Law, as that he nor any of his Anceſtors were not ever ſeiſed; **for this was only to the Warranty.** 9 H. 6. 50. **Contra** 10 H. 6. 15. 17.

23. It

In Præcipe quod reddat the Tenant *vouch'd*, and the *Demandant counterpleaded, that the Vouchee, nor none of his Anceſtors whoſe Heir &c. had ever any thing but jointly with the Tenant who vouch'd*; and no Counterplea to the *Poſſeſſion*, but to the Lien, by which he granted the Voucher. Br. Counterple de Voucher, pl 61. cites 45 E. 3. 16.

23. **It is not any Counterplea** at Common Law, that he who is vouch'd had never any thing but in Common with the Vouchor. 17 E. 3. 47. b. **adjudged.**

So it is no good Pleading to allege upon a Voucher, *that the Vouchee, nor any of his Anceſtors, any thing had, but jointly with J. S.* for the Jointenancy ought to be expreſsly alleg'd between the Vouchee, or ſome of his Anceſtors by Name, and that the Jointenancy continues. D. 341. a. b. pl. 51. Paſch. 17 Eliz. Anon.

Fol. 763.

24. **In** Right of Ward, **if Defendant** vouches J. S. who leas'd the Ward to him, **it is not a good Counterplea for the Demandant to ſay**, that he had nothing of the Leaſe of J. S. before the Writ purchas'd, **becauſe it is a Counterplea to the Warranty, and not to the Voucher.** 22 E. 3. 6. **Adjudged. Contra** 25 E. 3. 39. 40. b.

25. In Mortdanceſtor the Tenant *vouch'd A. who* enter'd and *vouch'd the Tenant, and* was compell'd to ſhew Cauſe, who *ſaid that the Tenant infeoff'd him, and after he leas'd to him for Life*; and the *Demandant ſaid that before the Leaſe made to the Tenant, the Tenant never had any thing, Priſt*; and the others econtra. Br. Counterple de Voucher, pl. 41. cites 12 Aſſ. 10.

26. In Præcipe quod reddat, if the Tenant *vouches D.* it is no *Counterplea, that this Land and other deſcended to the Tenant, and to the ſaid D. who made Purparty*; for it may be that D. releas'd with Warranty to the Tenant. Br. Counterple de Voucher, pl. 50. cites 18 E. 3. and Fitzh. Voucher 6.

In Formedon the *Demandant counted of the Gift to J. and N. his Feme in Tail*, and convey'd *as Heir to them*, and

27. In Præcipe quod reddat, the Tenant *vouch'd himſelf by a ſtrange Name*, and was compell'd to ſhew Cauſe, whereupon he *ſhew'd Gift in Tail by M. whoſe Heir he is*; and the Demandant *ſaid that he had nothing of the Feoffment of M.* And per Cur. non allocatur; for this is to the Lien or Warranty, and not to the Poſſeſſion; by which he counterpleaded the Poſſeſſion of M. &c. Br. Counterple de Garrantie, pl. 15. cites 21 E. 3. 37.

the *Tenant vouch'd himſelf by a ſtrange Name, and ſhew'd Cauſe inaſmuch as a Fine was levied between R. and A. and J. and S. his Feme, where J. and S. acknowledged the Right to be to R. and A. come ceo* &c. which *R. granted, and render'd to J. and S. his Feme for Term of their Lives*, the *Remainder to the now Tenant, and the Heirs of his Body, and that he is alſo Aſſignee of R. of the Fee-ſimple*, and *ſo vouch'd himſelf to ſave the Tail.* The *Demandant ſaid that J. S. and his Feme are the ſame Perſons to whom he ſuppoſes the Gift to be made*, and that they continued their Eſtates all their Lives, *abſque hoc that R. any thing had*, and ſo counterpleaded the Cauſe of the Voucher; for where the Tenant is compell'd to ſhew Cauſe, there always the Demandant counterpleads the Cauſe, tho' his Matter be to the Lien, and the Tenant eſtopp'd him by reaſon of the Fine levied, and well. And the Truth was, that the *Demandant was Heir ſpecial to R. and the Tenant was Heir general*, upon whoſe Warranty Concluſion &c. deſcended, and not upon the Heir ſpecial, and yet was awarded a Concluſion; for Per Finch, Stranger nor Privy ſhall not have Averment againſt this Fine which is executed, by which it was ſaid Per Cur. Anſwer, quod nota, quia Miror inde. Br. Counterple de Voucher, pl. 60. cites 42 E. 3. 9.

S. P. Br. Counterple de Voucher, pl. 53. cites 39 E. 3. 32. That it is a

28. In Præcipe quod reddat the Tenant *vouch'd two*, and the *Demandant ſaid that the one, nor none of his Anceſtors, ever had any thing after the Seiſin* &c. and held a good Counterplea; Quod nota. Br. Counterple de Voucher, pl. 36. cites 39 E. 3. 30.

good Counterplea that the one of the Vouchees, nor none of his Anceſtors whoſe Heir &c. ever had any thing. —— S. P. Br. Counterplea de Voucher, pl. 65. cites 20 H. 7. 1. ——— S. P. by the beſt Opinion of the Court; for falſe in Part, falſe in all. Br. Counterple de Voucher, pl. 57. cites 39 E. 3. 34. —— S. P. Per Wich, but Belk. contra, and that he ought to counterplead the Poſſeſſion of both.

In *Eſcheat, for* that the Tenant did *Felony* for which he was outlaw'd, the *Tenant vouch'd J. N.* and the *Demandant ſaid that the Vouchee nor none of his Anceſtors never had any thing after the Seiſin of his Tenant.* Perſay ſaid, You ought to counterplead *after the Felony*, and *not after the Seiſin*; but Per Belk. This cannot be; for it may be that the Tenant purchas'd after the Felony, and then is the Counterplea before the Title of the Demandant, which cannot be; for *a Man counterpleads all Poſſeſſions after his Title*,

Title, but none before his Title; & adjornatur. But the beſt Opinion was, that the Counterplea is good. Br. Counterple de Voucher, pl. 17. cites 48 E. 3. 2.

29. In Præcipe quod reddat the Tenant *vouch'd J. S.* and the *Demandant ſaid that the Vouchee, nor none of his Anceſtors, had any thing, but T. P. Father of the Vouchee, who had Iſſue J. S. the Vouchee, and one Alice who is alive, not nam'd*; Judgment &c. And no Counterplea for the Demandant; for this is to the Lien, which is for the Vouchee to plead, and not for the Demandant. Br. Counterple de Voucher, pl. 57. cites 39 E. 3. 34.

30. In Præcipe quod reddat the Tenant vouch'd; the *Demandant ſaid that he who was vouch'd never had any thing but for Term of Life, the Reverſion to the Tenant*; ſo that by his Pretence he cannot infeoff him, but may ſurrender; *this is a Counterplea to the Lien, and not to the Poſſeſſion*; for good Poſſeſſion to make a Feoffment is confeſs'd in the Vouchee. Br. Counterple de Garrantie, pl. 12. cites 40 E. 3. 12. Br. Counterple de Voucher, pl. 4 cites S. C.

31. In Præcipe quod reddat the Tenant *vouch'd one J.* and the *Demandant ſaid that he nor none of his Anceſtors ever had any thing in Demeſne nor Service* &c. *after the Title* &c. *but his Father, who was ſeiſed by Cauſe of Coverture of this ſame Tenant who vouch'd*; Judgment &c. and no Counterplea, becauſe he has confeſs'd that he may make Feoffment, which ſuffices for the Tenant to vouch. Br. Counterple de Voucher, pl. 7. cites 40 E. 3. 23.

32. Note, that in Præcipe quod reddat, viz. Formedon, where the Tenant vouches, it is no Counterplea *that the Vouchee, nor none of his Anceſtors, ever had any thing after the Seiſin of his Anceſtors, but after the* **Gift*; for if there was a Diſſeiſin after the Diſcontinuance, this is a Seiſin, yet this does not ouſt the Tenant of his Voucher which he had before. Br. Counterplea de Voucher, pl. 9. cites 41 E. 3. 15. S. P. Br. Counterple de Voucher, pl 38. cites 39 E. 3. 36. —S. P. Br. Counterple de Voucher, pl. 16. cites 46 E. 3. 32. and ſo is 25 E. 3. as ſaid there. —— S. P. Br. Counterple de Voucher, pl. 21. cites 1 H. 4. 19.

* Per Caresby, He ought to ſay after the Gift, *and before the Writ purchas'd*; for if the Vouchee was ſeiſed pending the Writ, and infeoff'd the Tenant, there the Tenant ſhall have the Voucher; by which the Demandant ſaid ſo. Ibid. pl. 45. cites 21 E. 4. 20.

In Formedon in Deſcender, the Tenant vouch'd to Warranty W. who vouch'd B. The Demandant counterpleaded, becauſe *B. nor any of his Anceſtors any thing had after the Gift, ſo as they might infeoff the ſaid W.* Harpur thought the Counterplea ill, and that he ſhould have ſaid generally, viz. ſo as they might make Feoffment, without ſaying any thing of the infeoffing him that vouch'd; but Dyer and Welſh contra, and that this is the Form. Weſton was of the contrary Opinion, but Leonard and all the Clerks ſaid that the Form of Entry always was as here pleaded; and Bendlow ſaid he had ſeen the Book of Entries, and that is according to the Pleading here. Mo. 66. pl. 178. Trin. 6 Eliz Felton v. Capell.

33. In Aſſiſe the *Tenant pleaded a Feoffment of the Grandfather with Warranty*, and demanded Judgment &c. And the Plaintiff *confeſs'd and avoided* the Warranty, *becauſe the Grandfather at the Time had nothing but for Life*, the Remainder over, and he in Remainder enter'd for Alienation. Br. Aſſiſe, pl. 38. cites 49 E. 3. 11.

34. Formedon. In Præcipe quod reddat brought the *Tenant made Default after Default*, and E. came and ſaid that he is in *Reverſion*, and *pray'd to be received, and was* received, where in Fact he *purchas'd the Reverſion pending the Writ, and* after he *vouch'd*, and the Voucher was *counterpleaded, inaſmuch as he had nothing in Reverſion the Day of the Writ purchas'd*, and good Counterplea; for he who purchaſes Reverſion pending the Writ, ſhall not turn the Demandant in Delay. Br. Counterplea de Voucher, pl. 32. cites 21 H. 6. 14. and M. 10 E. 3. [at the End of the Caſe before.] S. P. Br. Counterple de Voucher, pl. 59 cites 12 H. 7. 2.

35. The Demandant ſhall not counterplead *but to the Poſſeſſion*, unleſs in ſpecial Caſes; Per Fineux, Davers, and Brian Ch. J. Br. Counterple de Voucher, pl. 44. cites 8 H. 7. 5. *As* in Formedon, the *Tenant vouch'd W. N. and* the Voucher *granted*, and the *Vouchee died*; by which the *Tenant vouch'd again C. Son and Heir of the firſt Vouchee, and by his Nonage pray'd that the Parol demur*; the *Demandant counterpleaded that the Anceſtor had nothing*

nothing unleſs jointly with H. which Eſtate they continued all their Lives, and H. had all by the Survivor; Judgment of the Voucher. And per Fineux, Davers and Brian Ch. J. the Counterplea is not good; for he has confeſs'd Poſſeſſion, that he may make Feoffment, and the Count of the Poſſeſſion *is to the Lien*, which is for the Vouchee to plead, and not for the Demandant; but Jay, Rede and Vaviſor contra. Ibid.

36. In *Præcipe* quod reddat, the *Tenant vouch'd W. G. who appear'd at the Sequatur, and* after *died, and* after the Tenant *revouch'd S. the Heir of W. G. and by his Nonage pray'd that the Parol demur*; the *Demandant ſaid that W. G. the Anceſtor had nothing, unleſs jointly with W. T. who ſurviv'd.* And per Fineux, Vaviſor, Brian, and Townſend, it is no good Counterplea by the Statute nor by the Common Law. Br. Counterple de Voucher, pl. 63. cites 13 H. 7. 24.

Br. Voucher, pl. 165. cites S. C.

37. In Formedon the Tenant *vouch'd 3 ſeveral Heirs to 3 who made the Warranty*, and pray'd that the Parol demur for the Nonage of the one; and the Demandant *counterpleaded that the Anceſtor of the Infant, nor the other two who are vouch'd, nor any of their Anceſtors* &c. *ever had any thing* &c. and a good Counterplea &c. Br. Counterple de Voucher, pl. 64. cites 16 H. 7. 13.

38. In Formedon the Tenant *vouch'd the Baron and Feme*; and the *Demandant ſaid that the Feme nor none of her Anceſtors whoſe Heir ſhe is, ever had any thing after the Title of his Writ*; and a good Counterplea, notwithſtanding that thoſe Words whoſe Heir ſhe is, are in the Plea; for tho' thoſe Words are not in the Statute, yet it is according to the *Effect of the Statute*, and it is good without counterpleading the Poſſeſſion of the Baron. Br. Counterple de Voucher, pl. 65. cites 20 H. 7. 1.

39. If a *Feme Covert* be *Tenant by Reſceit* in a *Formedon* in Remainder, and vouches, it is no Counterplea *that ſhe has nothing but jointly with her Baron*; for the Feme ought not to loſe her Eſtate by Laches of her Baron; for it is intended that this Jointenancy was made during the Coverture, and then no Moieties between them, and now ſhe is by the Receipt as a Feme ſole &c. D. 341. a. pl. 51. Paſch. 17 Eliz. Anon.

(S. a) Counterplea by Demandant. What ſhall be good Counterplea.

It is not a ſufficient Counterplea of a Voucher to ſay that the *Vouchor had nothing tempore*, without ſaying *Nec unquam Poſtea*. Arg. cites Raſt. 367. and 126. and affirm'd Per Holt Ch. J. 2 Salk. 569 in Caſe of Lacy v. Williams.——*So* it is of *Non-tenure*. Arg. cites Raſt. 273. and affirm'd per Holt Ch. J. 2 Salk. 569. in the S. C.

1. **If the Tenant** vouches 3 Heirs in Gavelkind within Age, and prays the Parol to demur, **it is no good Counterplea of the Voucher by Demandant,** that they have not any thing by Deſcent in Gavelkind, without ſaying that they had not ever **any thing in Gavelkind by Deſcent.** 25 E. 3. 38. b.

(T. a.) How

(T. a) How the *Vouchee* ſhall *come in*. In what Caſes. *Without Proceſs*, and in what not.

1. IF a Man vouches himſelf to ſave the Tail, Proceſs ſhall be made againſt himſelf, becauſe without Proceſs of Warranty other Land cannot come in Value thereof. 8 R. 2. Ayd de Roy 114. Agreed.

(U. a) *Counterpleas by Vouchee*. Counterpleas *to the Warranty*. Voucher.

1. THE Vouchee may counterplead the Warranty. 44 E. 3. 2.

2. As he may ſay that the Tenant had nothing in the Tenancy. 44 E. 3. 2.

3. It is not a good Counterplea to the Warranty, that the Warranty commenc'd by Diſſeiſin, becauſe the Warranty here is demanded againſt him as Heir, in Nature of a Covenant. 50 E. 3. 12. b. (But quære) Br. Counterple de Garrantie, pl. 1, cites S. C.

4. It is a good Counterplea of the Warranty by the Vouchee, that the Tenant is in of other Eſtate than the Eſtate upon which the Warranty was created. 14 H. 6. 26.

5. So the Vouchee may ſay that he himſelf was Diſſeiſor, and ſo made the Feoffment, and Diſſeiſee has re-enter'd, and ſo Tenant is in of other Eſtate. Contra 14 H. 6. 26. becauſe he cannot ſay that he himſelf was Diſſeiſor.

6. It is a good Counterplea to the Warranty by Vouchee, that the Feoffment was made by him to the Vouchor and a Stranger, and to the Heirs of the Stranger who is alive, and not join'd in the Voucher. 17 E. 3. 74.

7. It is no good Counterplea, that where he is vouch'd as of full Age, that he is within Age. 17 E. 3. 59. Adjudged. *In Dower*, or *Quod ei deforceat*, the *Demandant ſhall not counterplead the Voucher, when the Tenant vouches the Heir of the Baron of full Age, to ſay that he is within Age*; Judgment if without *Deed ſhewn* &c. By the beſt Opinion. Br. Counterplea de Voucher, pl. 62. cites 50 E. 3. 25.

8. [But] It is a good Counterplea, that where he is vouch'd as of full Age, that he is within Age, and in Ward. 17 E. 3. 70.

9. If a Man be vouch'd as Son and Heir to J. S. it is good Counterplea that he does not claim to be Heir to the ſaid J. S. of any Inheritance, becauſe he is a Baſtard. 56 H. 3. Itinere Stafford. Rot. 6. Membrana 2. of the ſaid Roll. Adjudged.

10. It is not any Counterplea, that the Tenant might have abated the Writ by Non-tenure of Parcel, and would not, if he be vouch'd only for the Reſidue; for then no Prejudice is to the Vouchee thereby. 17 E. 3. 42. Curia. Fol. 764. If he were not Tenant at the Return of the Writ, he might abate the Writ by pleading *Non-tenure*; but if in that Caſe he *vouch'd over*, then as to himſelf he admitted the Writ good; but then the Vouchee might *counterplead* the Tenancy; but if the Vouchee does not counterplead the Tenancy, it is good againſt them all by Eſtoppel. Pig. of Recov. 29.

11. If

11. If the Tenant vouches as Tenant of all the Land in Demand, it is a good Counterplea for Vouchee, without ſhewing of the Deed of the Lien, that he is to warrant but Parcel in certain. 18 E. 3. 40. b. 41.

12. If the Demand be of the 3d Part of a Manor, and the Tenant ſays that he is Tenant of the 3d Part of the Manor except the Advowſon and Knight's Fees, and of the ſaid 3d Part vouches another; if the Deed of Lien be to warrant the 3d Part ſaving the Advowſon and Fees of Knights, the Vouchee cannot counterplead it, that he has vouch'd him of the 3d Part without the Exception; for it cannot be intended that he vouch'd otherwiſe than he took upon him the Tenancy, which is with the Exception. 18 E. 3. 40. b. Adjudged.

13. So in this Caſe it is not any Counterplea, that the Voucher has not in certain the Thing which is excepted, becauſe it is according to the Specialty, and the Vouchee is enough Conuſant of the Certainty, he or his Anceſtor being Party to the Deed. 18 E. 3. 40. b. Adjudged 41.

14. In Formedon of Tenements in D. Per Newton, if the *Tenant vouches J. N.* who *enters* into the Warranty, *and pleads Releaſe with Warranty collateral of the Anceſtor of the Demandant, whoſe Heir* &c. *in Bar of Tenements in S. where the Writ is in D. and ought to have been in S.* There the Vouchee, by his Pleading in Bar, has *affirm'd the Writ good*, where he *might have pleaded this Matter as Counterplea to the Lien at firſt.* Quod nota; for by the Warranty in S. he is not bound to warrant in D. Br. Counterplea de Garranty, pl. 4. cites 22 H. 6. 13.

4 Le. 250. pl. 407. S. C. ſtates the Uſes of the Recovery by R. the Plaintiff to be to the Uſe of R. for Life, and if a Marriage be had between him and A. S. within four Years, then to the Uſe of A. S. for her Jointure, Remainder over. And it was argued for the Plaintiff, That here was no Alteration of the Eſtate, to which the Warranty is annex'd; for tho' the Recovery was had the ſame Term, and a Voucher upon it, yet becauſe the Uſes did not take Effect preſently, but were contingent, R. remain'd Tenant in Fee-ſimple as before; and ſo the firſt Warranty not deſtroy'd. Adjornatur.——Hob. 20. pl. 37. S. C. and ſtates the Uſes as in Le. 250.——2 Brownl. 169. S. C. argued.

15. Warrantia Chartæ *againſt O. and M. his Wife*, and *counted that O. and M. levied a Fine 2 Jac. to the Defendant and his Heirs with Warranty*; the Defendant *pleaded that the ſame Term a Stranger brought a Writ of Entry ſur Diſſeiſin* [*in the Per*] *againſt the Plaintiff, who vouch'd O. only, and thereupon a Recovery paſs'd to the Uſe of the Plaintiff for Part of the Land for his Life, with diverſe Remainders in Tail*, with the *Remainder to the Plaintiff in Fee.* Reſolved by all, præter Winch J. that the Warranty was deſtroyed by the Severance and *Diviſion of the Land.* It was agreed by all but Warburton, that becauſe it appeared by the Plea in Bar, that the Uſe of the Recovery was to the Plaintiff but for Life; ſo as the Plaintiff is *in of another Eſtate*, that he could not have a Warrantia Chartæ to recover upon a Warranty in Fee. But Warburton thought that the Statute 27 H. 8. of Uſes, gave the Benefit of the Warranty to Ceſty que Uſe, and that he ſhall vouch as Aſſignee, and have Warrantia Chartæ; and that Tenant for Life, created by an Uſe, ſhall have Benefit for his Time of the Warranty, and may vouch, or have Warrantia Chartæ; but that he muſt make his Count accordingly, which he has not done in the principal Caſe. Mo. 859. pl. 1180. Trin. 9 Jac. Roll v. Osborn & Ux'.

(X. a) Coun-

(X. a) Counterpleas by Vouchee. *At what Time* it may be counterpleaded.

1. IF Vouchee demands of the Tenant what he has to bind him to the Warranty, **he cannot after ſay that the Tenant has nothing in the Tenancy; for by the Demand he admits him Tenant.** 44 E. 3. 2. Br. Voucher, pl. 28. cites S. C.

2. **If the** Tenant vouches, ſhewing Cauſe **of Voucher, in Caſe** where Cauſe ought to be ſhewn, and Demandant does not traverſe it, but the Vouchee enters into the Warranty, and pleads a Deed of the Great Grandfather **of the Demandant,** and another Deed of the Grandfather of the Demandant, **and the** Demandant demands **of him,** to which Deed he will hold him, **and** he ſays to one in certain; **the Demandant cannot traverſe the Cauſe of Voucher after, inaſmuch as he has accepted the Voucher before.** 25 Aſſ. 14. **Curia.**

3. In Præcipe quod reddat the Tenant vouch'd. The *Vouchee came ready to enter into the Warranty*, and the *Tenant ſhew'd Releaſe of him* with Warranty, bearing Date at Trinity Term. Finch, for the Demandant, pray'd Seiſin of the Land, becauſe the Deed *bore Date pending the Voucher*, he having vouch'd in Eaſter-Term. Morrice ſaid, This is no Plea for the Vouchor, but for the Vouchee. But per Knivet, It may be that the Demandant cannot have any Counterplea, by reaſon of the Seiſin of the Vouchee after &c. and therefore, before the Entry into the Warranty, the Demandant remains Party to pray Seiſin of the Land; for now it appears that you had not Cauſe to vouch the Day of the Voucher; and afaſter the Vouchee enter'd into the Warranty, and vouch'd over. Br. Voucher, pl. 56. cites 38 E. 3. 13. 14. Br. Counterplea de Voucher, pl 23. cites S. C.— Br. Garranties, pl. 26. cites S. C.

4. In Præcipe quod reddat the Tenant *vouch'd J. P.* and at the Summons ad Warrantizandum return'd, *came J. P. Chaplain, and demanded the Lien*; and the *Tenant ſaid that he vouch'd another of the ſame Name*; and the *Demandant pray'd Seiſin* of the Land, becauſe the Tenant had vouch'd, and could not bind the Vouchee to Warranty. Finch ſaid that the Demandant cannot counterplead after the Voucher granted, and therefore Proceſs iſſued againſt the Vouchee with Addition; ſo that he who appears ſhall not be grieved &c. Br. Voucher, pl. 29. cites 45 E. 3. 6. Br. Counterplea de Voucher, pl. 14. cites 45 E 3. 6.

(X. a. 2) Counterplea. *What* is an *Eſtoppel.*

1. IN Formedon the Tenant vouch'd, and the *Demandant ſaid that the Vouchee, nor none of his Anceſtors, had ever any Thing after the Seiſin of J. the Donee.* Per Kirton, You ought to ſay that they had nothing after the Gift; and after he paſs'd, and *ſhew'd that he, whom he vouch'd, granted and render'd by Fine to the Anceſtor of the Tenant*; Judgment if againſt the Fine. And the beſt Opinion was, That it is no Eſtoppel, and that it ſtands with the Fine, by which the Tenant maintain'd that he was ſeiſed, priſt; and the others econtra. Br. Counterplea de Voucher, pl. 26. cites 38 E. 3. 28.

2. If the Tenant *prays Aid of the King*, after Procedendo he ſhall not vouch a Stranger. Br. Aid del Roy, pl. 3. cites 9 H. 6. 3.

3. In *Præcipe* quod reddat, the *Tenant vouch'd and ſaid that the Vouchee is within Age*, and pray'd that the Parol Demur; the *Demandant ſaid that the Vouchee is of full Age*, and pray'd that he might be view'd; by this he has loſt the Advantage of counterpleading the Voucher after. Per Cur. Br. Eſtoppel, pl. 202. cites 22 H. 6. 48.

But in Treſpaſs *Vi & Armis*, if the Defendant pleads that his Franktenement &c. and the Plaintiff ſays that the Anceſtor of the Defendant, whoſe Heir he is &c. by this Deed infeoffed him with Warranty, and demands Judgment, if againſt the Deed with Warranty of his Anceſtor he ſhall be received to ſay that this is his Franktenement, this is a good Plea. Ibid.

4. *Treſpaſs* upon Anno 5 R. 2. the *Defendant pleaded a Feoffment with Warranty of the Anceſtor of the Plaintiff whoſe Heir the Plaintiff is*; Judgment if againſt the Deed of his Anceſtor &c. which comprehends Warranty &c. and the Opinion of the Court was that it is no Plea; for *he does not demand Franktenement nor Recover Franktenement* by this Action, *but only Damages*. Br. Garranties, pl. 87. cites 14 H. 7. 22.

5. There is a *Diverſity* between a *Warranty on the Part of the Mother*, and an *Eſtoppel*; for an Eſtoppel of the Part of the Mother ſhall not bind the Heir, when he claims from the Father; As if Lands be given to the Husband and Wife and to the Heirs of the Husband, the Husband makes a Gift in Tail and dies, the Wife recovers in a Cui in Vita againſt the Donee, ſuppoſing that ſhe had Fee-Simple, and makes a Feoffment and dies, the Donee dies without Iſſue, the Iſſue of the Huſband and Wife bring a Formedon in the Reverter againſt the Feoffee; and notwithſtanding that he was Heir to the Eſtoppel, and the Mother was eſtopped, yet for that he claim'd the Land as Heir to his Father he was not eſtopped. Note, that Warranties are favour'd in Law, being part of a Man's Aſſurance, but Eſtoppels are odious. Co. Litt. 365. b.

(X. a. 3) *Penalty of* Vouchee's denying his Warranty.

Albeit the Mirror ſaith of this Act, L'eſtatute de Garranties neſt forſque Revocation de error uſee jeſque a droit ley, yet the Tenant, according as it is here recited in the Preamble of this Act, after the Warranty tried could have no other Judgment, but that the Vouchee ſhould Warrant the Land according to the *Voucher of the Tenant*; but this *was many times in great Delay of the Demandant by Colluſion or Agreement between the Tenant and the Vouchee*, for Remedy whereof this Statute was made. 2 Inſt. 366.

1. *Stat. Weſt.* 2. 13 *E.* 1. *c.* 6.

WHEN *any Demandeth Land againſt another, and the Party, that is impleaded, voucheth to Warranty,*

* This is *not to be underſtood only where the Vouchee denies the Deed or other Cauſe of the Warranty*, and thereupon Iſſue is taken and found againſt the Vouchee. And where the Vouchee enters into the Warranty, and demands of the Tenant what he hath to bind him to Warranty, and the Tenant ſhews Special Matter to bind him to Warranty, and the *Vouchee demurs in Law upon the Lien*, this is within the Remedy of this Act; For the Words ſubſequent be, *Si convincatur quod Warrantizare debeat*, which the Vouchee is in this Caſe. And this Act being made to ouſt delays, which are odious in Law, is to be interpreted favourably. 2 Inſt. 366.

*And the Warrantor * denies his Warranty, and the Plea hangeth long between the Tenant and the Warrantor, and at length when it is tried, that the Vouchee is bound to Warranty by the Law and Cuſtom of the Realm hitherto uſed, there was none other Puniſhment aſſign'd for the Vouchee that denies his Warranty, but only that he ſhould warrantize, and ſhould be amerced, becauſe he did not warrant before, which was prejudicial unto the Demandant becauſe he ſuffer'd oftentimes great Delays by Colluſion between the Tenant and the Warrantor.*

Wherefore

Wherefore our Lord the King hath ordain'd, that like as the Tenant ſhould leaſe the Land being in demand, in Caſe where he vouch'd, and the Vouchee could diſcharge himſelf of the Warranty, in the ſame wiſe ſhall the Warrantor leaſe, in Caſe where he denies his Warranty, and it be tried againſt him, that he is bounden to Warranty; and if an Inqueſt be depending between the Tenant and the Warrantor, and the Demandant will require a Writ to cauſe the Jury to come, it ſhall be granted him.

And it is to be obſerved, that here is (like as, or, ſicut) which is an Adverb of Similitude, viz. like as the Tenant ſhould loſe the Land in Caſe he vouch'd, and the Vouchee could diſcharge himſelf of the Warranty; under which Words are included, if the Vouchee can devolve him of the Warranty *by Demurrer or any Iſſue whatſoever*, eodem Modo (ſaith this Act) amittat Warrantus &c. which fortifies the former Expoſition that hath been made; and to be ſhort, *whereſoever the Judgment at the Common Law ſhould have been againſt the Vouchee upon falſe Plea, or demurrer* &c. *quod Warrantizaret, all theſe Caſes are within the Proviſion of this Act.* 2 Inſt. 367.

(Y. a) Voucher. *What* Act or thing *will abate a Voucher. Act of God.*

1. If Baron and Feme are vouch'd, and the Feme is return'd Dead, the Voucher ſhall abate. 30 E. 3. 31. b.

If Baron and Feme are vouch'd, and the Feme dies, he ſhall not have new Voucher, but the Proceſs ſhall be continued againſt the Baron &c. Theloal's Dig. of Writs, lib. 12. cap. 3. S. 8. cites 30 E. 3. 40. Per Wich.

Where the Warranty was by the Baron and Feme, and the Feme died pending the Writ of Warrantia Chartæ againſt the Baron and her; it was reſolved that the Writ ſhould not abate, the Warranty being by both, and for the Heirs of the Baron, ſo as by the Death of the Feme the Warranty as to her is determined, and ſtands good for the Baron and his Heirs. Mo. 859. pl. 1180. Trin. 9 Jac. Roll v. Osborn.

2. If two are vouch'd and the one is return'd dead, the Voucher ſhall abate, becauſe the Survivor ſhall not be charged of the Whole, but he and the Heir of the deceaſed jointly. 17 E. 3. 41. b. Contra 30 E. 3. 31. b. adjudged.

Theloal's Dig. of Writs lib. 12. cap. 3. S. 5. cites S. C. that the other was not demanded, but the Tenant was forced to revouch him who was alive and the Heir of the other for the Reaſon within mention'd, and cites 19 H. 6. 55. accordingly, but adds Quære.

3. If a Man be vouch'd and return'd dead, the Voucher ſhall abate. 18 E. 3. 38. b. 50 E. 3. 2. b. 21 E. 3. 36. 37.

4. The Demandant cannot abate the Voucher upon a Nihil return'd that the Vouchee is dead, if the Tenant will not acknowledge it; but it ought to come by Return of the Sheriff. 21 E. 3. 36. b.

5. But the Tenant after Voucher cannot ſay that the Vouchee is dead without the Return of the Sheriff, for he has put his Anſwer in the Mouth of the Vouchee, and therefore if he makes Default, the Demandant ſhall have Seiſin of the Land. 18 E. 3. 38. b.

Fol. 765.

S P. Br. Sequatur, pl. 3. cites 14 H. 6. 7. and 20. Per Aſcue. —— S. P. Theloal's Dig. of Writs, lib 12. cap 3. S. 3. cites M. 8 E. 3. 425. and ſays that the ſame Term before Entry into the Warranty at the Grand Cape ad Valentiam return'd ſerved, the Tenant came and ſaid that the Vouchee was Dead, and the Demandant confeſſed it by which the Tenant pleaded over, and cites M. 22 E. 3. 18. accordingly, and that he may revouch the Heir.

6. If the Tenant vouches and the Voucher is counterpleaded by the Statute, the Tenant cannot ſay that the Vouchee is dead pending the Iſſue, becauſe if the Counterplea be good, the Demandant ſhall recover

S. P. For the Tenant ought to maintain the Iſſue taken,

recover the Land, which Benefit ſhall not be taken away by Plea of the Tenant himſelf. 50 E. 3. 2. b. adjudged.

Theloal's Dig. of Writs, lib. 12. cap. 3. S. 10. cites S. C. but cites M. 41 E 3. Voucher 7. That the Voucher was counterpleaded by the Statute, and after the Demandant came, and ſaid that the Vouchee is dead, and pray'd that the Tenant revouch, upon which the Tenant was put to a Revoucher.

If the Sheriff returns the Vouchee dead, yet the Iſſue ſhall ſtand; for the Death of a Stranger to the Iſſue ſhall not abate the Iſſue, and if the Counterplea paſſes for the Demandant the Tenant ſhall loſe the Land, be the Vouchee dead or alive. Br. Counterplea de Voucher, pl. 20. cites S. C. —— Br. Voucher, pl. 43 cites S. C.

7. But if the Counterplea be found falſe, and the Vouchor grants it, then upon the Proceſs, if the Vouchee be return'd dead, the Voucher ſhall abate. 50 E. 3. 2. b. 3.

Br. Iſſues. join'd, pl. 75. cites S. C. that it ſhall not abate the Iſſue of the Counterplea; for this is between the Demandant and the Tenant, and the Vouchee is a Stranger to it, therefore of this it ſhall ſtand, and the Tenant ſhall revouch for the other Part.

8. If the Tenant vouches and the Demandant grants it for Part, and for the Reſidue counterpleads it by the Statute, and upon the Proceſs againſt the Vouchee for this Part, whereof the Voucher is granted, the Vouchee is return'd dead, yet this ſhall not abate the Voucher for the Reſidue, whereof they are at Iſſue upon the Counterplea, becauſe if the Counterplea be good the Demandant ſhall recover the Land, which Benefit for the falſe Voucher ſhall not be taken away by this Return for the other Part. 50 E. 3. 2. b. adjudged.

Theloal's Dig. of Writs, lib. 12. cap. 3. S. 3. cites S. C. and H. 5. E. 2. Voucher 253. that he revouch'd his Executors, and the others ſurviving; but ſays that in M. 5 E. 3. 231. in ſuch Caſe at the Grand Cape ad Valentiam againſt the Guardians, one of them made Default, and another was Dead before, and another appear'd, upon which Seiſin was awarded againſt him who made Default for his Portion, and he who appear'd was put to anſwer before Revoucher of the Executors of the deceaſed, becauſe every one of them might give ſeveral Anſwers. And becauſe by the Voucher it was ſuppoſed that they were ſeveral Guardians of ſeveral Parts of the Land of the Infant. Contra 22 E. 3. 3.

9. If one be vouch'd in Ward of divers Lords, and at the Sequatur ſub ſuo Periculo one Lord is return'd Dead, the Voucher ſhall abate againſt all, and the Demandant ſhall not have Seiſin of the Land. 22 E. 3. 3. b.

[10.] The *Parol* was *put without Day by the Nonage of the Vouchee*, and at the *Reſummons* the *Tenant ſaid that the Vouchee is yet within Age*; Judgment of the Writ, which ſuppoſes that he is of full Age. To which the *Demandant ſaid, that the Vouchee was dead* &c. Whereupon the Tenant was put to anſwer over, becauſe the Demandant *could not have Writ of Reſummons of other Form.* Theloal's Dig. of Writs, Lib. 14. cap. 10. S. 4. cites Trin. 31 E. 3. Reſummons, 29.

(Y. a. 2) Act *of the Demandant.*

[1] 10. If 2 vouch, and one makes Default after [Default,] he ſhall loſe the Moiety; but the Voucher ſhall ſtand for the other Moiety. 42 E. 3. 17. b.

2. *Præcipe* quod reddat, *by* 2 *Femes.* The *Tenant vouch'd*, and Proceſs continued till the Summoneas ad Warrantizandum ſicut Pluries. And the *one Plaintiff had taken Baron pending the Writ*, and was *nonſuited and ſever'd*; by which the Writ was awarded good for the other, and did not

not abate for all, notwithſtanding that the Tenant pleaded it to the Writ. Br. Voucher, pl. 83. cites 39 E. 3. 16.

(Y. a. 3) *Verdict.*

[1] 11. IF 2 are vouch'd, and their Poſſeſſion counterpleaded, **and it** is found that one was ſeiſed, and the other not, **the Voucher ſhall abate for a** Moiety, **and the Demandant ſhall recover it.** 48 E. 3. 28.

[2] 12. **It is alſo held, that it ſhall abate** in the Whole. 48 E. 3. 29.

[3] 13. **If** Baron and Feme **are** vouch'd, and their Poſſeſſion counterpleaded, and found that the Feme only was ſeiſed, **the Voucher ſhall not abate for any Parcel. Dubitatur** 48 E. 3. 28.

(Z. a) Voucher. *Revoucher. In what Caſes* Revoucher may be.

1. IF **the** Vouchee be return'd dead **by the Sheriff, he may revouch.** 17 E. 3. 41. b. 64. b. 22 E. 3. 3. b. 20. b. 38 E. 3. 27. b. **Adjudged. Contra** 7 H. 4. 15.

2. But **he ſhall** not **revouch** upon Return of Nihil **by the Sheriff,** upon Suggeſtion that the Vouchee is dead, **becauſe no Iſſue can be taken upon it.** 17 E. 3. 41. b. 21 E. 3. 36. b. 37.

3. **If** at the Grand Cape ad Valentiam return'd ſerved againſt the Vouchee, **the** Vouchee makes Default, **the** Tenant may ſay that he is dead, **and revouch** * without Return of **the Sheriff, (becauſe otherwiſe the Demandant ſhall have Seiſin of the Land.)** 22 E. 3. 18. * Fol. 766.

4. **If a Man** vouches himſelf, and ſhews Cauſe, **and the other demurs that the Cauſe is not good, and it is** adjudg'd no Cauſe, **the ſame Term he may vouch again.** 11 H. 6. 48. If a Man *demurs upon Counterplea of Voucher,* which is *adjourn'd, and* after is *adjudg'd*

5. But **otherwiſe it is if it be adjudged** after Adjournment to other Term; **for then Judgment ſhall be to recover the Land.** 11 H. 6. 48.

againſt the Tenant, he cannot vouch over; for this is peremptory, and the Demandant by this ſhall recover the Land, and there the Tenant ſhall not be put over to another Anſwer after Adjournment; for the *Statute is intended* where all is *in one and the ſame Term.* Br. Voucher, pl 107. cites 8 H. 7. 5. 6.

6. **If a Man** vouches, ſhewing Cauſe, **in a Caſe where he ought,** and the Cauſe is traverſed, **the Voucher may revouch immediately.** 17 E. 3. 47. **Adjudged.**

7. In *Dower* the Tenant *vouch'd the Heir, and had Judgment by Default* againſt the Heir, *becauſe he had Aſſets, and that the Tenant hold in Peace.* And after the *Heir reverſed the firſt Judgment by Writ of Diſceit,* and the *Demandant brought Writ of Scire Facias againſt the Tenant,* and *the Tenant vouches the Heir*; there the Heir may extort him from the War-

ranty by the Judgment in the Writ of Diſceit. Br. Counterplea de Garranty, pl. 10. cites 4 E. 3. and Fitzh. Scire Facias, 140. Per Scote.

8. Where *the Baron and Feme were vouch'd*, and *the Baron died*, the Tenant was received to vouch the Heir of the Baron only. Theloal's Dig. of Writs, Lib. 12. cap. 3. S. 7. cites M. 20 E. 3. Voucher 130.

9. In Mortdanceſtor the *Tenant vouch'd*, and the *Vouchee caſt Eſſoin at the Summons return'd*, and was quaſh'd, and *Reſummons* awarded againſt the Vouchee; for ſuch Proceſs ſhall be againſt the Vouchee as againſt the Tenant. Quod nota. Br. Proceſs, pl. 96. cites 22 Aſſ. 79.

10. If a Man *vouches* 4, and the *one makes Default*, by which *Judgment is given of the 4th Part* of the Demand, and after *in another Action, of the reſt*, the Tenant may vouch again, and the Voucher is good againſt all; and if the others have nothing, he who render'd in Value before ſhall render in Value again. Br. Recovery, pl. 54. cites 26 E. 3. and Fitzh. Voucher 305.

11. *Two were vouch'd*, and at the Sequatur the *one was eſſoign'd de Servitio Regis*, and the *Sheriff return'd* that *the other* was *dead*; upon which the Tenant was not receiv'd to revouch the Survivor, but the firſt Voucher ſtood and was continued againſt him. Theloal's Dig. of Writs, lib. 12. cap. 3. S. 8. cites M. 30 E. 3. 40. Quære.

12. *When the Tenant has the Choice* of Vouchers, *and takes him to one*, and thereupon *proceeds to Judgment, he loſes the other*, and can never reſort to it again; as in Caſe of diverſe Pleas in Bar, where the Action comes to a final Judgment upon one. Per Hobart Ch. J. Hob. 29. in Caſe of Roll v. Osborn.

(A. b) Voucher. What Perſon may be vouch'd. After a Voucher where he may *vouch at large*.

1. IF the Vouchee be return'd dead, he may vouch at large. 38 E. 3. 27. b.

S. P. Theloal's Dig. of Writs, lib. 12 cap. 3. S. 4 cites M. 15 E. 3. Voucher 23. and ſays, See 8 H. 7. 6. of revouching a Stranger.

2. [But] if the Vouchee be return'd dead, he can not vouch a Stranger out of the Blood of the firſt Vouchee. 41 E. 3. 29. 30 E. 2. 24. b. in the ſame Original without ſhewing Cauſe.

3. If two are vouch'd, and one is return'd dead, the Tenant may vouch at large; for peradventure he has badly vouch'd before. 4 H. 4. 1. adjudged.

4. But if the Tenant vouches one, and Vouchee enters into the Warranty, tho' the Vouchee (as it ſeems) after dies, the Tenant ſhall not vouch at large, becauſe by Entry into the Warranty the Court is appriſ'd that the Voucher is good. 4 H. 4. 1. Curia.

5. If a Man vouches J. S. and after the Writ abates by the Death of the Tenant, in a new Writ againſt his Heir he may vouch at large, becauſe it is a new Original. 30 E. 4. 24. b.

Br. Counterple de Voucher, pl. 10. cites S. C. —— Br. Voucher, pl. 21. cites S. C.

6. If a Man vouches B. within Age, as Son and Heir of A. by which the Parol demurs, and after B. dies, in Reſummons Tenant cannot vouch C. as Couſin and Heir of B. B. having a Siſter of the Half-blood; for it cannot be intended but that the firſt Voucher was, becauſe of a Lien made by A. and by this Lien the Siſter ought to be vouch'd, and not the Couſin. 43 E. 3. 3. adjudged.

7. But

7. But **in this Caſe** if C. had been in Poſſeſſion of the Aſſets, **he might be vouch'd as Heir to B.** 43 E. 3. 3. a. b. The Tenant vouch'd J. as Son and Heir; the Demandant ſaid that J. is younger Son, and W. the eldeſt, the Tenant ſaid Proteſtando that J. is Heir, and *Proteſtando* that *he enter'd as Heir after A.'s Death*; and becauſe the Demandant could not deny the Entry of J. as Heir, the Voucher ſtood. Br. Counterple de Voucher, pl. 25. cites 38 E. 3. 27.

8. **If one** Coparcener vouches herſelf and her Siſter as Heir to another, ſhewing Cauſe **as ſhe ought, and** the Cauſe is travers'd, **ſhe may revouch any** Stranger **preſently.** 17 E. 3. 47. b. **agreed**; **for** this waives the firſt Voucher. Br. Voucher, pl. 60. cites S. C.

9. So **ſhe may** revouch her Siſter only, **who was vouch'd before.** 17 E. 3. 47. **adjudged.**

10. In *Dower* the *Tenant vouch'd the Heir of the Baron in* the *Ward* of ſuch a one, and the *Sheriff return'd* that *the Infant* is *dead* &c. upon which the *Tenant revouch'd the Heir of the firſt Vouchee in Ward of the ſame* Guardian. Theloal's Dig. of Writs, lib. 12. cap. 3. S. 12. cites M. 22. E. 3. 20. 21.

11. He who *fails of his Voucher* cannot vouch again. Br. Voucher, pl. 84. cites 39 E. 3. 26.

12. He who vouches where the *Demandant counterpleads*, may relinquiſh it and vouch other; quod nota. Br. Aid del Roy, pl. 14. cites 40 E. 3. 14.

13. In Præcipe quod reddat the *Tenant vouch'd E.* and the *Demandant as to 3 Parts counterpleaded the Voucher, and as to the 4th Part granted the Voucher*; and the *Sheriff return'd the Vouchee dead*, by which the *Tenant would have revouch'd for the whole*, and could not for 3 Parts; for as to theſe the Parties are at Iſſue, and the Death of the Vouchee does not abate the Iſſue; for he is a Stranger. And to the 4th Part he vouch'd J. Son of E. who ſhall be ſummon'd &c. and the *Demandant ſaid that the Tenant and he who is vouch'd are one and the ſame Perſon*; Judgment if without Cauſe ſhewn, by which he *ſhew'd other Cauſe*. Br. Voucher, pl. 43. cites 50 E. 3. 2. Br. Counterplea de Voucher, pl. 20. cites S. C.

14. In Præcipe quod reddat, if the Tenant *vouches J. S.* to Warranty, and the *Sheriff returns him dead*, by which the Tenant *vouches R. S. Son and Heir of the ſaid J. S.* it is no *Plea that there was not any R. S. Son and Heir of the ſaid J. S. the Day* &c. for he may *bind him by his own Warranty*. Br. Counterple de Voucher, pl. 48. cites 21 E. 4. 71. *But* if he had vouch'd R. S. Son and Heir of the ſaid J. S. *within Age, and pray'd that the Parol demur*, then it is a good Counterplea. Note the Diverſity in Appeal. Br. Counterple de Voucher, pl. 48. cites 21 E. 4. 71.

15. In Formedon the Tenant *vouch'd M.* and the Voucher granted, and the *Vouchee died*, and the Tenant *vouch'd C. Son and Heir of this ſame M.* who is within Age, and pray'd that the Parol demur. And per Brian, where the Tenant is vouch'd, and the Vouchee dies, as here, the Tenant ſhall not vouch at large, without *ſhewing Cauſe*. Br. Voucher, pl. 107. cites 8 H. 7. 5. 6.

16. It was ſaid, that if he vouches one within Age, and *prays that the Parol demur*, he cannot vouch at large after. Quære if he cannot if he ſhews Cauſe. Br. Voucher, pl. 107. cites 8 H. 7. 5. 6.

17. If I have *recover'd in Value*, I ſhall never vouch again for thoſe Lands by Force of the firſt Warranty, becauſe it was once executed. And by the ſame Reaſon, if I once have had *Judgment to have in Value* upon a Warranty, I ſhall not vouch again upon the ſame Warranty for the ſame Land. Hob. 27. in Caſe of Roll v. Osborn.

18. *Tenant in Tail*, the *Remainder or Reverſion levies a Fine to me and my Heirs with Warranty*, and then *I ſuffer a Recovery to bar the Remainder, and vouch the Tenant in Tail*, as I muſt, and ſo *the Recovery paſſes* with

with his ordinary Judgments, and after *a Stranger ſues me for the Land upon Title*; in that Caſe and the like I hold, that *I may vouch my Conuſor again*; for the other is known in Law, and to the Court, to be a feign'd Recovery, and by Conſent, and to be but Part of the Aſſurance of the Land between the Parties, to bind the Remainder or ſuppoſed Remainders, and not in Execution of the true Intent of the Warranty. Hob. 28. in Caſe of Roll v. Osborn.

(B. b) *By what Name the* Revoucher ſhall be.

1. IF Vouchee be return'd dead, he ought to vouch the Heir as Heir. 41 E. 3. 29.

(B. b. 2) *Foreign Voucher, or* Voucher of Foreigners.

The *Miſchief at the Common Law*, when the Tenant did vouch one to Warranty, and pray'd that the Vouchee might be ſummon'd in a foreign County, *was the great Delay* that the Demandant had thereby, and *ſpecially in London*; for that in London the Plea could not be remov'd neither by Tolt nor Pone; but the Plea was put without Day, and the Record remov'd by the King's Writ into the Court of C. B. &c. and ſome did hold that at the Common Law the inferior Court was put out of Juriſdiction. 2 Inſt. 324.

1. *Stat. Glouc.* 12. 6 *E.* 1. PRovides, *that if a Man impleaded for a Tenement in* * *London*

* *London is ſpecially nam'd* for the Cauſe aforeſaid, but *extends* by Equity *to all other privileged Places* where a foreign Voucher is made, *as* to *Cheſter*, *Durham*, *Salop* &c. 2 Inſt. 325.——Upon foreign Voucher *in Cheſter or Durham* the Plea ſhall be remov'd by *Recordare*. Br. Voucher, pl. 156. cites the Regiſter, fol. 6 & 7.

Wales is within the Equity of this Statute. See Jenk. 41. pl. 78.

Ancient Demeſne is (as ſome do hold) within this Statute, becauſe the Freehold is in the Tenants, and is within theſe Words (Soit implead de tenement;) but otherwiſe it is of a *Tenant by Copy-roll* in a Court Baron, becauſe he hath no Franktenement. 2 Inſt. 325.

In Ancient Demeſne, if the *Tenant vouches Foreigner to Warranty*, the *Tenant ſhall have Superſedeas and Writ of Warrantia Chartæ*. Quære; for the Parol cannot be remov'd by the Equity of the Statute of foreign Voucher in London. Br. Warrantia Cartæ, pl. 22. cites 21 E 3. and Fitzh. Voucher 222.—— If a Writ of Right is brought in Ancient Demeſne, and the Tenant vouches a Foreigner to Warranty, the Tenant in this Caſe may bring his Writ of Warrantia Chartæ againſt the Foreigner at Common Law; and when this is determined in the Common Pleas, it ſhall be certified into the Chancery, and the Chancellor ſhall command the Bailiffs of the Ancient Demeſne to proceed; but in the mean Time a Superſedeas ſhall be awarded out of the Chancery to ſtay the Suit in Ancient Demeſne. By all the Juſtices. Jenk. 41. pl. 78.

That is, when one *Vouch a Foreigner to Warranty*, vouch'd, and the Tenant prays that the Vouchee may be ſummon'd in a foreign County. 2 Inſt. 325.

This Act being a beneficial Law for the Furtherance of Juſtice, and for ouſting of Delay, *is taken* in this Point alſo *by Equity*, not only to foreign Pleas in real Actions, but alſo to Pleas, altho' they be not foreign, yet for Default of Power to proceed, the ſame ſhall be remov'd ut ſupra, and demanded ut ſupra: As if *in an Action Auncestrell*, the *Tenant plead Baſtardy* in the Demandant, *or in* a Writ of *Dower*, the Tenant *pleads Ne unques accouple* in loyal Matrimony, neither the Court in London, or any like Inferior Court, cannot award a Writ to the Biſhop for Trial thereof; for Nullus alius præter Regem poſſit Epiſcopo demandare inquiſitionem faciendam. And another treating of the Plea of Ne unques accouple, in Bar of a Writ of Dower, ſays, Ac ſi alius quam Rex demandaret Epiſcopo quod inde inquireretur, Epiſcopus alterius mandatum quam Regis non tenetur obtemperare. And herewith agree our Books in all Succeſſions of Ages. 2 Inſt. 325.

And

And therefore if ſuch Pleas be pleaded in London, or ſuch other Inferior Courts, the Records ſhall be removed, and after a Writ to the Biſhop, and Certificate made by the Biſhop, the Record ſhall be remanded; And it appears that *this Act extends to Real* Actions wherein Voucher lies, and *not to Perſonal Actions*; and leaſt that foreign Vouchers ſhould be us'd for Delay, they *muſt ſhew a Charter* &c. comprehending Warranty, to the Court. 2 Inſt. 325.

He ſhall have a Writ out of Chancery to ſummon the Warrantor at a certain Day before the Juſtices of the Bench, and another to the Mayor and Bailiffs of London to ſurceaſe the Matter before them, until the Plea of the Warranty be determined in the Bench.

This is corrected and *altered by* the Article upon this Statute in An. 9 *E.* 2. for by that Statute the Mayor and Bailiffs ſhall adjourn the Parties before the Juſtices of the Bench at a certain Day, and ſhall * ſend the Record thither, Et le Juſtices face ſummon le garrantee devant eux & pledent le garrantie; and hereby the *Juſtices of the Bench ſhall award the Summons ad auxiliandum* &c. and not fetch it out of the Chancery. And by the ſame Act of 9 E. 2. it is provided, That if at the Day given in Bank the Tenant make Default, a *Petit Cape* ſhall be awarded to the Mayor and Bailiffs to give Judgment upon that Default, if it cannot be ſaved &c. 2 Inſt. 325.

* Writ of Recordare ſhall be awarded out of Chancery to the Mayor and Bailiffs, to remove the Record before the Juſtices of the Bench. 2 Inſt. 324.

In a Præcipe *in the Huſtings* in London, the *Tenant vouches one in London, and other foreign Vouchees in the County of Norfolk* &c. in this Caſe, as well the Voucher within London, as the foreign Vouchers, ſhall be remov'd; for altho' the Words of this Act be, *Vouch forrein a garrantie*, yet becauſe Proceſs muſt be made againſt all the Vouchees at one Time, and if Proceſs ſhould be made by the Court of C. B. only againſt the foreign Vouchees, altho' they come in they ſhould not warrant, nor anſwer without the others before Proceſs was determined againſt them in London, ſo as *Neceſſity requires, that Proceſs ſhould be made againſt all at one Time, and* that ought to be done *in the more worthy Court*; and when the Warranty is determined in the Court of C. B. all ſhall be remanded. 2 Inſt. 325. 326.

And when the Plea at the Bench ſhall be determined, then ſhall the Vouchee be commanded to go into the City to anſwer the Chief Plea;

This is the Power given to the Juſtices of the Court of C. B. and *this Act is in Nature of a Commiſſion* to them, therefore it is good to be ſeen what is within their Commiſſion; the Words of the ſaid Writ of Recordare are, Ut terminata Warrantia illa Coram præfat' Juſtic' eadem recordum & Proceſs' vobis remittamus &c 2 Inſt. 326.

If the *Tenant vouches a Foreigner* to Warranty, and the *Record is remov'd into* the Court of *C. B.* to determine the Warranty, the *Vouchee may vouch over in a foreign County, and that Vouchee may vouch over*; *and if* the *Vouchee make Default, the Court may make Proceſs againſt him* &c. Quia quando Lex aliquid alicui concedit, omnia incidentia tacite conceduntur; but *none of the Vouchees can plead in Chief, but* that muſt be pleaded *in the Inferior Court*; for that is not within the ſaid Commiſſion given by this Act. But if the *Demandant in Bank appears not*, the Court may award a *Non-ſuit* as incident, and ſo the *Tenant in Bank may be eſſoign'd.* 2 Inſt. 326.

In Dower *in the Huſtings* of London againſt the *Husband and Wife*, who *vouch a Foreigner* to Warranty, whereupon *the Plea is adjourn'd into C. B.* to a certain Day, at which Day the *Husband and Wife ſued out a Writ againſt the Vouchee*; whereupon the *Vouchee appear'd*, and the *Baron made Default*, and the *Wife* pray'd to be receiv'd upon his Default; and by the Rule of the Court ſhe *was receiv'd, and* that *it was within their Commiſſion*, for that the Default was made in this Court, whereupon the Land was to be loſt, if ſhe were not receiv'd; for it is a Maxim in Law, Neceſſitas ſub Lege non continetur, quia *quod alias non eſt licitum, neceſſitas facit licitum.* But yet others are of another Opinion. 2 Inſt. 326.

And a Writ ſhall alſo be awarded at the Demandant's Suit, by the Juſtices, to the Mayor and Bailiffs, to cauſe them to proceed in the Plea:

That is, the ſaid Writ of *Recordare*, whereby they are commanded Quod recordum & proceſſum ejuſdem loquelæ cum omnibus ea tangentibus Juſticiariis noſtris de Banco ſub ſigillo veſtro mittatis &c. *which* to them *is a Superſedeas in Law.* 2 Inſt. 326.

This is a *Procedendo in Loquela* directed to the Mayor &c. to proceed, which you may read in the Judicial Regiſter. 2 Inſt. 326.

And if the Demandant recover againſt the Tenant, the Tenant ſhall come before the Juſtices of the Bench, who ſhall direct a Writ to the Mayor and Bailiffs, to cauſe the Land ſo loſt by the Tenant to be extended and valued, and to return that Extent, at a certain Day, unto the Bench; and after the Sheriff of the County (where the Warranty was ſummon'd) ſhall be commanded to deliver to the Vouchor Land of the Vouchee anſwerable in Value to the Land that the Vouchor has loſt.

For the better Performance of this Act, the *Tenant muſt ſurmiſe that Execution is ſued againſt him, and pray a Venire facias recordum.* 2 Inſt. 326.

By Force of this Act the Juſtices of C. B. upon that Record ſhall award a Writ of *Extendi & appre-*

 ciari

ciari fac', to the Mayor and Bailiffs; which Writs grounded upon this Act are ſufficient Expoſitions of the ſame, and will reſolve many Doubts that may ariſe hereupon. 2 Inſt. 326.

2 Inſt. 327. ſays, that at the Common Law in Caſe of a foreign Voucher in the Huſtings of London, the Plea was adjourn'd before the Juſtices in Eyre when they came to the Tower of London; for the Court of Huſtings was not deriv'd out of the Court of C. B. as other Courts, that have Power to hold Pleas real, are; and therefore the Adjournment was before the Juſtices in Eyre.

2. Foreign Voucher *ſhall be determined before Juſtices Errants.* Br. Voucher, pl. 151. (bis) cites Britton, Tit. Court Baron, fol. 274.

3. In Dower in London, the Tenant *vouch'd Foreigner to Warranty*, by which Proceſs was made by the Statute to try the Warranty in Bank at a certain Day; and the *Vouchee* came, and *enter'd into the Warranty, as he who had nothing by Deſcent ready to render Dower*; and the *Tenant ſaid that he has Aſſets by Deſcent in the County of N.* and the Demandant pray'd Seiſin of the Land. But the Court ſaid we have not Power to award Seiſin of the Land, but to try the Warranty; and becauſe he confeſs'd the Warranty, the Parol was remanded; quod nota bene. Br. Voucher, pl. 20. (bis) cites 42 E. 3. 1.

4. Formedon in London. The Tenant *vouch'd Foreigner* to Warranty, by which the Record was ſent into Bank, and Proceſs made againſt the Vouchee; and *at the Summons* returned, the *Tenant ſaid that pending this Proceſs, it was found before the Eſcheator* in London, *that J. was ſeiſed in Fee long before the Gift, and died without Heir; by which the Eſcheator ſeiſed for the King*, and the *King gave* them to the Tenant by his Patent, *and pray'd Aid of the King*; and the Demandant demurr'd, becauſe he departed from his Voucher; and yet the Court recorded the Aid-Prayer, and remanded all into London. Br. Voucher, pl. 24. cites 44 E. 3. 2. 3.

5. In *Formedon in Deſcender* brought *in London*, the *Tenant pleaded Releaſe with Warranty of the Anceſtor, and Aſſets deſcended in Fee in a foreign County*; and the Record, after Iſſue, was removed by Writ into C. B. to be tried. And ſo ſee that London cannot ſend it into Bank without Writ; but *Special Writ ought to come to remove it.* Br. Voucher, pl. 120. cites 48 E. 3. 21.

6. If a Man *vouches Foreigner in London*, and *prays that he be ſummon'd in another County, and pleads Warranty there*, and *Aſſets deſcended in a foreign County*, they ſhall not be at Iſſue there where the Voucher ſhall be granted; ſo that Proceſs is to be made to the Sheriff of the foreign County, before that the Parol ſhall be removed into Bank, and then Writ ſhall come to remove it. And ſo ſee that it ſhall not come into Bank by the ſending of thoſe of London, but by Writ of the King, and then it ſhall be tried in Bank, and remanded. Br. Voucher, pl. 144. cites 48 E. 3. 21.

7. In Formedon *againſt Baron and Feme in London*, in the Huſtings, the *Feme was received in Default of the Baron*, and *pleaded Releaſe of the Anceſtor of the Demandant with Warranty, and Aſſets deſcended in a foreign County*, upon which they were at *Iſſue*; by which the *Record was ſent into Bank* to try, and *there the Feme pleaded Recovery by a Stranger in Bank, againſt her and her Baron*, of the Land in Demand, *pending the Writ*; Judgment of the Writ. Wich ſaid, We have not Power to abate the Writ, nor to take Iſſue upon it; for the Record is ſent here only to determine the firſt Iſſue taken in London, and if the *Vouchee will vouch over in Banco, it ſhall not be received*; quod Belk. conceſſit. But per Perſey, If the Demandant will be nonſuited in Bank, the Court ſhall give Judgment upon it. Quære; for it ſeems that they *ſhall do nothing but record it, and remand it* into London. And per Belk. When they remand the Record, they ſhew upon what Cauſe it is remanded. Br. Voucher, pl. 42. cites 49 E. 3. 21.

8. Plea

8. Plea was *removed out of Cheſter* by foreign Voucher, and *in Bank* the *Vouchee* came, and *enter'd into the Warranty, and confeſs'd the Action*; and the Entry into the Warranty was recorded, and the Plea remanded; but the *Confeſſing of the Action was not recorded*; for the Court ſaid that they had not Power but only to determine the Warranty. Quod nota. Br. Voucher, pl. 1. cites 18 H. 8. 1.

9. *In Mortdanceſtor* in ancient Demeſne, the *Tenant pleaded in Bar to Part*, abſque hoc *that the Father of the Demandant died ſeiſed*, and vouch'd Foreigner for the reſt, there the *firſt Plea ſhall be continued*, and the laſt Matter only ſhall be removed to try the Voucher. Quod nota. Br. Voucher, pl. 2. cites 27 H. 8. 12.

(C. b) *At what Time* he may, or ſhall, be compell'd to *enter into the Warranty.*

Fol. 767.

1. IF 2 are vouch'd, and one makes Default, **he who comes ſhall have** Idem Dies, **till Proceſs ended, againſt the other by** Grand Cape ad Valentiam. 48 E. 3. 5. b.

2. **The** ſame **Law in Writ** of Dower, where an Infant is vouch'd in the Ward of diverſe Guardians, who have each ſeveral Portions in the Ward. 48 E. 3. 5. b.

3. **The** ſame **Law**, tho' one who is vouch'd be deins le 6 Portions. 49 E. 3. 9. b.

4. If at the Time of the Voucher the Vouchee be ready in Court, **he may enter into the Warranty without Proceſs.** 2 H. 6. 1.

(D. b) *How* the Entry into the Warranty may be.

1. IF **the** Diſcontinuee vouches the Iſſue in Tail **to the Warranty, the Iſſue may enter into the Warranty,** ſaving **to him** his Action, according to the Tail. 50 E. 3. 12. b. 11 H. 4. 22.

A Man *may enter into the Warranty of Fee-ſimple, ſaving to him his Action of the Tail*; per Middleton. Br. Counterplea de Garrantie, pl. 1. cites 50 E. 3. 12.

2. If Tenant in Dower of the Aſſignment of the Guardian, where ſhe is not dowable, vouches the Heir, **he may enter,** ſaving **to him** his Action by Aſſiſe of Mortdanceſtor. 50 E. 3. 12.

S. P. For he does not warrant but for Term of Life, and ſaving Action of the Fee-ſimple; and in the other Caſe above he warrants the Fee-ſimple, ſaving to him his Action of the Tail; but *he can in no Caſe warrant the ſame Eſtate that he ſaves*; per Middleton. But Fulth. contra; and that he may warrant the Fee-ſimple, ſaving Action of Fee-ſimple. Quod fuit negatum per aliquos. Br. Counterplea de Garrantie, pl. 1. cites S. C.

In Dower the Tenant vouch'd, and the *Vouchee ſaid that he had Aſſiſe of Mortdanceſtor againſt the ſame Tenant pending of the ſame Land*, and enter'd into the Warranty, ſaving his Action of Aſſiſe of Mortdanceſtor, and admitted. Br. Counterplea de Garrantie, pl. 6. cites 4 E. 3. and Fitzh. Vouch. 176.—— Br. ibid. pl. 19. cites S. C.

3. But **if a** Fee be demanded, **the Vouchee cannot enter into the Warranty, ſaving to him his Action for the Fee, As becauſe the Warranty commenced by Diſſeiſin.** 50 E. 3. 12. b. 13.

In *Formedon* the Tenant vouch'd, and the *Vouchee* came in and *demanded the Lien*, and the *Tenant ſhew'd* Deed of *Feoffment with Warranty of the Father of the Vouchee.* The

The *Vouchee ſaid that his Father had nothing, but at his Will, and ſo* the Warranty *commenced by Diſſeiſin*; Judgment if he ſhall be bound to the Warranty. Per Fulth. If it was by way of Action upon this Diſſeiſin, the Warranty which commenced by Diſſeiſin will not bind you; but now it is demanded againſt you as Heir of your Anceſtor, in which Caſe, if you have by Deſcent, you ſhall be bound to the Warranty, and you may *enter into the Warranty, ſaving to yourſelf your Action.* Br. Garranties, pl. 19. cites S. C.——Br. Voucher, pl. 44. cites S. C.

4. He in Reverſion or Tail **may enter into the Warranty,** upon Voucher of Leſſee for Life, ſaving his Action. 18 E. 3. 12.

5. If 2 are vouch'd, **and** at the Sequatur **ſub ſuo Periculo** the one comes, and the other makes Default, **the** Tenant may allege that he who does not come has nothing to render **in Value, and upon this he ſhall have the Warranty wholly againſt him who appears.** 41 E. 3. 3. b.

6. A. brought Writ of Entry Sur Diſſeiſin againſt B. who vouch'd one B. who enter'd into the Warranty, *ſaving to himſelf a Rent iſſuing out of the ſame Land*; and this was allow'd by the Court, and the Voucher was in a Writ of Entry for a Common Recovery to be had. Goldsb. 76. pl. 5. Hill. 30 Eliz. Sherly v. Grateway.

(E. b) Voucher *Lien.* When he comes in, *by what Warranty* he may be bound.

1. **If a Man be** vouch'd as Son and Heir of A. **yet he** may be bound becauſe of his own Deed. 43 E. 3. 3. 11 H. 4. 20. b. 9 H. 6. 50. 10 H. 6. 18. b. D. 12 El. 290. 62. 63. **Contra** 48 E. 3. 28. b.

2. So **upon ſuch Voucher he may be bound** becauſe of Homage Anceſtrel. 43 E. 3. 3.

3. Or **becauſe** of Reverſion. 43 E. 3. 3. 50 E. 3. 25. b.

A Reverſion is cauſe to vouch and to recover in Value. Br. Voucher, pl. 162. cites 10 H. 7. 10. Per Frowick.

4. So **he may be bound becauſe** of Warranty of other Anceſtor. 11 H. 4. 20. b.

5. **A Man** may be vouch'd as of full Age as Heir **to another,** and may be bound as within Age when he comes. 50 E. 3. 25.

6. **If a Man be** vouch'd as Heir to J. S. within Age, and it is pray'd the Parol to demur, **he cannot be bound** by his own Deed, **becauſe by the Special Voucher he has delayed the Demandant.** D. 12 El. 290. 62. 63. * 21 E. 3. 9. b. 48 E. 3. 28. b. 9 H. 6. 50. **Contra** 10 H. 6. 15. b.

* Br. Voucher, pl 62. cites S. C.—Br. Counterple de Voucher, pl 27. cites S. C.

* Fol. 768. ‡ Br. Voucher, pl. 62. cites S. C.

7. But **in this Caſe he may be bound** by the Deed of other Anceſtor * than of him of whom he is ſuppoſed to be Heir. ‡ 21 E. 3. 9. **Curia.** 46 D. 12 El. 290. 62. 63.

——Br. Counterple de Voucher, pl. 27. cites S. C. that he may be bound by the Deed of any of his Anceſtors, as well as by the Deed of J. S.

8. **If a Man will** vouch one by his Name generally, **when he comes in he may be bound to Warranty** by his own Deed. 10 H. 7. 22. b. **Curia.**

9. So **in ſuch Caſe he may be bound to Warranty** by the Deed of his Anceſtor. 10 H. 7. 22. b. **Curia.**

10. If

10. If a Man vouches and ſhews Cauſe of Voucher (where he ought) he cannot bind the Vouchee for other Cauſe, for he cannot vary from this Special Cauſe. 11 H. 4. 21. b.

11. If a Man vouches another, and ſhews a Deed for Cauſe of Warranty, where he ought to ſhew Cauſe, he cannot bind him for Cauſe of other Deed. Contra 30 E. 3. 17. b.

12. If Tenant in Dower vouches the Heir of the Baron for Cauſe of the Reverſion, ſhe cannot bind him to the Warranty for any other Cauſe. 29 E. 3. 41. b.

13. *Dedi* is no Warranty but againſt the Feoffor, and not againſt his Heir. Br. Warrantia Cartæ, pl. 14. cites 39 E. 3. 26. Per Knivet and Thorp.

(E. b. 2) *Failer* of Voucher; *What*; *and the Effect* thereof.

1. PRæcipe quod reddat *againſt B.* who *vouch'd J. and R. who* came and *demanded the Lien*; the *Tenant ſhew'd Deed of J. and of the Father of R. with Warranty*, and would bind them by *Dedi*; the Demandant pray'd Seiſin of the Land, becauſe the Tenant could not bind them; for Dedi does not bind the Heir but only the Party, and therefore he cannot bind J. and R. but only J. And after per Cur. becauſe Failur of Voucher is *peremptory to the Tenant to loſe his Warranty*, which ſhall be greater Miſchief than *in Warrantia Chartæ* (for there it does not go but to abate the Writ, and the Plaintiff may have another Writ, but he who fails of his Voucher cannot vouch again) and therefore J. ſhall warrant; by which J. enter'd into the Warranty, and confeſſed the Action; wherefore the Demandant had Judgment to recover againſt the Tenant, and the Tenant over againſt J. and J. in Miſericordia. Br. Voucher, pl. 84. cites 39 E. 3. 26.

But Brooke ſays that ſome held the *Cauſe* of this Award in the time of H. 8. to be becauſe *the Tenant had Colour to vouch both, notwithſtanding that he could not bind but one of them*; quære of this Conceit, and if this Book be Law. Ibid.——Br. Peremptory, pl. 24. cites S. C.

2. If a Man *vouches 2 jointly*, and *binds them by ſeveral Deeds*, he has fail'd of his Voucher; per Cand. Br. Voucher, pl. 84. cites 39 E. 3. 26.

3. *Leaſe was made for Life by the Heir* of the Baron. The Widow brought Dower, the Tenant vouch'd the Heir, and the *Demandant recover'd againſt the Tenant, and he over in Value againſt the Heir.* Br. Recovery, pl. 3. cites 41 E. 3. 24.

So of Leaſe for Life of the Baron, ſhe ſhall recover againſt the Tenant, and he over in Value; and ſo it ſeems clear, that *Reverſion* is good Cauſe to vouch, and to recover in Value. Br. Ibid.

4. In Formedon the Caſe was, That a Man ſeiſed of certain Land *leaſed* it *for Life*, the *Remainder over in Tail.* The *Tenant for Life* is *impleaded*, and *vouches him in Remainder*, to recover in Value. And it was awarded, that the Tenant ſhall be ouſted of the Lien by vouching him in Remainder; for the Vouchee enter'd, and demanded the Lien, and the Tenant ſhew'd Leaſe to him for Term of Life, the Remainder to the Vouchee; and the Judgment was, That the Tenant ſhall be ouſted of the Lien, and that the Demandant ſhall recover Seiſin of the Land, becauſe the *Tenant had pray'd Aid of the ſame Donor before*, and was ouſted, and this *Voucher of him in Remainder is only in Lieu of Aid-Prayer*; and the Demandant ſhall not be delay'd twice for one and the ſame Cauſe;

and the Caſe adjudged as above, that he has fail'd of his Lien, and there is no Mention there if any Rent be reſerved or not. And ſo ſee that the *Tenure by Service, without Rent*, ſuffices to recover in Value. Br. Voucher, pl. 87. cites 14 H. 6. 25.

(F. b) Voucher; Lier. *Who may be bound* to the Warranty. [*One of the Vouchees only.*]

Br. Voucher, pl. 84 cites S. C. Per Morrice, which Candiſh agreed.

1. IF 2 are vouch'd, **whereof the** one ſhews that he was within Age at the Warranty made, **yet** the other alone may be bound **to the Warranty; for each binds himſelf to warrant the Whole, and the Voucher was good till this was ſhewn.** 39 E. 3. 26.

——Br. Warrantia Chartæ, pl. 14. cites S. C.——Br. Garranties, pl. 98. cites S. C.——Br. Recovery, pl. 39. cites S. C. That it ſhall *not* fall alone upon him of full Age, to make him to render in Value for the Whole; [but it is miſprinted, and ſhould be as in Roll, and ſo is the Year-Book.]

Where a *Man of full Age and an Infant makes Warranty*, yet both ſhall be vouch'd; for it does not appear that the one is an Infant till it be pleaded; but upon this being pleaded, and found, it ſeems that the other ſhall warrant the Whole. Br. Voucher, pl. 52. cites 48 E. 3. 12. Per Belk. & Finch. —Br. Baron & Feme, pl. 24. cites S. C.——Br. Garranties, pl. 24. cites S. C.

Br. Voucher, pl. 84. cites S. C. per Morrice, which Candiſh agreed.

2. If 2 are vouch'd, **and they are** bound **to warranty** becauſe of a Reverſion, **if the** one diſclaims, **yet the Voucher ſhall continue againſt the other.** 39 E. 3. 26.

Br. Voucher, pl 84. cites S. C. Per Candiſh —— Br. Warrantia Cartæ, pl. 14. cites S. C.

3. If 2 are vouch'd, **and when they come,** a Deed is ſhew'd forth, by which it appears that he has Cauſe **of Voucher** againſt one only, **yet he ſhall be bound to the Warranty; for otherwiſe he ſhould loſe his Warranty perpetually, if this ſhould be a Failer of his Voucher.** 39 E. 3. 26. **Adjudged.**

4. Where *two make Feoffment* by Deed, *by Dedi & Conceſſi*, and the *one dies*, the other ſhall warrant the Whole. Br. Garranties, pl. 98. cites 39 E. 3. 26.

(G. b) When he comes in, [*what*] *he ſhall plead after Entry into the Warranty.*

1. WHERE a Fee is demanded, and Vouchee enters **into the Warranty** generally, **yet he may ſay** that he is to warrant only a Fee-Tail, or Eſtate for Life. 43 E. 3. 7. 44 E. 3. 39. **For he enters to** warrant ſuch Eſtate as the Tenant has.

2. So **where a Fee is demanded, and the** Vouchee enters **into the Warranty** ſimply, **yet he may ſay** that the Tenant is but Tenant for Life, and that he warranted only the Eſtate for Life. 40 Aſſ. 37. **Adjudged.**

3. **If a** Manor be in Demand, **and the Tenant vouches another, who** enters generally **into the Warranty, and after the Demandant counts againſt him, he cannot ſay** that he did not warrant all the Manor

nor, but that **the Warranty** was with Exception of a Parcel; **for by his general Entry he is concluded to say so.** 17 E. 3. 62. b. 53. b.

4. [So] **If a Manor be in Demand, and the Tenant vouches another, who comes and demands the Lien, and Tenant says,** that his Anceſtor infeoff'd him of the Manor except a certain Parcel, ſhewing what in certain, with Warranty, **upon which the Vouchee enters into the Warranty, he ſhall not be bound by this Entry to warrant this, which was excepted; for his Entry was, by Intendment, according to the Lien, and ſo ſpecial.** 17 E. 3. 62. a. b.

5. In Formedon the *Tenant vouch'd E.* who enter'd into the Warranty, and *vouch'd D.* and D. came, and *pleaded that T. had recover'd the Land againſt the Tertenant pending the Writ*; Judgment of the Writ. And per Finch, He ſhall have the Plea; but *Quære* if he ſhall have the Plea, *if the Judgment was before he enter'd into the Warranty*; for then the Tertenant in the firſt Voucher might have pleaded it. Br. Voucher, pl. 17. cites 41 E. 3. 10. 11.

(H. b) *Judgment. At what Time* it ſhall be *given* for the Tenant or Demandant. [*In* Writ of *Dower.*]

Fol. 769.

1. **IN Writ of** Dower, **if Tenant vouches, and** Vouchee, upon ſhewing of the Deed of Lier, denies it, **the Demandant ſhall recover immediately.** 17 E. 3. 22. b.

2. **In Writ of Dower, if the** Heir be vouch'd in the ſame County, and he counterpleads **the Voucher,** becauſe he is not vouch'd in Ward, **the Demandant ſhall not have Judgment immediately, but ſhall ſtay till the Counterplea be tried, becauſe, before it be tried, it cannot be known whether the Judgment ſhall be againſt the Tenant or the Heir.** 17 E. 3. 47. b. 70. b. **Adjudged.**

3. But **if the Heir be** vouch'd in a foreign County, **the Demandant ſhall have Judgment immediately againſt the Tenant.** 17 E. 3. 70. b.

4. **In Writ of Dower** by Baron and Feme, **if the** Tenant vouches the Heir of a Stranger and not of the Baron **(as it ſeems is intended)** in Ward of the Tenant who is Demandant, **the Demandants ſhall recover immediately againſt the Tenants, tho' the Baron of the Demandant be Party to the Iſſue.** 22 E. 3. 3.

5. In *Dower* the *Tenant vouch'd the Heir in Ward of E. who* came and *ſaid that he had nothing in the Ward*, and ſo to Iſſue; and the Demandant recover'd immediately. Br. Counterple de garrantie, pl. 18. cites 10 E. 3. 58. and Fitzh. Judgment, 209.

6. Where an *Infant* is *vouch'd* who is *in Ward of the King*, the Feme ſhall recover Dower immediately. Br. Dower, pl. 20. cites 46 E. 3. 19. Per Mombray.

7. If in Dower the *Tenant vouches*, and the *Vouchee counterpleads the Warranty*, the Feme ſhall recover immediately; quod non negatur. Br. Dower, pl. 21. cites 46 E. 3. 25.

Otherwiſe it is in other Action. Br. Dower, pl. 21. cites 46 E. 3. 25.

8. In Dower if the Tenant *vouches the Heir* &c. *who appears*, and they are at *Counterplea of the Lien* &c. *or* if the *Vouchee* after that he is ſummon'd *makes Default*, the Tenant ſhall have Execution immediately againſt the Vouchee, if he has Land in the ſame County. Br. Voucher, pl. 125. cites 34 H. 6. 1.

S. P. Br. Dower, pl. 5. cites 34 H. 6. 11.

(I. b) *In what Caſes* Judgment ſhall be given.

1. IF a Man be vouch'd in Ward, and at the Sequatur **ſub ſuo Periculo** is return'd dead, and the Guardian does not come, **yet the Demandant ſhall not have Seiſin of the Land**; for if the Infant be dead then the Guardian is not now Guardian. 22 E. 3. 20. **adjudged. But Quære.**

(K. b) In what Caſes *Judgment final* ſhall be, and in what not.

1. IF the Tenant vouch and it is counterpleaded, **there he ſhall be put to other Anſwer, and there ſhall not be final Judgment.** 42 E. 3. 17. b.

Br. Peremptory, pl. 11. cites S. C. notwithſtanding that it is upon Demurrer, as appears P. 22 E. 3. 2. **If the Demandant** counterpleads **the Voucher** by the firſt Counterplea of the Statute, **upon which the Parties** demur **whether the Counterplea be good, and it** is adjourn'd to another Term, and then adjudged that the Counterplea is good **the Demandant ſhall recover the Land.** 21 E. 3. 11. —— Br. Voucher, pl. 153. cites S. C. and P. but at the firſt Day the Tenant might have refuſed the Counterplea and vouched de Novo.

Br. Peremptory, pl. 60. cites 40 Aſſ. 2. Contra that it is not Peremptory after Adjournment, but he ſhall plead over in Bar; Quod nota. 3. So **if the Demandant counterpleads the Voucher by the firſt Counterplea of the Statute** in Aſſiſe en Pais, **upon which the Parties demur, and it** is adjourn'd before themſelves to another Place where it is adjudged a good Counterplea, **the Demandant ſhall recover the Land. Contra** 40 Aſſ. 2. **adjudged by Admittance.**

4. But **if the Tenant vouches and** Demandant does not counterplead it, but demurs upon his ſhewing whether he ought to have the Voucher, **there it is peremptory; for the Voucher is given in Lieu of an Anſwer there.** 42 E. 3. 18.

5. **If it be** demurred **upon a Voucher** for not ſhewing of Cauſe of **Voucher,** and adjudged againſt Vouchor, **he ſhall loſe the Land, and ſhall not be put to other Anſwer.** 11 H. 4. 20. b.

* Br. Voucher, pl. 153 † Fol. 770. cites S. C. where it is the ſame Term. 6. But **the Reporter ſays that hoc verum eſt, where it is adjourn'd to another Day, otherwiſe** where it is the ſame Day. 11 H. 4. 20. b. 23. * 11 H. 6. † 48. **But it ſeems there is no Diverſity; for it is not within the Statute; for it is Counterplea to the Common Plea.**

Br. Peremptory, pl. 35. cites S. C. and Proceſs ſhall be awarded againſt the Vouchee. 7. **If the Tenant vouches, and the Demandant** counterpleads it by the Statute, **and** Tenant takes Iſſue with him, **and it is** found againſt the Demandant, **the Judgment ſhall be that the Voucher ſhall ſtand, and it ſhall not be peremptory to the Demandant.** * 34 Aſſ. 6. **adjudged.** Contra if it be *found by Verdict againſt the Tenant* it is Peremptory, and the *Demandant ſhall recover Seiſin of the Land.* Note the Diverſity.—Br. Voucher, 102. cites 36 Aſſ. 6.

* This ſhould be 36 Aſſ. 6.

8. If

8. If the Cauſe of Voucher be traverſed, and paſſes by Verdict againſt the Vouchor, he ſhall loſe the Land. 11 H. 4. 20. b.

9. At the Common Law, if an Iſſue upon the Cauſe of the Lien between the Vouchee and the Tenant was found againſt the Vouchee, it was not Peremptory, but the Judgment ſhould be only that the Voucher ſhould ſtand. 18 E. 3. 40.

10. An Iſſue upon a Lien ſhewn between the Tenant and Vouchee, is peremptory. 9 H. 6. 1. Contra 18 E. 3. 40. b.

11. It is made peremptory, being found againſt the Vouchee, by the Statute of W. 2. cap. 6. 18 E. 3. 40. b.

12. So a Demurrer in ſuch Caſe between them is peremptory. 9 H. 6. 1.

If a Man *vouches, and ſhews Lien,* and the *Vouchee* not denying the Lien, thinking that it is inſufficient, *demurs* in Law *upon the Lien*, which is adjudg'd againſt him, this is peremptory, and the Demandant ſhall recover; quod nota. Br. Peremptory, pl. 77. cites 5 E. 3. and Fitzh. Voucher 249.

So in Formedon the *Tenant vouch'd*, and the *Demandant counterpleaded*, and Keble *demurr'd upon the Counterplea.* Vaviſor [bid them] be well advis'd; for if it be *adjourn'd to another Term, and adjudg'd againſt the Tenant*, it is peremptory; for *Voucher is in Lieu of Bar* for the Tenant. Br. Peremptory, pl. 42. cites 8 H. 7. 7.

13. If the Tenant and Vouchee demur in Law upon the Lien, and it is adjudg'd againſt the Vouchee, the Judgment ſhall be, that the Voucher ſhall ſtand, and that he ſhall enter into the Warranty, and not that the Demandant ſhall recover the Land. 18 E. 3. 41. adjudged. 39 E. 26. b. adjudged.

14. But if it be adjudg'd againſt the Tenant that he has fail'd of his Voucher, the Demandant ſhall recover Seiſin of the Land. 39 E. 3. 26. b.

15. If the Tenant vouches, and Proceſs continues againſt the Vouchee to the Sequatur ſub ſuo periculo, and at the Day of Return the Writ is not return'd, yet if the Vouchee does not appear, the Demandant ſhall have Seiſin of the Land; (for the Vouchee might appear without Return of the Writ) 14 H. 6. 7. b.

Where 3 *Writs* are *return'd, and none of them ſerv'd againſt the Vouchee*, the Demandant ſhall recover againſt the Tenant, and he ſhall have in Value againſt the Vouchee. *Contra where any Writ is ſerv'd againſt him*, and he makes Default at the Sequatur. Br. Voucher, pl. 86. cites 14 H. 6. 7. 19. 20.

16. So it ſhall be, tho' the Vouchee dies before the Return; for the Tenant cannot plead it without Return of the Sheriff. * 14 H. 6. 7. Dubitatur. (But it ſeems it will be erroneous if Judgment be given; for then Judgment ſhall be againſt a dead Perſon) 18 E. 3. 38. b.

* Br. Sequatur, pl. 3. cites 14 H. 6. 7. 20.

17. In Præcipe quod reddat, if the *Tenant vouches*, and the *Demandant counterpleads*, and the *Tenant refuſes it*, this is peremptory, as it is held there. Brooke makes a Quære if he ſhall not be put to anſwer over by the Statute of *Weſt.* 1. *c.* 39. Br. Peremptory, pl. 76. cites 13 E. 3.

But upon Demurrer upon the Aid, View, or Voucher, this is not peremptory; for Error was thereof ſued. Br. Peremptory, pl. 76. cites 13 E. 3. and Fitzh. Voucher 119.

18. *Failer of the Voucher or Lien is peremptory upon the Vouchor*; for he cannot revouch; *but* it *is not* peremptory *in Warrantia Chartæ*, *but* is dilatory, and *ſhall abate the Writ.* Br. Peremptory, pl. 24. cites 39 E. 3. 26.

Br. Voucher, pl. 84. cites S. C.

19. In Præcipe quod reddat the Tenant *vouch'd A.* who was *return'd dead upon the Writ of Summons*, by which the Tenant *vouch'd K. Siſter and Heir of the ſaid A.* and the Demandant *counterpleaded that no ſuch K. Siſter and Heir* &c. and *found* that K. is *Siſter, but not Heir*; *for A. is alive, and the Return falſe.* And the beſt Opinion was, that the Demandant ſhall recover Seiſin of the Land; for the Iſſue is found for him; for it is a good Counterplea; for the Tenant who vouch'd A. cannot

after vouch in another Line; Per Thorp quære. Br. Counterple de Voucher, pl. 56, cites 41 E. 3. 28.

But if it be adjudg'd againſt him upon an Adjournment *in another Term*, this

20. In Formedon, if the *Tenant vouches*, and the *Demandant counterpleads*, and the *Tenant demurs upon it*, he may after *relinquiſh it, and vouch over another in the ſame Term; and* if the Demurrer be *adjudg'd againſt him in the ſame Term, he may vouch another.* Br. Peremptory, pl. 83. cites 11 H. 6. 48.

is peremptory, and he ſhall loſe Seiſin of the Land; Per Martin, quod Curia conceſſit. And this ſeems to be by the Statute of Weſtminſter 1. *c.* 39. And ſo ſee in what Term the Demurrer is peremptory, and in what not; & nota bene. Ibid.

[*But* by] Keble, it is no otherwiſe peremptory than that the Tenant ſhall

21. If the Tenant vouches, and *ſhews Cauſe, which Cauſe is not ſufficient*, and it is *adjourn'd to another Term*, this is peremptory for the Tenant. Contrary in the ſame Term; but otherwiſe it is of Aid Prayer; for this is the Act of the Court. Br. Peremptory, pl. 42. cites 8 H. 7. 7.

be ouſted of his Voucher; for *it is not as a Bar for the Tenant, but in Lieu of Action to have the Voucher.* [*But*] Brian ſaid No; for it is peremptory, and the Tenant after Adjournment and Judgment *cannot vouch another*; for *it is out of the Caſe of the Statute, which wills that he be put over to another Anſwer*; and this is *in the ſame Term*, but *not after Adjournment*; and therefore after Adjournment this is peremptory, as a Trial is, and the Tenant ſhall loſe his Land Ibid.

22. Where the *Tenant vouches in Writ of Right, and recovers* in Value, his Judgment againſt the Vouchee ſhall not be final; Per Fitz. and Shelley J. and per Fitzh. every Recovery upon Departure in Deſpite of the Court, is a Recovery by Default. Br. Recovery, pl. 1. cites 26 H. 8. 8.

(L.b) *Recovery in Value. Againſt whom* it ſhall be recover'd.

In Account, if *two are vouch'd*, and the *one does not come*, or

1. IF two are vouch'd as Heir, **and the** one has by Deſcent in Poſſeſſion, and the other has nothing, **the Demandant ſhall recover** all **againſt him who has.** 12 H. 6. 6. b.

if the one *has nothing*, the other ſhall render in Value for the whole for both. Br. Recovery, pl. 58. cites 41 E. 3. 3. Per Finch.——Br. Garranties, pl. 77. cites 41 E. 3. 30.——Br. Account, pl. 10. cites 41 E. 3. 3. and 9. Per Finch.

2. If two Coparceners are vouch'd, **and** the one makes Default after Default, by which the Demandant has Judgment **againſt the Tenant** for a Moiety, and the Tenant over **againſt her who made Default,** if **the** other Coparcener after loſes, and has not Aſſets, **the Tenant ſhall have in Value againſt her who firſt made Default; ſo that the firſt Judgment ſhall charge her.** 26 E. 3. 49. b. by Greene.

3. In Dower the Tenant *vouch'd S. who vouch'd P. who demanded the Lien*, and *S. ſhew'd Gift of the Anceſtor of P. to him and his Feme in Frankmarriage*; and becauſe he *had not pray'd Aid of his Feme*, and then they two to have vouch'd P. therefore the Demandant recover'd againſt the Tenant, and the Tenant over in Value againſt S. and therefore *P. tenet quit.* Br. Recovery, pl. 50. cites 4 E. 2. and Fitzh. Voucher, 243.

S.P. Br. Recovery, pl. 49. cites 8 E. 2. and Fitzh. Voucher, 236.

4. In Præcipe quod reddat the Tenant *vouch'd A. who* enter'd into the Warranty, and *vouch'd B. who* enter'd and *vouch'd C.* which C. appear'd, and demanded what the ſaid B had to bind him to the Warranty, and *B. ſhew'd Deed*; and upon this the Court aroſe; and the *next Day* they were

were demanded, and *B. made Default*, by which the Demandant recover'd againſt the Tenant, and the Tenant over in Value againſt A. and and A. over againſt B. and that *C. ſhall go quit*, becauſe B. departed, and did not purſue his Warranty. Br. Recovery, pl. 61. cites 6 E. 2. It. Canc.

5. In *Aſſiſe againſt* 2, the *one took the Tenancy, and vouch'd the other*, who enter'd into the Warranty, and pleaded in Bar; and there it is ſaid, that he who vouches ſhall recover in Value againſt him who is vouch'd. Quod non negatur. Br. Voucher, pl. 98. cites 16 Aſſ. 19. Br. Recovery, pl. 16. cites S. C.

6. In *Dower*, if the Tenant *vouches the Heir in Ward of ſeveral*, the one only ſhall not render in Value for the Whole, but it ſhall be apportion'd between them. Br. Recovery, pl. 35. cites 48 E. 3. 5. Br. Extent, pl. 11. cites S. C. that the one came, and the other not, and Proceſs with Extent iſſued againſt the other; for *each* of them *ſhall be contributory* to the Recovery in Value for *his Portion*. So in Statute-Merchant, contra it is of him who is vouch'd, and infeoffs 2.

In Dower the Tenant vouch'd the Heir in Ward of 3, and the Demandant ſaid, that the one had nothing in Ward, and this is found for the Demandant; in this Caſe the Demandant ſhall recover Seiſin for the Portion of the 3d. Br. Peremptory, pl. 75. cites 21 E. 3. 53. and Fitzh. Tit. Voucher, 105. Per Hill.

7. In *Dower* the *Tenant vouch'd the Heir of the Baron*, who *made Default at the Sequatur* ſub ſuo Periculo *ſicut alias*, by which it was awarded that the Demandant ſhould recover againſt the Vouchee, if he has in the ſame County; and if not, againſt the Tenant, and the Tenant over in Value againſt the Vouchee. Quod nota, Judgment given againſt the *Vouchee*, where he *never appear'd, nor never was ſummon'd, nor any Proceſs ſued againſt him, nor could be ſummon'd*, as it ſeems. Br. Sequatur, pl. 2. cites 2 H. 4. 8. Br. Recovery, pl. 20. cites S. C. but adds Quære Legem.—— Br. Voucher, pl. 147. cites S. C. and ſays it was clearly examin'd by the Court, that the Vouchee was Heir to the Baron, of whoſe Dowment ſhe demanded; but adds Quære.——Br. Dower, pl. 28. cites S. C.

8. If *two are vouch'd, and enter into the Warranty*, and after the one makes Default, *and after appears*, the Petit Cape ſhall iſſue of the Whole; for each has warranted the Whole; per Brown, but Coteſmore contra. Br. Recovery, pl. 48. cites 12 H. 6. 6.

9. *But* Coteſmore agreed, that where the *Baſtard and Mulier are vouch'd*, that the Baſtard ſhall render for the Whole. Br. Recovery, pl. 48. cites 12 H. 6. 6.

10. In Formedon the Caſe was, that a Man ſeiſed of certain Land, *leaſed* it *for Life*, the *Remainder over in Tail*. The *Tenant for Life* is impleaded, and *vouches him in Remainder* to recover in Value. And per Cand. if *a Man grants the Reverſion of his Tenant for Life*, and the *Tenant attornes, and is impleaded*, he may *vouch* him in *Reverſion*, and recover in Value; which Juyn Ch. J. denied, unleſs he has *Dedi* in the Leaſe, or Warranty in the Deed of Leaſe. *But* after, by all the Juſtices, *Tenant for Life* may vouch him in *Reverſion*, and recover in Value. Br. Voucher, pl. 87. cites 14 H. 6. 25. Br. Garranties, pl. 39. cites S. C.

11. *Tenant by the Curteſy may vouch the Heir*, but he ſhall not recover in Value; for *it is only in Lieu of an Aid-Prayer*; per Strange. Br. Voucher, pl. 87. cites 14 H. 6. 25. Br. Garranties, pl. 39. cites S. C.

12. *Feme made Warranty*, and after *takes Baron*, and the *Tenant* is impleaded, and *vouches the Baron and Feme, who loſe*; there the Tenant ſhall recover in *Value of the Land of the Feme*, if the Baron be not intitled to be Tenant by the Curteſy. Br. Recovery, pl. 62. cites 11 H. 7. 19. *But* if the Feme *leaſes this Land for Life, and grants other Land with Warranty*, by which ſhe is vouch'd, and loſes, the Tenant who recovers in Value ſhall not have Execution *againſt the Tenant for Life*. Ibid.

13. Where

Br. Voucher, pl. 165. cites S. C.

13. Where *two* are *vouch'd as Heirs to 2 ſeveral Perſons*, who made the Warranty, the Recovery in Value ſhall be againſt both in common, and againſt both ſeverally; but he *ſhall not have in Value of the Whole againſt each.* Quod nota. Br. Recovery, pl. 63. cites 16 H. 7. 12.

14. If 2 Jointenants make a Feoffment in Fee, *with an expreſs Warranty for them and their Heirs, to the Feoffee and his Heirs*, and the one of them dies, the Survivor ſhall not be vouch'd alone, but the Heir alſo of the other, and the Recompence in Value ſhall be equally upon them; but if the one of them have nothing, the other ſhall anſwer the Whole; for it is a Maxim in Law, Quando de una & eadem re duo onerabiles exiſtunt, unus pro inſufficientia alterius de integro onerabitur. 2 Inſt. 276.

15. If a Man have *divers Warranties for the ſame Lands*, he may have *ſeveral Writs* of Warranty of Charters, and Judgment upon them; and ſo is Fitz. N. Br. 135. I. and that may give him *double Remedy*, or not, as the Caſe may be; for if he be after ſued for that Land in an Action, wherein he may vouch but one, then he can never take Advantage againſt the other. Per Hobart Ch. J. Hob. 29. in Caſe of Roll v. Osborn.

16. But *if he be ſued in an Action wherein he cannot vouch, but may require Plea*, and he doth require Plea of them both, and *they both adviſe one Plea*, and *he pleads that, and loſes*, he ſhall have ſeveral Recompence againſt either; *but if they adviſe ſeveral Pleas*, he can have no Recompence but againſt him whoſe Plea he follow'd. Hob. 29. in Caſe of Roll v. Osborn.

17. But if the *Land* be not *recover'd* againſt him by Action, but *by Entry upon an Eigne Title*, then he may ſue *ſeveral Executions* upon the ſeveral Judgments in the Writ of Warrantia Chartæ, againſt either of them, *for full Recompence*; and ſo he ſhall have *double Value for his Loſs*, for either of them warranted the Whole, and neither of them hath Colour to pray Aid, or make Uſe of the Recompence that the other hath yielded for his own Eaſe. Hob. 29. in Caſe of Roll v. Osborn.

18. If *Lands deſcend to an Heir who dies before an actual Entry*, and ſo they *deſcend to another Heir*, thoſe Lands ſhall not be recover'd in Value by a *Warranty made of other Lands by the firſt Heir*, becauſe he had only a *Seiſin in Law*, as it is expreſsly proved. Arg. cites C. L. 239. [a. b.] But this Caſe was denied to be Law per Holt Ch. J. Carth. 128. Paſch. 2 W. & M. in B. R. in Caſe of Kellow v. Rowden.

(L. b. 2) Recovery in Value, againſt whom. *The King*, and How.

1. A Man who *prays Aid of the King in Lieu of Voucher*, ſhall not recover in Value unleſs *he ſhews Deed thereof.* Br. Recovery, pl. 12. cites 24 E. 3. 39.

Br. Aid de Roy, pl. 62. cites S. C.

2. If the *King grants* Land *to me and my Heirs, and that if I am evicted*, or my Heirs, *by Title*, that *he ſhall make in Value* of other Lands, Per Wich and Finch, this *is no Warranty*; but that the King ſhall make in Value if &c. *which ſounds in Covenant*, if it was between common Perſons and not in Warranty of Voucher, and therefore no Cauſe to have Aid of the King in Lieu of Voucher; and yet the Aid was granted of the King; and ſo it ſeems there to be good Cauſe to have in Value againſt the King. Br. Recovery, pl. 32. cites 39 E. 3. 12.

Br. Garranties, pl. 2. cites 9 H. 6.

3. Where a Man *prays Aid of the King by Warranty or Clauſe of Recompenſation* in Lieu of Voucher, he ſhall not recover in Value by Petition, if

if his *Cauſe be not enter'd*; quod nota. And ſee alſo that he ſhall have Petition to recover in Value. Br. Voucher, pl. 6. cites 9 H. 6. 3.

4 —— Br. Aid del Roy pl. 2. cites S. C.——Br. Recovery, pl. 2. cites S. C.

4. In Quare Impedit it was doubted if Words of *Warranty* be *ſufficient to recover in Value againſt the King without* theſe Words (*in Recompenſation.*) Per Babbington quære; for it ſeems that they are. And per Martin, Advowſon with Warranty is good enough. Br. Garranties, pl. 3. cites 9 H. 6. 56.

5. Ld. Coke ſays, that by the Branch in the *Statute de Bigamis* 4 E. 1. cap. 1. which enacts that *where a Feoffment with a Charter thereupon, being made by the King, hath ſo much in it, that another Perſon, by the like Feoffment and like Deed, ſhould be bound to Warranty, the Juſtices ſhall not proceed without the King's Command*; if the King gives Lands with Clauſe of an Expreſs Warranty, yet the Patentee &c. ſhall not have or recover in Value againſt the King, without Special Words that the King ſhall yield Lands in Value upon Eviction &c. And nevertheleſs in that Caſe he ſhall have Aid of the King by the general Purview of this Law; for it is for the Honour of the King that he aid the Patentee with any Records or Evidence that he hath for Maintenance of the Eſtate which he hath granted and warranted to him; but if the King exchange Lands with another, by this Warranty in Law, the King is bound to Warranty, and to yield to Value; and ſo it was adjudged Hill. 6 E. 1. in C. B. rot. 2. William Brewſe's Caſe, Wallia. 2 Inſt. 268, 269.

(L. b. 3.) Recovery in Value. *In what Caſes* it ſhall be. *And How, and by what Perſons*; In Reſpect of Eſtate.

1. THE Demandant in *Quod ei deforceat* ſhall recover in Value; quod nota bene. Br. Recovery, pl. 41. cites 9 E. 3. 22.

2. *Reverſion* and *Rent reſerved upon a Leaſe for Life* is ſufficient Cauſe to recover in Value. Br. Recovery, pl. 26. cites 22 Aſſ. 52.

3. A. *enfeoffs B. with Warranty, and B. recovers* in a Warrantia Chartæ *on a general Count* of the Land, and *afterwards a Rent is recovered againſt him*, and he brings a *Scire facias on the general Judgment* in the Warrantia Chartæ, *to have the Value of the Rent*; and per Thirn, he ſhall not have in Value, ſeeing he never demanded Warranty of Rent; but Finchd. and it ſeems the better Opinion were contra. F. N. B. 135. (E) in the new Notes there (b) cites 31 E. 3. Garranty de Charters 20. and 30 E. 2. 20.

4. In Dower the Tenant *vouch'd B. by his own Deed, who* came into Court and anſwer'd, and *ſaid that he had nothing to render in Value but jointly with his Feme in Tail*, by which the Demandant recover'd her Dower; but the *Tenant could not have in Value, becauſe the Feme ſhall not be ouſted of her Franktenement by any Plea to which ſhe is not Party or Privy.* Br. Recovery, pl. 4. cites 41 E. 3. 24.

5. In Præcipe quod reddat the *Tenant vouch'd*, and *Proceſs continued to the Sequatur*, which was *return'd Tarde*, and the *Vouchee did not come*; by which it was awarded that the Demandant recover againſt the Tenant, and the Tenant in Miſericordia. Br. Recovery, pl. 34. cites 42 E. 3. 13.

Br. Voucher, pl. 123 cites S. C. Brooke ſays, and ſo it ſeems that the Tenant has loſt his Warranty, inaſmuch as the Proceſs never was returned againſt the Vouchee, nor he never was Party by

by Appearance nor otherwiſe, and therefore Judgment over in Value cannot be given.——*So* it is *if* the Proceſs continues till the Sequatur, and *all is return'd Nihil.* Br. Recovery, pl. 56. cites Vet. N. B. Brief de Capias ad Valentiam.——S. P. Br. Recovery, pl. 40. cites 13 E. 3. Fitzh. Judgment, 170.

6. It was agreed that *Warranty implies* in it ſelf *Recovery in Value*, and that he who acknowledges Acquittance ought to acquit the Party in Fact, and this without Words that he ſhall render in Value or acquit. Br. Garrantie, pl. 17. cites 46. E. 3. 28.

7. If a Man *vouches two*, and the *Demandant counterpleads*, and *it is found that the one was ſeiſed, and the other had nothing*, the Tenant ſhall loſe the Moiety of the Land; Per Kirton. But Belk contra, and that the other Warrants the whole, and the Demandant ſhall recover nothing by it; for he had no more Delay by the vouching of the two, than he ſhould have had if he had vouch'd the one only. Br. Counterple de Voucher, pl. 19. cites 48 E. 3. 28.

But if Tenant *for Life vouches him in Remainder*, he ſhall

8. *Tenant for Life* * may vouch *him in Reverſion* and recover in Value, for he holds of him in Reverſion. Br. Recovery, pl. 14. cites 14 H. 6. 25.

not recover in Value; for he does not hold of him, and therefore it is not Reaſon that he ſhall render in Value to him of whom he had nothing before; which ſee there, & nota bene; It ſeems that thoſe Vouchers are *in Lieu of Aid Prayer.* Ibid. —— Br. Voucher, pl. 87. cites S. C.

* S. P. Per Cand. which Juyn Ch J denied, unleſs he has *Dedi* in the Leaſe, or Warranty in the Deed of Leaſe. Br. Voucher, pl. 87. cites S. C.——He cannot vouch and recover in Value, unleſs his Leaſe be by *Dedi & Conceſſi*, or Rent reſerved. Br. Recovery, pl. 18. cites 6 H. 7. 2. Per Huſſey and Fineux.

Br. Voucher, pl. 87. cites S. C. —— S. P. Per Frowike,

9. If Tenant by the *Curteſey* vouches, he ſhall not recover in Value; for he *does not hold of the Heir.* Br. Recovery, pl. 14. cites 14 H. 6. 25.

Brooke ſays Quære if this is not to be underſtood in Quod ei deforceat, it ſeems that it is. Br. Voucher, pl. 162. cites 10 H. 7. 10.

It was agreed, that the Tenant

10. A Man may recover in Value where the Proceſs is ſerv'd, and the *Vouchee makes Default.* Br. Recovery, pl. 40. cites 3 H. 7. 13.

ſhall not have Judgment over in Value againſt the Vouchee, *unleſs ſome of the Writs are ſerv'd.* Br. Sequatur, pl. 3. cites 14 H. 6. 7. & 20.——And Br. Recovery, pl. 56. ſays it ſeems that *where the Vouchee never is return'd, ſummon'd, nor appears*, that the Tenant ſhall not recover in Value againſt him. *Contra upon Summons return'd ſerv'd*, and the Grand Cape alſo.

If in Præcipe quod reddat at the Grand Cape ad Valentiam,

11. *As* where the *Grand Cape* ad Valentiam is *return'd ſerv'd*, and the *Vouchee does not come*, the Demandant ſhall recover againſt the Tenant, and the Tenant over in Value. Br. Recovery, pl. 56. cites Vet. N. B. Brief de Capias ad Valentiam.

the Vouchee make Default, and the *Tenant is eſſoign'd*, this ſhall be adjudg'd but not adjourn'd, and this to give Day, to the Intent that the Demandant ſhall have Judgment againſt the Tenant, and he over in Value; quod nota Per Cur. Br. Recovery, pl. 40. cites 3 H. 7. 13.——*So* if the *Sequatur* be *return'd ſummon'd.* Br. Recovery, pl. 40. cites 13 E. 3. Fitzh. Judgment 170.

If the Tenant vouches, and the *Vouchee makes Default after Default, by which the Tenant loſes by Default of the Vouchee before Appearance*, there Quod ei deforceat lies well; for there he has no Recompence. Br. Voucher, pl. 155. cites F. N. B. 156.——*But* if the Tenant vouches, and the *Vouchee appears, and* after *makes Default*, the *Tenant ſhall not have Quod ei deforceat* there; for the Demandant ſhall recover againſt the Tenant, and he over againſt the Vouchee, upon Appearance of the Vouchee; quod nota. Br. Voucher, pl. 155. cites F. N. B. 156.—— Brooke ſays, *And* ſo it ſeems that the Tenant ſhall not have Judgment to recover againſt the Vouchee, where he does not appear. Quære inde; for contrary Fitzh. Voucher 267. Tempore E. 1. for there it is ſaid that he ſhall recover in Value *upon Default of the Vouchee, if the Proceſs be return'd ſerv'd.* Ibid.

Br. Voucher, pl. 140. cites S. C.

12. In *Formedon* the *Tenant vouch'd*, and the *Sheriff return'd him ſummon'd*, and he *made Default*, by which *Grand Cape iſſued*, and another *new Sheriff return'd* the Vouchee *Nihil.* And Huſſey Ch. J. held, that the Demandant ſhall recover againſt the Tenant, and the Tenant over in

in Value upon the Default, becauſe there was ſeveral Proceſſes. Br. Recovery, pl. 17. cites 4 H. 7. 18. at the End.

13. In Replevin the Defendant *avow'd for Rent in Tail*, and the *Plaintiff ſaid that after the Gift ſuch a one his Anceſtor whoſe Heir* &c. *was ſeis'd of the Land out of which* &c. *diſcharg'd of the Rent, and infeoff'd N. with Warranty in Fee, Que Eſtate he has*; and demanded Judgment, and ſo would rebut of the Rent in Avowry, by Feoffment with Warranty of the Land diſcharg'd &c. And per Kingſmill J. where the *Land* is *diſcharg'd tempore Feoffamenti*, if the *Tenant* be *impleaded* thereof, he *ſhall recover* in Value *for the Charge recover'd againſt him*. Br. Voucher, pl. 88. cites 21 H. 7. 9. S. P. Br. Recovery in Value, pl. 15. cites 21 H. 6. 10.—Br Bar, pl. 48. cites S. C.

14. If Land be *charg'd for the Time by Unity of Poſſeſſion* by *Releaſe* &c. for the Time, *tho'* it be *not* diſcharg'd in Right *for ever by Extinguiſhment of the Tail*, the Warranty is good, and the Tenant ſhall recover in Value for the Charge recover'd againſt him; Per Kingſmill J. and Frowike Ch. J. Br. Voucher, pl. 88. cites 21 H. 7. 9. S. P. Br. Recovery in Value, pl 15. cites 21 H. 6. 10.—— Br. Bar, pl. 48. cites S C.

(L. b. 4) Recovery in Value. *What* thing ſhall be recover'd in Value. *And of what Seiſin.*

1. W*Arranty and Aſſets deſcended* to the Heir, and he *alien'd by Covin*, and after the *Feoffee of his Father* is impleaded, he ſhall vouch the Heir, and *have an Execution againſt the Heir of his own Land* of his Purchaſe by the Covin, but not the firſt Land which he alien'd; quod nota. Br. Recovery, pl. 53. cites 31 E. 1. and Fitzh. Voucher 301.

2. Where the *Father makes Warranty, and dies*, and the *Grandfather dies ſeiſed of other Lands in Fee*, to whom the Son is Heir immediate, this Aſſets ſhall not make the Son to render in Value by the Deed of the Father; for the Father was never ſeiſed, and the Reverſion deſcended from the Grandfather to the Father, who died before the Tenant for Life, and after the Tenant for Life died; this Aſſets ſhall not charge the Son to render in Value; for the Father was never ſeiſed of the Land. Br. Recovery, pl. 13. cites * 24 E. 3. 47. Br. Aſſets, pl. 19. cites S. C.—— S. P. Tho' the Son conveys by the Father. Br. Execution, pl. 143. cites S.C. and Fitzh. Recovery in Value 14.—— *So* if the *Father had the Reverſion, and was never ſeiſed in Poſſeſſion*, and dies, this ſhall not be extended againſt the Son. Ibid.—*So* Execution ſhall be made *of the Rent which the Vouchee has by Reverſion in Tail*, and yet the *Reverſion itſelf* cannot be put in Execution, and there, when the *Vouchee dies*, the Executor is diſcharg'd for ever, and *the Heir in Tail ſhall avoid it*. Ibid. cites 17 E. 3. 11. 12.

* Lat. 66. in Caſe of Saul v. Clark, cites 24 E. 4. 47. S. P. accordingly.

3. *Contra where the Father was ſeis'd, and leas'd for Life and died*, and the *Tenant for Life dies*, the Heir ſhall be bound by the Warranty of his Father, and by this Aſſets; Per Thorp and Wilby J. Br. Recovery, pl. 13. cites 24 E. 3. 47.

4. In Formedon it was agreed, that where the *Tenant pleads Warranty*, and has no Proof of Aſſets, by which the *Demandant recovers*, and after *Aſſets deſcend*, the Tenant ſhall have Scire facias, and recover in Value. Br. Scire facias, pl. 74. cites 11 H. 4. 21. *So* where *Reverſion is deſcended to the Demandant*, and he recovers other Lands by Formedon, and after the *Reverſion falls*, he ſhall have Scire facias to recover in Value. And Brooke ſays, See the Difference of this Scire facias, and the Writ of Debt againſt Executors. 4 H. 6. 4. And per Hank. Such Scire facias ſhall lie upon Voucher, where the *Heir has not Aſſets at the Time*

Time &c. but Aſſets *deſcend* to him *after*, as upon Bar pleaded above. Br. Scire facias, pl. 74. cites 11 H. 4. 21.

Ibid. in the new Notes (a) ſays, See accordant 4 E. 3. Garranty &c.

5. If a Man be *impleaded in Aſſiſe* &c. and he *brings* a Writ of *Warrantia Chartæ*, and *counts that he is impleaded by Aſſiſe* &c. *and that he has loſt* &c. if the Plaintiff recovers his Warranty, he ſhall recover his *Damages*, *and* alſo to have the *Value of the Land* loſt. F. N. B. 135. (H)

29 E 3. Ibid. 30. & Ant. 134. K. Bro. Garranty 31. 16 E. 3. pl. 20. 4 E. 2. pl. 29.——And the Note in Marg. cites 4 E. 2. Gar. Charters 29. That it is but a perſonal Action in the Nature of a Covenant; therefore he ſhall recover Damages, and cites 2 H. 6. 31. where it is holden, that in this Caſe he ſhall recover Damages only. But ſays it ſeems by Br. Warr Chart. 31. that if he hath no Land to be recover'd in Value, that he ſhall not recover Damages tantum, nor more than in Voucher.

Dal. 48. pl. 8. by Dyer, Browne, and Walſhe accordingly; for if he be impleaded by a Stranger, he ſhall never vouch by this Warranty, and *the Nature of ſuch Warranty is only to rebut* againſt him and his Heirs, and not to have Recompence in Value.

6. A *Warranty was only againſt himſelf and his Heirs.* It was held clearly per Cur. that a Warranty of Charters does not lie, unleſs there are *the Words Dedi & Conceſſi in the Deed.* Dy. 221. a. pl. 17. Paſch. 5 Eliz. Anon.

7. An *Advowſon* may be yielded in Value on a Voucher; Per Cur. Hob. 304. Mich. 16 Jac. in Caſe of London v. the Chapter of the Collegiate Church of Southwell.

(M. b) *What Thing* ſhall be in Value. *By Reaſon of others.*

1. IF Water runs thro' Land deliver'd in Value, this paſſes in Execution with the Land. 2 H. 4. 8. b.

Fol. 771.

(N. b) *What* Thing ſhall be in Value *for Collateral Reſpect.*

1. IF Recovery in Value be againſt one that has alien'd his Land by Fraud to ouſt him of it, and takes the Profits, yet it ſhall not be put in Value, becauſe the Frankteneſment is in another Man. 48 E. 3. 33.

2. In Writ of Covenant upon a Warranty made by the Father of the Tenant, by which the Land call'd D. is bound, and now he ſues to have it in Value for the Land recover'd &c. if the Tenant pleads Riens per Diſcent, becauſe his Father infeoff'd him of the Land, and confeſſes himſelf to be Heir, the Plaintiff ſays inaſmuch as he confeſſes himſelf to be Heir and Tenant, he demands Judgment if by the ſaid Feoffment made by Fraud, he ought to be barr'd; and upon this adjudg'd for the Demandant. In Time of E. 1. 65. it ſeems it was but an Execution upon a Recovery in a Warrantia Chartæ.

3. If

3. If a Man gives Land in Fee with Warranty, and binds certain Land ſpecially to warranty, yet the Perſon of the Donor is only bound by it, and not the Land, unleſs that which he had at the Time of the Voucher. 31 E. 1. Voucher 292. Co. Litt. 102. b.

(O. b) What Thing, *in reſpect of the Place where* it is, ſhall be recover'd in Value.

1. IF the Vouchee has not Aſſets in the County where he is ſummon'd, he ſhall render other Land in Value. Contra 29 E. 3. 4.

2. In Præcipe quod reddat, if the *Tenant vouches A.* and *prays that the Vouchee be ſummon'd in the County of B. only*, if the Demandant recovers againſt the Tenant, and the Tenant over in Value, there his *Land in the County of S.* may be put in Execution. Br. Recovery, pl. 51. cites 4 E. 2. and Fitzh. Voucher, 248. Br. Recovery, pl. 60. cites Itin. Not. tempore E. 3.

(P. b) *What Eſtate* ſhall be recover'd in Value.

1. IF a Warranty be made to the Tenant for Life, to him and his Heirs, yet he ſhall recover in Value, upon this Warranty, an Eſtate only for Life; for the Warranty does not enlarge the Eſtate, and the Recovery ought to be according to the Eſtate. 38 E. 3. 14. Br. Recovery, pl. 9. cites S. C. Per Thorp. Quod non negatur.—— Br. Garranties, pl. 26. cites S. C.

2. So if a Warranty be made to Tenant for Life, to him and his Heirs for his Life, he ſhall recover in Value an Eſtate only for his Life, and not in Fee. 38 E. 3. 14.

3. But if a Man be ſeiſed in Fee, and a Warranty is made to him and his Heirs for his Life, he ſhall recover in Value upon this Warranty an Eſtate in Fee; for he has warranted his Eſtate during his Life. 38 E. 3. 14. Br. Recovery, pl. 9. cites S. C.—— Br. Garranties, pl. 26. cites S. C.——Co. Litt. 387. a. S. P.

4. If Tenant in Tail be vouch'd to warranty upon his own Warranty in Fee, and a Recovery is had againſt him, if he has no other Land, this Land in Tail ſhall be recover'd in Value againſt himſelf. (But it ſhall not bind the Iſſue, as it ſeems.) 40 Aſſ. 37. by Fitz-John.

5. The Law will be the ſame, tho' the Reverſion expectant upon the Tail be in the King. 40 Aſſ. 37. by Fitz-John.

6. Where *Tenant for Life* is impleaded, and he *vouches his Leſſor, and loſes*, and the Tenant recovers in Value, he ſhall not recover but an Eſtate for Term of Life, as he loſt; and the Reverſion of the Land, recover'd in Value, remains in the Leſſor. Br. Recovery, pl. 55. cites 19 E. 3.

7. If a Man *leaſes for Life*, and after *grants the Reverſion to a Stranger*, and the Tenant attorns, and after the *Tenant* is impleaded, and *vouches*

the Grantee of the Reverſion, who enters and loſes, and the Tenant recovers over in Value, the Reverſion of the Land recover'd in Value ſhall revert to the Grantee of the Reverſion likewiſe. Quod nota. Br. Recovery, pl. 55. cites 19 E. 3.

Br. Voucher, pl. 55. cites S. C. —— S C cited by Hobart Ch. J. Hob. 26. in Caſe of Roll v. Osborn.

8. If a Man *leaſes for Life*, and *a Stranger releaſes to the Tenant for Life, and obliges himſelf and his Heirs to warrant* the Land, and after *he who releaſes purchaſes the Reverſion*, and the Tenant is impleaded, and vouches him who releaſes, and he enters into the Warranty of his own free Will, the Tenant ſhall not recover in Value but for Term of Life, if *the Deed* be not enter'd, and *if it be enter'd, he ſhall recover Fee-ſimple*; per Finchd. Quod non negatur. And this ſeems to be underſtood, *where he and his Heirs warrant to the Tenant and his Heirs.* Br. Recovery, pl. 8. cites 38 E. 3. 9.

9. If a Man *recovers againſt* him in *Remainder* by Writ of Warranty of Charters, and he in Remainder dies, and after the Tenant for Life dies, the Recoveror ſhall have Execution of this Land in Remainder. Br. Prerogative, pl. 25. cites 15 H. 4. 11.

(Q. b) *At what Time* he ſhall recover in Value.

1. IF Tenant by the Curteſy ſurrenders **to the Heir in Reverſion, and** after the Heir vouches, **he ſhall not recover in Value** during the Life of Tenant by the Curteſy. 1 H. 6. 2.

* [It ſeems it ſhould be thus, viz. the Tenant at full Age of the Vouchee ſhall &c.]

2. If the *Parol demurs by Age of the Vouchee in Cui in Vita*, by which the Demandant *recovers immediately* by the Statute, and the Demandant dies, * the *Tenant at full Age*, the Tenant *ſhall have Re-ſummons* to have Recovery in Value againſt the Vouchee. Br. Recovery, pl. 46. cites 3 E. 2. and Fitzh. Voucher, 210.

Where an *Infant* is *vouch'd in Dower in Ward of the King*, the Feme ſhall recover immediately; per Mombray. Br. Voucher, pl. 34. cites 46 E. 3. 19. ——Br. Dower, pl. 20 cites S. C.——S. P. Br. Recovery, pl. 37. cites 50 E. 3. 35.

3. In Writ of *Dower* the *Tenant vouch'd an Infant in Ward of the King*, and therefore after Procedendo the Demandant recover'd againſt the Tenant, and the Tenant over in Value, and *Ceſſet Executio till the Infant has ſued Livery.* Br. Recovery, pl. 42. cites 5 E. 3. 4. and Fitzh. Voucher, 180.

Br. Voucher, pl. 54. cites S. C.

4. Voucher *to ſave the Tail is for the Advantage of the Iſſue* in Tail, and *not of the Tenant* who vouches; for he ſhall have Judgment to recover in Value immediately, but Ceſſet executio during his Life; for his Iſſue ſhall have Execution, and not he who vouch'd. Br. Counterple de Voucher, pl. 22. cites 38 E. 3. 4.

Br. Voucher, pl. 56. cites S. C.

5. The Tenant *vouch'd*, and after *ſhew'd Lien made pending the Voucher*; and therefore the *Demandant pray'd Seiſin of the Land.* Morrice ſaid, this is for the Vouchee to take Advantage of for extorting the Voucher and not for the Demandant &c. But Knivet contra, and that for this Cauſe he may pray Seiſin of the Land; but after the Vouchee enter'd into the Warranty, and vouch'd over; therefore quære. Br. Counterple de Voucher, pl. 23. cites 38 E. 3. 14.

But per Belk. the Feme ſhall not recover

6. If Baron *diſcontinues the Right of his Feme, and retakes to him and his Feme*, and they are impleaded, and the *Baron makes Default*, and the *Feme is received*, ſhe may vouch and have the firſt Warranty; for the Feme

Feme *is remitted.* Br. Recovery, pl. 5. cites 44 E. 3. 17. Per Thorp for Law.

in Value during the Life of the Baron; quod non negatur by any. But it ſeems that ſhe ſhall have Judgment in Value, but *Ceſſabit Executio during the Life of the Baron.* Ibid.

7. If the *Tenant in Dower leaſes* her Eſtate *to the Heir rendring Rent for her Life*, and the *Heir is impleaded*, he may vouch as Heir, and deraign the firſt Warranty as Heir in the Life of the Tenant in Dower; but he ſhall not have in Value during the Life of the Tenant in Dower. Per Mombray, quod non negatur. Br. Recovery, pl. 6. cites 45 E. 3. 13. But ſee 1 H. 5. which is contra, as it is ſaid, and that he ſhall have in Value immediately. Ibid.

8. In Dower an Infant was vouch'd in Ward of the King, who came and *pleaded in Abatement* of the Voucher, *becauſe the King leaſed the Ward to W. before the Voucher*, ſo he ought to have been vouch'd in Ward of the Leſſee, and therefore ill; and where the Tenant Vouches an Infant as above, the Demandant ſhall recover, and the Tenant over in Value againſt the Infant, but he ſhall not have in Value *till the full Age*; quod non negatur. Br. Voucher, pl. 34. cites 46 E. 3. 19.

Br. Dower, pl. 20. cites S. C.

9. In Dower if the *Vouchee counterpleads the Lien*, the Demandant ſhall recover immediately. Br. Voucher, pl. 35. cites 46 E. 3. 25.

So in Dower if the Tenant vouches

and the Demandant *counterpleads the Lien*, the Demandant ſhall recover immediately againſt the Tenant, and the Tenant ſhall attend to his Recovery in Value till the *Counterplea* be *tried*. Br. Recovery, pl. 37. cites 50 E. 3. 25.

10. In Dower the *Tenant vouch'd* &c. and *Judgment* was given *againſt the Tenant at the Default upon the Sequatur ſicut alias* to recover in Value againſt the Vouchee. Br. Recovery, pl. 25. cites 2 H. 4. 7.

Br. Sequatur, pl. 2. cites 2 H. 4 8.

11. A Man *leaſed* Land *for Term of Life*, and the *Leſſor granted the Reverſion* to another with Warranty, and the *Tenant attorn'd, and after* the Tenant *ſurrenders to* him in *Reverſion*, and after he in *Reverſion is impleaded in the Life of Tenant for Life, and vouch'd the Grantor* to Warranty, *and he* enter'd into the Warranty, and *could not bar the Demandant*, by which he recover'd againſt the Tenant, and the Tenant over in Value againſt his Grantor whom he vouch'd; but the *Execution* in Value *ceaſed during the Life of the Tenant for Life who ſurrender'd.* Br. Voucher, pl. 127. cites 5 H. 5. 9. Per June and Norton.

Br. Recovery, pl. 24. cites S. C. Per June. But Luddington contra. —— If a Man *leaſes for Life* and *Grants the Reverſion* to another *in Fee with Warranty*, and he vouches the Grantor, he ſhall not have Execution in Value living the Tenant

12. *But* if I am impleaded, and being *Tenant for Life make Default after Default*, and he in *Reverſion is received and vouches*, by which Judgment in Value is given, there he in Reverſion who recovers ſhall not have Execution in Value during the Life of Tenant for Life; Per Lud. But *Contrary* by him *after Surrender*; *for in the one Caſe he who recover'd* in Value *was in Poſſeſſion, and in the other* Caſe *not*, and therefore there, by him, he ſhall have Execution in Value immediately in the firſt Caſe, contrary in the ſecond Caſe. Br. Voucher, pl. 127. cites 5 H. 5. 9.

for Life; Per Pigot. Br. Voucher, pl. 80. cites 9 E. 4. 18.

13. In Præcipe quod reddat, if the *Tenant vouches* and the *Demandant recovers*, and the *Tenant over in Value*, there the *Tenant ſhall never have Execution, if the Demandant does not take Execution againſt the Tenant*; for he is at no Loſs. Br. Warrantia Carte, pl. 11. cites 21 H. 6. 41. and 22. H. 6. 22.

So of Recovery *in Warrantia Chartæ*, he ſhall not have Execution, till the firſt,

who recover'd, has Execution againſt the Tenant. Ibid.

(Q. b. 2) Recovery in Value: At what Time. *After a former Recovery* in Value.

1. IN ſome Special Caſes there ſhall be *two Recoveries* in Value upon *one Warrranty*. Co Litt. 393. a.

2. *As* if a *Diſſeiſor gives Lands to the Husband and Wife, and to the Heirs of the Husband*, the *Husband aliens in Fee with Warranty and dies*, the *Wife brings a Cui in Vita*, the *Tenant vouches and recovers in Value*, if *after the Death of the Wife, the Diſſeiſee brings a Præcipe againſt the Alienee*, he ſhall vouch and recover in Value again. Co. Litt. 393. a.

3. *So* if *Land recover'd* in Value be *evicted*, he ſhall vouch again. Arg. Roll. R. 308. in Caſe of Holland v. Lee, cites 30 E. 1. Voucher, fol. 297.

4. *So* if a Man recovers in Value *againſt one Coparcener*, he may vouch both afterwards, becauſe he has not the Effect of the Warranty. Arg. Roll R. 308. Hill. 13 Jac. B. R. in Caſe of Holland v. Lee, cites 23 E. 3. Recovery in Value, 12.

A Man infeoffed with Warranty, brought Writ of Warrantia Chartæ, and *recover'd Pro loco & Tempore*; and after *a Stranger recover'd Rent Charge againſt him out of the Land warranted*; and the Opinion of the Court was, that here the Plaintiff in the Warrantia Chartæ *ſhall have Execution againſt the Warrantor, and yet nothing was warranted but the Land which then was charged*; but the Warranty does not extend to Rent Service. Br. Warrantia Carte, pl. 33. cites P. 31. E. 3. and Itinere Canc. But Brooke ſays, Quære Legem.

5. *So* if a Man *recovers* in a Warrantia Chartæ *Pro Loco & Tempore*, yet he ſhall afterwards vouch, becauſe he *has not the Effect of the Warranty*. Arg. Roll. Rep. 307. Hill. 13 Jac. B. R. in Caſe of Holland v. Lee, cites 26 E. 3. Recovery in Value, 591.

6. *But* where a Man has *once a Recompence in Value*, he ſhall not vouch again. Arg. Roll. R. 308. in Caſe of Holland v. Lee.

Fol. 772.

(R. b) To what Time it ſhall *relate*.

But if a *Man* be *vouch'd*, he

1. HE ſhall have Execution of the Land which the Vouchee had at the Time of the Voucher. 9 H. 4. 1. 18 E. 3. 17.

ſhall not *render in Value but of the Lands which he had at the Time of the Voucher*, and if he have *alien'd* the Lands *before the Voucher*, he ſhall render nothing in Value; and therefore it is Policy to bring his Warrantia Chartæ againſt him when he hath the Land to render in Value. F. N. B. 134. (K)

2. If a Vouchee enters into the Warranty, and dies, by which a Reſummons is ſued againſt the Tenant who revouches the Heir of the firſt Vouchee, he ſhall recover in Value the Land which the firſt Vouchee had the Day of the firſt Voucher. 18 E. 3. 17.

3. If two exchange, and then one aliens, and the other vouches him being impleaded, he ſhall recover in Value the Land given in Exchange, and ſo it ſhall relate before the Recovery. Perkins. Sect. The Feme of the Alienee ſhall not be endow'd.

4. A Man ſhall recover in Value Land which he purchas'd ſince the Warranty created, if he has no other Land. Quære 29 E. 3. 4.

5. A.

5. A. makes a *Leaſe for Life by Dedi*, and *grants over the Reverſion*, yet the Leſſee may vouch A. F. N. B. 134. (H) in the new Notes there (a) cites 48 E. 3. 2. 6 H. 7. 2. 14 H. 6. 25. 48 E. 3. 2. Perk. 26.

6. The Defendant ſhall have in *Value of the Lands* againſt the Vouchee, *which he had at the Time of the Purchaſe of his Warrantia Chartæ*; and therefore it is good Policy to bring his Warrantia Chartæ againſt him before he be ſued, to bind the Lands of the Vouchee which he had at that Time. And upon this Writ and Judgment the Land ſhall be bound. F. N. B. 134. (K)

But if a *Man recovers* his Warranty *by Writ of Warrantia Chartæ*, and hath bounden the Land which the Vouchee had at that Time, *yet if he be afterwards impleaded* for that Land for which he recover'd his Warranty, *he ought to vouch him againſt whom he recover'd* his Warranty, to defend the Land, if he be ſued in any Action wherein he may vouch, otherwiſe he ſhall not have Advantage by Recovery of his Warranty in the Warrantia Chartæ. F. N. B. 134. (K)

7. In a Warrantia Chartæ againſt the Heir, the Defendant pleads *Riens per Deſcent* &c. Upon this the Plaintiff ſhall recover *Pro loco & tempore*. 8 Rep. 134. in Mary Shipley's Caſe.

In this Caſe the Judgment ſhall be enter'd for the Plaintiff without Trial, if he will; for the Warranty is confeſs'd Pro loco & Tempore; for the Trial may be long and chargeable. Noy 149. Thompſon v. Jackſon.——Such Writ may be brought before the Party has Loſs, but has Cauſe of Action, viz. that having a Warranty he *ſues Quia timet* to eſtabliſh the ſame by Judgment to bind the Land of the Warrantor &c. Pro loco & Tempore, which kind of Action is Proviſional only, and not preſently Remedial, by *Scire facias* afterwards. Hob. 217. Per Hobert.——F. N. B. 134 (K)

(R. b. 2) *Warranty.* By Warranty *in Law.* [*Extent thereof.*]

1. IF 2 exchange in Fee, **this Warranty in Law** binds their Heirs **who have the Land exchanged.** 22 E. 3. 3. **Curia.** See (A) pl. 3.

2. It was agreed, that the Vouchee does not warrant but *ſuch Eſtate which the Tenant has* by *general Entry* into the Warranty. Br. Counterple de Voucher, pl. 13. cites 44 E. 3. 38.

3. A Man, *ſeiſed of a Rent-ſeck* iſſuing out of the Manor of Dale, *takes a Wife, and releaſes to the Tertenant, and warrants Tenementa prædicta*, and *dies*; the *Wife brings* a Writ of *Dower of the Rent*; the Tertenant ſhall vouch, for that albeit the Releaſe enured by Way of Extinguiſhment, yet the Warranty extended to it, and by the Warranty of the Land all Rents &c. iſſuing out of the Land, that are ſuſpended or diſcharg'd at the Time of the Warranty created, are warranted alſo. Co. Litt. 366. b.

4. A Man *by Deed* granted and *demiſed* certain *Lands for Years*, which Demiſe imported in itſelf a Covenant in Law; *and* he further *expreſsly covenanted for Enjoyment againſt himſelf, and all others claiming from or under him*; which expreſs Covenant was narrower than his Covenant in Law, and gave Bond for Performance of Covenants. Two Points were reſolv'd. 1ſt. That this Bond extended to the Covenant in Law. 2dly. That by the expreſs Covenant the Covenant in Law was reſtrain'd; by Popham's Opinion, and all the Court. 3dly. It was agreed that the ſame had been reſolv'd before about 14 Eliz. in one **Hammond's Caſe.** And Sir Edward Coke, in the Cloſe of the Caſe ſays, Much Inconvenience would elſe happen againſt the Intention of Parties. The expreſs Covenants in Deeds being different from the Covenants in Law uſually. 4thly. It is there agreed, that it is not ſo in Real Warranties, as in Co-

4 Rep. 80. b. 81. a. Trin. 41 Eliz. S. C. alias Nokes v. James accordingly.—Cro. E. 674. pl. 2. B. R. S. C. ſays the Court being put in mind of Hammond's Caſe in B.

R. wherein it was rul'd, that an expreſs Covenant ſhall take away

venants, but it is at the Party's Choice to take the Warranty in Law, or the expreſs Warranty. Cited by Vaughan Ch. J. Vaugh. 126. 127. Paſch. 21 Car. 2. C. B. in Caſe of Hayes v. Bickerſtaff, as clearly reſolv'd in Nokes's Caſe.

the Covenant in Law; Popham Ch. J. inclin'd to this Opinion, but the other Juſtices did not deliver any Opinion therein, but would have given Judgment upon the Pleading; but the Plaintiff pray'd to diſcontinue his Suit, which was granted.——S. C. cited Arg. 5 Mod. 371.——S. C. cited Lev. 57. Hill. 13 & 14 Car. 2. in B. R. in the Caſe of Brown v. Brown.

(R. b. 3) Recovery in Value. *To what Eſtate it ſhall go.*

1. IF the *Leſſee for Life* the *Remainder over*, or *Tenant in Tail* the *Remainder over*, be impleaded, and *vouches his Leſſor, and recovers* in Value, the Land recover'd in *Value ſhall go to him in the Remainder*. Br. Recovery, pl. 55. cites 19 E. 3. and Vet. N. B. Brief de Formedon.

S. P. Per Montague J. and others,

2. *So* if he had *vouch'd a Stranger*. Br. Recovery, pl. 55. cites 19 E. 3. and Vet. N. B. Brief de Formedon.

That the *Recompence ſhall go* to him in Remainder; but yet in the Caſe of the Ld Touch and Stowell in Chancery, the Law was determined otherwiſe by all the Judges, as it is ſaid. The Reaſon ſeems to be inaſmuch as when he vouches a Stranger, the Recompence ſhall not go to him in Remainder. Contra if he vouches the Donor, or his Heir, who is privy; but now at this Day moſt put it in Ure to bind the Remainder. Br. Recovery, pl. 28. cites 27 H. 8.——Ibid. pl. 33. cites 5 E. 4. 2. That if *my Tenant for Life vouches a Stranger who enters into the Warranty*, and cannot bar the Demandant, by which the *Demandant recovers, and* the *Tenant over in Value*, this Land recover'd in Value *ſhall go to me in Reverſion after the Death of Tenant for Life, and the Reverſion* of the Land recover'd in Value *ſhall be in me in the Life of the Tenant for Life*; as if Releaſe had been made to the Tenant for Life, this ſhall enure to him in Reverſion; which Brooke ſays was taken contra 25 H. 8——Br. Voucher, pl. 111. cites S. C. but ſays it is held contrary at this Day of the Recovery in Value.

But if *Tenant in Tail diſcontinues*, and *retakes another*

3. Where *Tenant in Tail* is *ſeiſed by the Tail*, and *ſuffers a Recovery* with *Judgment in Value*, this *ſhall bind the Tail*; for the *Recompence ſhall go as the Land goes*. Br. Recovery, pl. 19. cites 12 E. 4. 15.

Eſtate, and ſuffers a Recovery upon Voucher, and recovers over in Value, and dies, this Recovery ſhall not bind the Iſſue in Tail; for the Recompence ſhall be only in Lieu of his Eſtate which the Tenant had at the Time of the Recovery, which was other Eſtate, and not the firſt Tail; and therefore the Recompence ſhall not go in Lieu of the firſt Tail, of which the Tenant was not ſeiſed at the Time of the Recovery; and ſo no Bar. Br. Recovery, pl. 19. cites 12 E. 4. 15.

4. It was held, that where *Tenant for Life is*, and *Remainder over in Tail, or for Life*, and *Tenant for Life is impleaded, and vouches* him in *Remainder, who vouches over one who has Title of Formedon*, and ſo the Recovery paſſes by the Voucher, there the Iſſue of him, who has Title of Formedon, may bring his Formedon, and recover againſt the Tenant for Life; for the *Recompence ſuppoſed ſhall not go to the Tenant for Life*, and therefore he may recover; for his Anceſtor *warranted only the Remainder*, and not the Eſtate for Life, and therefore the Tenant for Life may bind him by the Recovery; for he did not warrant to him, and therefore in ſuch Caſe, the ſureſt way is to make the *Tenant for Life pray Aid of him in Remainder, and they to join, and vouch him who has Title of Formedon*, and ſo to paſs the Recovery; for the Recompence ſhall go to both. Br. Recovery, pl. 30. cites 30 H. 8.

So if the *Grantee of the Rent*

5. A *Woman, that hath a Rent-charge in Fee, inter-marries with the Tenant* of the Land; an *Eſtranger releaſes to the Tenant* of the Land *with Warranty*;

Warranty; He ſhall not take Advantage of this Warranty, either by Voucher or Warrantia Chartæ; for the Wife, if her Husband die, or the Heir of the Wife, living the Husband, cannot have an Action for the Rent upon a Title before the Warranty made; for if the Heir of the Wife bring an Aſſiſe of Mortdanceſter, this Action is grounded after the the Warranty, whereunto the Warranty ſhall not extend. Co. Litt. 388. b.

grants it to the Tenant of the Land, *upon Condition, who makes a Feoffment of the Land with Warranty*, this Warranty cannot extend to the Rent, albeit the Feoffment was made of the Land diſcharged of the Rent; for if the Condition be broken, and the Grantor be intituled to an Action, this muſt of neceſſity be grounded after the Warranty made. Co Litt. 389. a.

But in the Caſe above, when the Woman, *Grantee of the Rent, married with the Tenant, who makes a Feoffment in Fee with Warranty, and dies*, in a *Cui in Vita* brought by the Wife, (as by Law ſhe may) the Feoffee ſhall vouch as of Lands diſcharged at the Time of the Warranty made, for that her Title is paramount. Co. Litt. 389. a.—So if *Tenant in Tail of a Rent-Charge purchaſes the Land*, and *makes a Feoffment with Warranty*, if the Iſſue bring a Formedon of the Rent, the Tenant ſhall vouch Cauſa qua ſupra. Co. Litt. 389. a.

But ſome do hold, that a Man ſhall not vouch &c. as of Land diſcharged of a *Rent-Service*. Co. Litt. 389. a.

6. If the *Warranty deſcends on one, and the Land on another, as ſpecial Heir*, viz. by Cuſtom of Burrow-Engliſh or Gavelkind, or Heir on the Part of the Mother, the Heir at Law may either be vouched alone, or the other may be vouch'd with him as Heir to the Land. And it ſeems that if there be a Warranty paramount, they ſhall join in Deraigning it, and the Recompence ſhall go to the ſpecial Heir alone; for he only had the Loſs. Hawk. Co. Litt. 474, 475.

7. *So* if a *Recovery* be had *againſt Tenant in Tail and his Wife*, and *they vouch*, and *have Judgment to recover in Value, and he dies*, his Iſſue only ſhall ſue Execution, tho' the Wife was privy to the Judgment. Hawk. Co. Litt. 475.

8. The Recompence in Value ſhall go *to him that has loſt the Tenancy, and of ſuch Eſtate as he loſt*; ſo that if he loſt an Eſtate Tail, he ſhall have Eſtate in Tail only in Recompence, and not a Fee-ſimple. Agreed by all the Juſtices. Pl. C. 514. b. 515. a. Hill. 20 Eliz. Eare v. Snow.

S. P. Co. Litt. 376. b. and ſo, as ſome have ſaid, a Recovery in Value by a Warranty of the Part of the Mother, ſhall go to the Heir of the Part of the Mother &c.

9. A. levied a *Fine to B. and C. and to the Heirs of B.* and they granted and *render'd to A. and M. his Wife, (not Party to the Writ of Covenant, nor to the Conuſance) and to the Heirs of the Body of A. the Remainder to B. A. alone, without M. ſuffer'd a common Recovery. M. died. A. died without Iſſue.* It was agreed, per tot. Cur. That the Land to be recover'd in Value, by reaſon of this Recovery, cannot go to the Eſtate which is given; for the Eſtate given was to A. and M. and the Heirs of the Body of A. and then the Tenant, againſt whom the Recovery was had, was impleaded as ſole Tenant; in which Caſe the Vouchee, when he comes in, is to warrant a ſole Eſtate, but not another; but now the Land to be recover'd in Value ſhall go to A. alone, and M. ſhall have nothing; ſo as the true Eſtate is not warranted, and ſo not anſwer'd. 4 Le. 93. pl. 192. Mich. 29 Eliz. C. B. Owen v. Morgan.

Mo. 210. pl. 350. Owen's Caſe, S. C. —And. 162. pl. 208. S. C. accordingly; for if Execution had been had, the Feme ſhould have nothing in the Land recover'd in Value, but the Baron only, which cannot be in reſpect of the Eſtate which the Baron and Feme had; for A. alone had not the Franktenement, but A. and M. had Eſtate, which, during their Lives, cannot be divided by any Means ——— 3 Rep. 5. a. b. S. C. cited in the Marquis of Winchester's Caſe, by the Reporter; and that the Recompence recover'd by the Baron only, in this Caſe, cannot enure to B. in the Remainder, which depends upon a joint and undivided Eſtate made to A. and M. and the Jointenancy between the Baron and Feme cannot be ſever'd by the Judgment againſt the Baron.

10. If a Man, *for him and his Heirs, warrants* Land *to one and his Heirs*, this is a General Warranty, inaſmuch as it is not reſtrain'd againſt any

any Perſon in certain. Reſolved, 1 Rep. 1. Paſch. 40 Eliz. in Chancery, by Popham and Anderſon Ch. J. and Gawdy J. Aſſiſtants to the Ld. Keeper, in the Caſe of Ld. Buckhurſt v. Fenner &c.

11. Land was *ſpecially intail'd to A. and his Wife*, the Remainder *to B. in Tail*, the Remainder *to C. in Fee*; and *A. the* Husband *levies a Fine alone to D. in Fee*, and *dies*, *leaving Iſſue*. The *Wife enters*; ſhe is in of her Eſtate in Tail, and *her Entry* alſo *remits B. and C. to their ſeveral Remainders*, *and hath put D. out of his whole Eſtate*. And therefore I am clear of Opinion, that the *Wife*, in that Caſe, *may ſuffer a common Recovery againſt herſelf as Tenant in Tail*, *and vouch the common Vouchee*; *and that ſhall bar the old Remainders of B. and C.* for ſhe cannot be ſaid to be Eins d'autre Eſtate at all, much leſs to them. And yet it is a Rare Caſe, that a Common Recovery againſt the Tenant in Tail ſhall bar the Remainder, and not bar the Intail; for here the Intail, (that is, *the Iſſues of the Intail) were barr'd before by the Fine*; *but* yet it may be truly ſaid that *the Intail is barr'd by the Recovery*; becauſe the Wife was ſeiſed of the whole Intail, which was ſo barr'd, and the Remainders are then depending immediately upon it. *If the Wife*, *after ſuch Common Recovery paſs'd againſt her*, *dies*, *leaving Iſſue by her Husband*, now *D. is to have the Land*, (as hath been ſaid) neither can the Recovery, had againſt her, hurt him; *for as to him ſhe was Eins d'autre Eſtate*, *and therefore the Value cannot come to him*; and if ſhe had come in as a Vouchee, yet it could not have hurt D. For *his Eſtate and hers never* ſtood together, nor *had Dependance the one upon the other*; and he had his Eſtate divided from hers, and by contrary Means, tho' both out of the Root of the Intail; Per Hobart Ch. J. Hob. 259. in Caſe of Duncombe v. Wingfield.

12. Recovery in Value ſhall not go *to a Poſſibility*. See Tit. Recovery Common, (A) pl. 5.

(S. b) *Recovery in Value.* In what manner he ſhall have the Thing recover'd in Value.

Br. Recovery, pl. 26. cites S. C. and that it is ſaid elſewhere, that the Law is the ſame, where the firſt *Leaſe* was upon *Condition*, there the Land recover'd in Value ſhall be without Condition.

1. IF Leſſee for Life, rendring Rent, recovers in Value **for this Land againſt Leſſor**, he ſhall not render any Rent out of this Land ſo recover'd in Value; **becauſe the Rent, which he ought to pay, ſhall be** recoup'd **upon the Recovery in Value.** 22 Aſſ. 52. **by Thorpe.**

(S. b. 2) *Remedy* for Recovery of the Value.

Br. Recovery, pl. 30. cites S. C. —* S. P. Br. General Brief, pl. 13. cites 7 H. 7. 2.

1. WHERE *Tenant in Tail* is *ſeiſed by the Tail*, and *ſuffers a Recovery*, with *Judgment in Value*, this *ſhall bind the Tail*; for the *Recompence ſhall go as the Land tail'd goes*, and he may of this have * *Formedon upon an Et ſic Dedit.* Br. Recovery, pl. 19. cites 12 E. 4. 15.

2. A Man ſhall have a Writ of *Warrantia Chartæ*, *altho' he may vouch in the Action* brought againſt him, and *if he recovers in the Warrantia Chartæ, and afterwards loſes in the Action brought againſt him, in which he vouch'd him againſt whom he recover'd his Warranty*, then *he ſhall have* a Writ which is call'd *Habere fac' ad Valenc'* * &c. preſently, within the Year after the Recovery, and ſhall not ſue forth Scire Facias. F. N. B. 135. (D)

S. C. cited by Hobart Ch. J. Hob. 22 in Caſe of Roll v. Osborn, who ſaid the Reaſon of this is clear; for he ſhall *bind the Land from the Teſte of the Warrantia Chartæ*, (tho' he cannot have Execution until he take Loſs) and *upon the Voucher he ſhall have it but from the Time of the Voucher*, which may be delay'd, and therefore he was of Opinion, that he may bring it even after Voucher, becauſe that Action may be diſcontinued, and fail many ways; and ſo the Warranty of Charters be neceſſary, and this Reaſon is expreſsly given both in 9 E. 2. and by Fitzh. Nat. Br.

* F. N. B. 135. (D) in the new Notes there, (a) ſays that ſo is 16 E. 3. Garranty de Charters, 20. Contra where he *recovers before the Writ brought againſt him*, yet there he ſhall have a Scire Facias; and and cites 19 E. 3. Warranty of Charters, 10.——And it ſeems, if the Defendant does not acknowledge (or confeſs) that he has loſt, he ſhall have only a Scire Facias. Ibid. cites 16 E. 3. ibid. 20 & 29 E. 3. 4. per Tiff. 18 E. 3. 4. 2. 9 E. 2. pl. 2. 45 Ed. 3. 10. Bro. Warranty, 20. 36 E. 3. pl. 11. 9 E. 2. pl. 30. 31 E. 3. pl. 22.

(T. b) Recovery in Value. *How. To what Value.*

1. A Man ſhall recover in Value, according to the Value of the Land at the Warranty made. 19 H. 6. 46. 61. 30 E. 3. 14 b.

2. As if the Land be of greater Value than it was at the Warranty made, by finding of a Mine of * [Lead] or Tinn, he ſhall not render in Value according to that, but as it was at the Warranty made. 19 H. 6. 46. 61.

So if improved *by Building*, or otherwiſe. Br. Voucher, pl. 69. cites

S. C.——S. P. and it was inquired what the Value was at the Time of the Warranty. Br. Recovery, pl. 59. cites 3 E. 3. It. D.

* Orig. is (Eſtan) but in Br. it is (Plumbe.)

3. But in this Caſe, if he enters into the Warranty generally, and not ſhewing the Special Matter, he ſhall recover in Value, according to the Value at the Entry into the Warranty. 19 H. 6. 46. 61. 30 E. 3. 6. 14. b.

If the Tenant be impleaded, and vouches me, and at the Grand Cape ad Valentiam I come, and cannot bar the Demandant, I ſhall *take Iſſue* with the Tenant *of what Value the Land was at the Time of the Warranty*, and ſhall not render more in Value. Br. Voucher, pl. 69. cites 19 H. 6. 45. 46.

4. If a Man grants a Ward which creates a Warranty in Law, if after the Grant other Land deſcends to the Ward, by which he is of much greater Value, yet he ſhall not render in Value according to that, but only according to the Value at the Warranty created, tho' all the Ward and Marriage paſſes at the Warranty created; for it is better'd by the Deſcent after. 30 E. 3. * 4. b.

* This ſhould be 14. b.

5. If a Man recovers in Value upon a Warranty in Law upon an Exchange, he ſhall have in Value according to the Value which he loſt. Co. 4. *Buſtard* 122.

Fol. 773.

If *Parcel only* of the Land exchang'd be recover'd, he ſhall recover only for that Portion. Br. Voucher, pl. 116. cites 13 E. 4. 3. Per Littleton.——S. C. & P. Br. Recovery, pl. 36. That it is the ſame in Partition; and yet if a Man enters into Parcel of the Land exchang'd or divided, this defeats all the Exchange or Partition, ſo that the Party may enter into the whole; for Exchange is intire.

*Cro. E. 902. pl. 6 Mich. 44 & 45 Eliz. B. R. Buſtard v. Coulter, S. C. and Ibid. 917. pl. 9. Hill. 45 Eliz. B. R. S. C. adjudg'd for the Plaintiff; but in neither of thoſe Places does this Point, or the Point at pl. 5. appear.——Mo. 665. pl. 909. S. C. adjudg'd, but S. P. does not appear.——Yelv. 8. S. C. but S. P. does not appear.

6. If Coparceners make Partition, **and then** after Aid any of the Part of one Parcener is recover'd by a Stranger, **the Parcener who loſes it ſhall not have in Value according to the Value which ſhe loſt, but ſhe ſhall have in Value according to her equal Part,** all the Reſidue, whereof they made Partition, being put and valued together, and ſo each ſhall have after an equal Part. Co. 4. * *Buſtard* 122. 46 E. 3. 31. b. 13 E. 4. 3. b.

7. [So] **if two Coparceners make Partition, and after the** one aliens Parcel of her Purparty, and after the other is impleaded, who has Aid of her Siſter, and they loſe, **ſhe who loſes ſhall not have in Value only the Moiety of that which the other has, but according to the Value** of the Moiety of that which ſhe herſelf loſt; **for her Alienation of Part is her own Act.** 1 E. 3. 4. b. **But quære.**

8. If the Vouchee enters into the Warranty, and *takes by Proteſtation the Value of the Land*, the Proteſtation ſhall ſerve him for the Value, tho' the Plea be found againſt him. Co. Litt. 126. a. (z)

9. If there are *new Buildings erected ſince the Warranty made*, and the Warranty is demanded of them, and after the Deed is ſhew'd, the Defendant ſhall not have any Benefit by demurring upon it; but if he will be aided, he muſt *ſhew the ſpecial Matter*, and enter into the Warranty for ſo much as was at the Time of making of the Deed, and not for the Reſidue. Godb. 152. Paſch. 5 Jac. C. B. Ballet v. Ballet.

(T. b. 2) *Remedy where more is recover'd than ought to be.*

1. IF *more Land be put in Execution upon Recovery in Value than ought to be*, there upon this Surmiſe he ſhall have Scire facias. Br. Scire facias, pl. 228. cites 22 E. 3. 1. and Fitzh. Recovery in Value 22.—And ſuch a Scire facias, tit. Brief in Fitzh. the ſame Year, M. 37. 8.

(U. b) Recovery in Value. To what Value. *In reſpect of the Pleading.*

1. IF **the** Thing warranted becomes of greater Value after the Warranty created, and before the Entry into the Warranty, **if the Vouchee** enters generally **into the Warranty without ſhewing the ſpecial Matter, he ſhall render in Value according to the Value** at the Entry into the Warranty. 30 E. 3. 14. b. 19 H. 6. 46. 61.

2. But **in ſuch Caſe**, if the Vouchee demands the Lien, and demurs upon the Cauſe ſhewn, and it is adjudged againſt him, **he ſhall render in Value only according to the Value** at the Warranty created, **becauſe he could not plead the Special Matter of the Value in this Caſe, as** he

he might in the Caſe before, where he entered into the Warranty, and loſt by the Pleading. 30 E. 3. 14. b.

3. If the thing warranted becomes of greater Value after the Entry into the Warranty, the Vouchee ſhall render in Value only according to the Value at the Warranty made, becauſe he could not have pleaded this Special Matter. 30 E. 3. 14. b.

4. In *Præcipe quod reddat* the *Tenant vouch'd*, and the *Demandant recover'd againſt the Tenant, and he over in Value Land extended to 4 l. 9 s. ſaving to the Vouchee that he at another Time might challenge the Extent*, and after *the Vouchee challeng'd the Extent*, and Proceſs iſſued to the *Sheriff* of E. who *return'd Extent to the Value of* 60 *s.* and becauſe the *Tenant* firſt challeng'd this Extent, and after *ceas'd, and did not fully challenge*, therefore it was awarded that the Tenant have in Value according to the Extent, and that the ſame Vouchee rehave the Reſidue of the Land firſt extended; quod nota. And ſo ſee Extent upon Extent. Br. Extent, pl. 3. cites 7 H. 4. 19. Br. Recovery, pl. 1. cites S. C.

(U. b. 2) *Warranty collateral.* [*Bar*]

See (U. b. 3) S. P.

1. If a Man be diſſeiſed, and an Anceſtor collateral of the Diſſeiſee releaſes with Warranty to the Diſſeiſor, and dies, this ſhall bar the Diſſeiſee. 26 Aſſ. 8. 35 H. 6. 63.

So if *Tenant for Life*, the *Remainder over is diſſeiſed*, and *the Anceſtor collateral of* him in Remainder *releaſes to the Diſſeiſor with Warranty, and dies without Iſſue*, and the *Tenant for Life re-enters, or recovers* by Aſſiſe, yet he in Remainder ſhall be barr'd, becauſe his *Right is extinct by the Deſcent of the Warranty before the Entry of the Tenant for Life.* Br. Garranties, pl. 51. cites 44 Aſſ. 35.——*So if* my *Tenant for Life be diſſeiſed*, and my Anceſtor releaſes with Warranty to the Diſſeiſor, and dies, this ſhall be a Bar. Br. Garranties, pl. 13. cites 45 E. 3. 21.

(U. b. 3) Warranty collateral. *Bar.*

1. If Tenant by the Curteſy be, the Reverſion to an Infant, and the Tenant by the Curteſy aliens in Fee with Warranty, and dies, by which the Warranty with Aſſets deſcends upon the Infant in Reverſion, yet this ſhall not bind the Infant, but he may enter and defeat the Warranty, and upon Re-entry may have an Aſſiſe; for his Laches of Entry during the Life of Tenant by the Curteſy, ſhall not hurt him. 28 Aſſ. 28. adjudg'd.

2. If an Infant be diſſeiſed, and a collateral Anceſtor releaſes with Warranty to the Diſſeiſor, and dies, and the Infant brings Aſſiſe againſt the Diſſeiſor, this * collateral Warranty ſhall bar him, becauſe tho' he might have enter'd, and ſo have defeated the Warranty, yet inaſmuch as he has brought his Action, he has given Power to the Diſſeiſor to plead it againſt him. 35 H. 6. 63. * Fol. 774.

3. *Stat. of Glouceſter.* 6 *E.* 4. *cap.* 3. * *If a Man* † *alien a Tenement* *Before the making of this Statute*, when the Heir demanded Inheritance on the Part of his Mother, the Warranty of the Tenant by the Curteſy, whoſe Heir he was, barr'd him of that Inheritance without any Aſſets. This Statute does provide that it ſhall not bar without Aſſets. 2 Inſt. 292.

But *at the Common Law*, if the Heir had been within Age, and his Entry congeable, tho' he had not enter'd in the Life of the Anceſtor, the Warranty bound him not but that he might enter and avoid the Warranty; but if he were driven to his Action, the Warranty had bound him; and ſo it was in Caſe of a Feme Covert. 2 Inſt. 292.

* It

* It is a Rule and Law of Parliament, that regularly Nova conſtitutio futuris formam imponere debet, non præteritis. 2 Inſt. 292.

† This Word (*Alien*) doth properly ſignify a Tranſmutation of Poſſeſſion, but yet a *Releaſe or Confirmation of the Tenant by the Curteſy with Warranty, where no Tranſmutation of Poſſeſſion is*, is within the ſame Miſchief; and therefore is within the Remedy of this Statute; for otherwiſe the Statute ſhould ſerve to little Purpoſe. 2 Inſt. 293.——Co. Litt. 365. b. S. P.

*If the *Heir demands the Heritage of the Part of his Father*, and the *Warranty on the Part of his Mother is pleaded*, this Caſe is not holpen by this Statute, as in the firſt Part of the Inſtitutes it appears; for this Act by this Branch provides only for the Caſe of the Tenant by the Curteſy, and therefore *Tenant for Life or* Tenant *in Dower is not within* the Caſe or Claſſis of *this Act*; but as concerning the Caſe of the Tenant by the Curteſy, which is the Caſe of this Act, this Statute is taken by Equity. 2 Inſt. 293.

*That he * holds by the Law of England, his † Son ſhall not be barr'd by the Deed of his Father, ‡ (from whom no Heritage to him deſcended)*

† This not only *extends* to the Son but *to the Daughter, and* to *any other Heir immediatly*, as here the Example is put, or mediately, as Coſin and Heir, be they never ſo remote. 2 Inſt. 293.

‡ That is to ſay, *from whom no Lands or Tenements in Fee-ſimple, of the yearly Value of the Inheritance of the Part of the Mother doth deſcend to the Heir*; for the Warranty is no Bar without ſuch Aſſets. 2 Inſt. 293.

And *by the Equity of this Statute* the *Warranty of the Tenant in Tail is no Bar* unleſs there be Aſſets in Fee-Simple deſcended. 2 Inſt. 293.

Albeit the Word *Heritage* be general, yet *hath* it *in Conſtruction a ſpecial Signification*; for the Aſſets muſt reſpect the eſſential Quality of the Inheritance, whereof the Heir is to be barr'd, and that is, *that it be a local, Poſſeſſory, and certain* Inheritance, *as Lands, Rents, Commons*, and the like: And therefore * an *Annuity*, that is a Perſonal Inheritance, and lies in Action, *nor any Right of Action of Inheritance is no Heritage* within this Statute, *until* it be *reduced into Poſſeſſion*, Et ſic de ſimilibus. 2 Inſt. 293.

** Co. Litt. 274. b.

* The Intendment of the Makers of this Act is, that the *Warranty of him that held by the Curteſy ſhould not* be a *Bar to the Heirs of his Wife, unleſs he left Aſſets*; and the Makers of the Statute could not put all the Caſes that might happen, but did put the ſtrongeſt Caſes, and by Conſtruction the leſſer ſhall be included, and therefore in all Actions, as the *Writ of Right*, the *Formedon in the Deſcender*; the Writ *of Entry in the Per*, the Writ of Entry *ad communem Legem*, and the like *are within this Statute*. 2. Inſt. 293.——— S. P. For the Actions here put are put only for Examples. Co. Litt. 365. b.

*To demand and recover by * Writ of Mortdanceſtor, of the Seiſin of his Mother, altho' the Deed of his Father doth mention, that he and his Heirs be bound to Warranty.*

It ſhall be no Bar in Mortdanceſtor, Ayel, or Coſinage without Aſſets in Facto & Re, whereas before, Aſſets were only intended in Law. And Dyer ſays this Statute is to be ſtrictly taken; for he takes the Law at this Day to be, that if the Heir does not enter upon the Alienee in the Life of his Father, he ſhall be bound and barr'd of his Entry by the Warranty. D. 148. a. pl. 77. Paſch. 3 & 4 P. & M. in Caſe of Villars v. Beaumont.

If Tenant by the *Curteſy* be *of a Seigniory, and the Tenancy eſcheats unto him*, and after he aliens with Warranty, this ſhall not bind the Iſſue, unleſs Aſſets deſcend; for it is in equal Miſchief. But notwithſtanding this Statute, if *Feme Tenant in Dower had alien'd in Fee with Warranty*, and died, the Warranty had bound the Heir until the Statute 11 H. 7. by which Statute the Heir may enter notwithſtanding ſuch Warranty. Co. Litt. 365. b.

If a *Seigniory of Homage and Fealty* deſcend to the Heir, this *is no Aſſets, but if a Tenancy eſcheats* to the Heir, altho' it were never in the Father, this ſhall be accounted Aſſets, becauſe the Seigniory that came from the Father was the Means to bring it to the Heir, Et ſic de ſimilibus. 2 Inſt. 293.

And if any Heritage deſcend to him of his Father's Side, then he ſhall be barr'd for the Value of the Heritage that is to him deſcended.

By this Act the Warranty of a Tenant by the Curteſy, being pleaded with Aſſets deſcended, is a Bar to the Heir of the Mother; but *if Aſſets* be not then deſcended, but *after* it *deſcends from the ſame Father*, then the *Tenant ſhall have Recovery of the Inheritance of the Mother* by a Writ of Judgment, as this Act appoints: And by the Equity of this Act it is taken, that in a Formedon in the Deſcender, if the *Warranty of Tenant in Tail* be pleaded, where no Aſſets is then deſcended, but *after Aſſets doth deſcend to the Iſſue*, there the Tenant ſhall have a Scire facias to have the Aſſets, and not the Land in Tail; for if he ſhould have the Landin Tail, it was conſider'd, that if the Iſſue alien'd the Aſſets, his Iſſue

And if, in Time after, any Heritage deſcends to him by the ſame Father, then ſhall the Tenant recover againſt him of the Seiſin of his Mother by a Judicial Writ, that ſhall iſſue out of the Rolls of the Juſtices before whom the Plea was pleaded, to reſummon his Warranty, as before hath been done in Caſes where the Warrantor comes into the Court, ſaying, That nothing deſcended from him by whoſe Deed he is vouch'd.

Iſſue might recover the Land tail'd in a Formedon; Wherein is to be obſerved the great Wiſdom of the Sages of the Law in ancient Times, ever ſo to reſolve and give Judgment, Ut ſit finis litium. But in none of the Books that treat of this Matter is expreſſed how the Tenant ſhall demean himſelf in pleading to take Advantage upon this Statute of the Aſſets, which after deſcended. 2 Inſt. 293, 294.——Co. Litt. 366. a. S. P.

And therefore, if in a *Mortdancestor* &c. the *Tenant pleads the Warranty of the Tenant by the Curteſy with Aſſets* (as in ſome of the Books it is ſaid) *or in a Formedon* the Tenant pleads *a lineal Warranty with Aſſets*, and the Demandant takes Iſſue upon the Aſſets, and it is *found that nothing deſcended*, and thereupon the *Demandant recovers*, and *after the Recovery Aſſets deſcend*, the Tenant ſhall never have a Scire facias to take Benefit of this Act; for *he that will take Benefit of this Act muſt* not begin with an Untruth, but muſt *plead the Warranty and confeſs the Title of the Demandant, and pray the Advantage of this Act when Aſſets ſhall deſcend*, and upon this Record when Aſſets deſcend he ſhall have a Scire facias; for our Act ſays, (By a Judicial Writ which ſhall iſſue out of the Rolls of the Juſtices;) And this Expoſition agreeth with the Words of this Act, viz. (To reſummon his Garranty, as before had been done in Caſes where the Warrantee comes into Court, and ſays that nothing deſcended from him, by whoſe Deed he is vouch'd:) For there without Queſtion, after Aſſets ſhall deſcend, a Scire facias ſhall be awarded upon the Record. 2 Inſt. 294.——S. P. And if *Aſſets deſcend but for Part*, he ſhall have a Scire facias for ſo much. Co. Litt. 366. a.

And in like Manner the Iſſue of the Son ſhall recover by Writ of Coſinage, Aiel, and Beſaiel.

Likewiſe in like Manner the Heir of the Wife ſhall not be barr'd of his Action after the Death of his Father and Mother, by the Deed of his Father,

By the firſt Branch the Act provides Remedy againſt the Warranty made by Tenant by the Curteſy after the Death of his Wife; this Branch provides Remedy againſt the Alienation of the Husband with Warranty during the Life of his Wife. Upon theſe Words, ſome have conceived that this Warranty ſhall not bind; albeit Aſſets doth deſcend from the Father, becauſe Aſſets is not mention'd in this Branch, as it is in the former. But theſe Words (Likewiſe and in like Manner) do ſo couple this Branch by Reference to the former, as if in this Caſe Aſſets doth deſcend, *by* the *Warranty and Aſſets, the Heir is barr'd.* 2 Inſt. 294.

If the *Husband makes a Feoffment in Fee of the Wife's Land with Warranty, and hath Iſſue by her*, and they *both die*, in a Writ of Entry ſur Diſſeiſin brought againſt the Feoffee, he vouches the Heir of the Husband, who is alſo the Heir of the Wife, he may upon this Statute devolve the Tenant of the Warranty for that the *Husband left no Aſſets*, and that he hath an Action as Heir to his Mother to recover the Land, and if he ſhould enter into the Warranty, he ſhould foreclose himſelf of his Action, and therefore by the Rule of the Court he enter'd not into the Warranty. 2 Inſt. 294.

*If he demand by Action the * Inheritance of his Mother by a † Writ of Entry, which his Father did alien in the Time of his Mother, ‡ whereof no Fine is levied in the King's Court.*

* Some expound (the Heritage of the Mother) to be the Lands which the Mother has by Deſcent, and that Conſtruction is true; but the Statute, by the Authority of Littleton, extends alſo where the Mother has it by Purchaſe in Fee-Simple; for ſo ſays Littleton himſelf, that this Word (Inheritance) is not only intended where a Man has Lands by Deſcent, but where a Man has a Fee-ſimple by Purchaſe, becauſe his Heirs may inherit him. And albeit it be true that the Statute extends to an Eſtate in Frank-Marriage, acquired by Purchaſe, yet does it extend alſo to all Eſtates in Tail, as well by Deſcent as by Purchaſe; for that Frank-Marriage is put but for an Example. Co. Litt. 383. b.

† That is a *Sur Cui in Vita*, but if the *Lands were entail'd to the Wife*, and after the Statute of Donis of W. 2. the Heir brought a Formedon, the collateral Warranty of the Husband ſhall Bar in that Action. 2 Inſt. 294.

‡ This is to be underſtood whereof *no Fine* is lawfully levied, that is *by the Husband and Wife*, for then her Heir claiming a Fee Simple is barr'd; but a Fine levied by the Husband alone was a Wrong, and at that Time a Diſcontinuance, and therefore ſuch a Fine was not within the Intention of this Act. 2 Inſt. 294.——Co. Litt. 381. b. S. P.

4. If Collateral Warranty *deſcends upon an Infant*, he may *enter in the Life of the Anceſtor, or after*; well enough; per Shard, Stouf, and Birton. Br. Garranties, pl. 48. cites 23 Aſſ. 28.

5. If *Warranty Collateral deſcends upon the Heir within Age, the Entry of whom is lawful, and he enters*, he ſhall not be barr'd by the Warranty; *contra where the Entry is toll'd*, there the Warranty is a Bar; and ſo it ſeems of *Coverture* and Warranty Collateral deſcended. Br. Garranties, pl. 94. cites 32 E. 3.

6. If *Tenant in Tail* be, the *Remainder to E. in Tail*, the Remainder *to C. in Tail*, and the *Tenant in Tail dies without Iſſue*, and E. in the *firſt Remainder makes Feoffment with Warranty*, and *has Iſſue and dies*, and after *the Iſſue dies without Iſſue*, and *C. in the ſecond Remainder be Heir to him*, he ſhall be barr'd by this Warranty tho' *the Iſſue had nothing by Deſcent*; ſo that he was not barrable; per Finch; but Kirton Serjeant contra. Br Garranties, pl. 8. cites 41 E. 3. 7.

7. It was in a Manner agreed, that if a Man *releaſes with Warranty to my Tenant for Life*, the *Reverſion to me and dies*, and *I am Heir to him*, yet I ſhall not be barr'd; for the Reverſion continues in me. Br. Garranties, pl. 13. cites 45 E. 3. 21.

8. It was agreed that Collateral Warranty deſcended *ſhall bind the Right and extinguiſh the Tail and the Right*, ſo that a Man cannot be *remitted* after Collateral Warranty deſcended; for *lineal Warranty and Aſſets* deſcended *is only a Bar to the Tail, but Collateral* Warranty *is an Extinguiſhment* of the Tail; ſo that tho' the Tenant in Tail or his Iſſues enter after this, and die ſeiſed, and his Heir is in by Deſcent, yet he ſhall not be remitted for the Reaſon aboveſaid; for per Newton, if the Aſſets be alien'd or recover'd, the Heir in Tail ſhall reſort to his Formedon, notwithſtanding the lineal Warranty. Contra upon Warranty Collateral. Br. Garranties, pl. 31. cites 19 H 6. 59.

Where a *Man has Entry lawful* and *ſuffers Collateral*

9. If Collateral Warranty deſcends, it *ſhall bind the Right and Entry, and is a Bar in the Action.* Br. Entre Cong. pl. 33. cites 19 H. 6. 59.

Warranty to deſcend upon him, his Title is extinct if he be of full Age; but if he be *within Age at the Time of the Deſcent*, he may Defeat it by Entry within Age or at full Age, but ſhall not defeat it by Aſſiſe; for if it be pleaded againſt him, and he cannot plead Entry to defeat it, he ſhall be bound; Per Priſot Br. Garranties, pl. 4. cites 35 H. 6 63.——*And* it is ſaid elſewhere, that upon Deſcent &c. *where Entry is not lawfull, and collateral Warranty deſcends*, this ſhall bind for ever notwithſtanding Nonage or Coverture; for *Nonage nor Coverture ſhall not ſerve to defeat collateral Warranty, but where his Entry is lawful*; quod nota. Br. Garranties, pl. 4. cites 35 H. 6. 63.——Br. Entre Congeable, pl. 5. cites 35 H. 6. 60. S C.

Rights of Entry are bound by collateral Warranty as well as Rights *of Action.* 2 Salk. 686. Paſch. 4 Annæ, Smith v. Tindal.

But it was doubted if ſuch Warranty ſo deſcended be a ſufficient Bar *in Formedon in Remainder* brought by the Feme, the Reaſon ſeems to be *inaſmuch as Warranty cannot be avoided unleſs by Entry*, and ſhe cannot enter upon a Diſcontinuance, and then it ſeems that this is a Bar notwithſtanding the Coverture. Ibid.

10. In *Treſpaſs*, Collateral Warranty was *pleaded againſt a Feme in Remainder in Tail, who was Covert at the Time of the Deſcent thereof*, and held a good Bar in this Action, by Reaſon that it was made *upon Diſcontinuance*; for this is a ſufficient Bar in Treſpaſs without the Warranty. Br. Garranties, pl. 54. cites 3 H. 7. 9.

S. P. Br. Garranties, pl. 42. cites 21 H. 7. 39. by the Juſtices who ſaid that it is not *ſo clear as the Uſurpation* [ſee pl. 13.] becauſe

11. *Tenant in Tail of an Advowſon in Groſs gave it to W. N. in Fee*, and the *Anceſtor collateral* to the Tenant in Tail *releaſed with Warranty and died without Iſſue*, the *Tenant in Tail died*, the *Church voided*, *W. N. preſented*, and the Iſſue in Tail brought Quare impedit, and the other pleaded the Releaſe with Warranty; and adjudg'd a good Bar, becauſe he *claims Inheritance. Contra* if he had claim'd only for *Term of Years.* Br. Garranties, pl. 36. cites 15 H. 7. 9.

the Uſurper has Fee by the Uſurpation.

12. *Releaſe with Warranty by the Anceſtor Collateral*, is a good Bar in *Waſte*, where the Plaintiff counts *for Term of Life*; but it is no Bar againſt him who claims by *Elegit*, or by *Statute-Merchant*; but if he claims Franktenement, it is a good Bar. Quod nota. Br. Garranties, pl. 36. cites 15 H. 7. 9.

13. *Tenant*

13. *Tenant in Tail of an Advowſon in Groſs*, and *a Stranger preſented by Uſurpation*, the *ſix Months paſs'd*, and the *Uſurper granted the Advowſon to a Stranger in Fee.* The *Tenant in Tail died*, and the *Anceſtor Collateral of the Iſſue in Tail releaſed* to the Grantee *with Warranty, and died without Iſſue.* And the Opinion of all the Juſtices of C. B. was, That the Iſſue in Tail is barr'd, becauſe the *Grantee had Fee at the Time* &c. Br. Garranties, pl. 42. cites 21 H. 7. 39. Br. Taile & Dones, &c. pl. 40. cites S. C.

14. If Tenant in Tail *of Rent grants it* in Fee, and an Anceſtor Collateral releaſes with Warranty, and dies without Iſſue, this is a Bar; per Vaviſor, who ſaid that his Companions were of the ſame Opinion. Br. Garranties, pl. 42. cites 21 H. 7. 39. S. P. becauſe he warrants the Fee-ſimple. Br. Taile & Dones, pl. 40. cites S. C.——*But* if Tenant in Tail of Rent grants it in Fee with Warranty, and dies, *this ſhall not be a Bar, if the Iſſue will diſtrain. Contra if he brings Formedon, and admits the Diſcontinuance*; and this where Aſſets is deſcended with the Warranty. Quod fuit conceſſum. Br. Garranties, pl. 42. cites S. C.——Br. Taile & Dones, pl. 40. cites S. C.

15. If the *Tenant in Tail has Iſſue 2 Sons by diverſe Venters, and diſcontinues*, and *dies*, and *the Anceſtor Collateral of the eldeſt Son releaſes with Warranty*, and *dies without Iſſue*, and *the eldeſt Son dies without Iſſue before any Formedon brought*, the youngeſt Son may recover by Formedon; for he is not Heir to the Warrantor, and his Brother was not barr'd by Judgment. But Quære inde; for it ſeems that the Deſcent of the Collateral Warranty extinguiſhes the Tail; but if the Eldeſt had been barr'd by Judgment, then clearly the Youngeſt is gone alſo. Br. Taile & Dones &c. pl. 33. cites 24 H. 8. If there are *two Brothers of the Half-Blood*, and the *Eldeſt releaſes with Warranty to the Diſſeiſor of the Uncle, and dies without Iſſue*, the *Uncle dies*, the Warranty is removed, and the younger Brother may enter into the Land. Co. Litt. 387. a.

16. In a *Juris Utrum* brought *by a Parſon of a Church*, the *Collateral Warranty of his Anceſtor is no Bar*; for that he demands the Land in the Right of his Church, in his politick Capacity, and the Warranty deſcends on him in his natural Capacity. Co. Litt. 370. a.

17. But ſome have holden, that *if* a *Parſon bring* an *Aſſiſe*, that a Collateral Warranty of his Anceſtor ſhall bind him; and their Reaſon is, for that the Aſſiſe is brought of his Poſſeſſion and Seiſin, and he ſhall recover the mean Profits to his own Uſe; but ſeeing he is ſeiſed of the Freehold, whereof the Aſſiſe is brought *in Jure Eccleſiæ*, which is in another Right than the Warranty, *it ſeems* that it ſhould *not* be *any Bar* in the Aſſiſe. The *like Law* is *of a Biſhop*, Archdeacon, Dean, Maſter of an Hoſpital, *and the like*, of their ſole Poſſeſſions, and of the Prebend, Vicar, and the like. Co. Litt. 370 a. b.

18. If *Huſband and Wife*, *Tenants in ſpecial Tail*, *have Iſſue a Daughter*, and the *Wife dies*, the *Huſband by a 2d Wife hath Iſſue another Daughter*, *and diſcontinues in Fee*, *and dies*, a *Collateral Anceſtor of the Daughters releaſes to the Diſcontinuee with Warranty*, *and dies*; the Warranty deſcends upon both Daughters, yet the Iſſue in Tail ſhall be barr'd of the Whole; for, in Judgment of Law, the intire Warranty deſcended upon both of them. Co. Litt. 373. b.

19. Albeit a Woman may have a Writ of *Dower* to recover her Dower, yet becauſe her Title of Dower cannot be diveſted out of the original Eſſence, a Collateral Warranty of the Anceſtor of the Woman ſhall not bar her. So it is of a Feoffment Cauſa matrimonii prælocuti. Co. Litt. 389. a. (d)

20. A Man had Iſſue 2 Sons, and *deviſed Lands to his youngeſt Son in Tail*, and died, the Eldeſt having Iſſue a Son. The *youngeſt Son alien'd* the Land *in Fee with Warranty*, and went beyond Sea, and there *died without Iſſue*, the *Son of the Eldeſt being within Age.* It was the Opinion of Plowden and Bromley, Sollicitors, and of Manwood and Lovelace, Serjeants, and of Dyer and Catlyn Ch. Juſtices, That the ſame was a Collateral Vaugh. 382. in Caſe of Bole v. Horton, S. C. cited by Vaughan Ch. J. who

ſays, that by the Perſons named it appears to be no judicial Opinion, nor given in any Court; and that the Motive of their Opinion was becauſe the Warranty was collateral, which, he ſays, is no true Reaſon of the binding or not of any Warranty.

Collateral Warranty, and, without Aſſets, was a Bar to the Iſſue of the eldeſt Son, notwithſtanding his Nonage, becauſe his Entry was toll'd. Mo. 96. pl. 239. ſays this was reported to him as 12 or 13 Eliz. one Evans's Caſe.

* For no Surrender or Forfeiture was alleg'd. Trotm. Abr. of S. C. 106.

21. A. infeoff'd W. R. and W. S. of 2 Manors, to the Intent that they ſhould re-grant the ſame to A. and M. whom he intended to marry, and *to the Heirs Male of the Body of A.* which was done accordingly. A. and M. marry, and have *Iſſue B.* A. dies. *B. in the Life of M.* [as] Tenant of the Franktenement, which was intended * *by Diſſeiſin*, Anno 4 H. 8. ſuffer'd a Common Recovery with *ſingle Voucher by Agreement*, to the Intent that the Recoverors ſhould infeoff others to Uſes, and that M. ſhould, for better Aſſurance, releaſe to them with Warranty. *M. releaſed with Warranty* accordingly, and then M. died, and after B. died. And the Queſtion was, Whether this *Collateral Warranty* ſhall bar the Demandant, who was the Iſſue of B. And it was reſolved, That the Eſtate Tail was barr'd by the Warranty; but if the Releaſe by M. had been made after the Death of B. in ſuch Caſe the Iſſue of B. might have avoided the Warranty by the Statute of 11 H. 7. 20. 3 Rep. 58. b. 61. a. b. Mich. 37 & 38 Eliz. C. B. the 3d Reſolution in Lincoln-College's Caſe.

22. If *Tenant in Tail*, being *in of another Eſtate*, ſuffers *a Common Recovery*, and a Collateral Anceſtor of the Tenant in Tail *releaſes with Warranty* to the Recoveror, and after the *Recoveror makes a Feoffment to Uſes*, which are executed by the Statute 27 H. 8. and after the *Collateral Anceſtor dies*. In this Caſe, tho' the Eſtate of the Land be transferr'd en le Poſt, before the Deſcent of the Warranty, yet this Warranty ſhall bind, and the *Terretenants* may take Advantage of it by way of *Rebutter*. 3 Rep. 62. the 4th Reſolution in Lincoln-College Caſe.

Mod. 192. pl. 24. S. C. accordingly. ——Freem. Rep. 162. pl. 179. S. C. argued.—— Ibid. 188. pl. 192 S. C. adjudg'd by 3 Juſtices, (Vaughan being dead,) That the Defendant ſhould take Advantage of this Warranty, by way of Rebutter.

23. *A. was Tenant for Life*, Remainder *in Tail to B. his Son*, Remainder *to the right Heirs of A. who levied a Fine with Warranty to the Uſe of L. and M. in Fee*, and *they by Bargain and Sale convey their Eſtate to the Defendant. B. in A.'s Life-time, before the Warranty attach'd, came of full Age.* Then *A. died.* And the Queſtion was, Whether the Entry of the Son was barr'd by this Collateral Warranty, thus deſcended on him; and 3 Juſtices, abſente North Ch. J. were clear of Opinion that it was, and ſo Judgment was given for the Defendant. And Ellis J. ſaid, that tho' in this Caſe the Warranty did not attach before the Eſtate in the Land was transferr'd, yet 'tis well enough if it attach afterwards. 2 Mod. 14. Hill. 26 & 27 Car. 2. C. B. Williamſon v. Hancock.

24. J. Tenant for *Ninety-nine Years, if he ſo long live, Remainder to Truſtees* during the Life of J. *to preſerve the contingent Remainders*, Remainder *to firſt, ſecond &c. Sons of J.* to be begotten *in Tail*, Remainder *to Heirs Male of the Body of J. Remainder to T.* Brother to J. and to the Heirs Male of his Body; and this Eſtate was created by A. Father to J. and T. *J. having no Iſſue, the Truſtees convey the Freehold to him*, and he levies a Fine, and after ſuffers a Recovery, which was to the Uſe of himſelf and his Heirs, and deviſes the Land to Temple &c. in Truſt for &c. and dies, T. being his Brother and Heir. In this Caſe it ſeem'd to be the Opinion of the Court, that the Remainder of T. was barr'd by the Collateral Warranty deſcended upon him. Skin. 106. Paſch. 35 Car. 2. B. R. Riſley and Temple.

25. 4 &

25. 4 & 5 *Ann. cap.* 16. *S.* 21. Enacts, That *all Warranties made after the first Day of Trinity-Term, by any Tenant for Life, of any Lands, Tenements, or Hereditaments, the same descending or coming to any Person in Reversion or Remainder, should be void. And so of Collateral Warranties by any Ancestor, who has no Estate of Inheritance in the same, they shall be void against the Heir.*

Before this Act, Collateral Warranty of every other Tenant for Life barr'd the Heir in Reversion or Remainder, not entring in the Ancestor's Life; but if he had enter'd for the Forfeiture, and avoided the Estate to which the Warranty was annex'd, the Warranty was avoided also. Hawk. Co. Litt. 461.

Before this Act collateral Warranty was a *Bar both of a State in Fee and Tail, with or without Assets.* Hawk. Co. Litt. 473.

A. B. and C. are *Brothers.* A *Gift is made to A. in Tail*, Remainder *to B. in Tail*, Remainder to *C. in Tail.* A. *discontinues with Warranty.* This is collateral to the Brothers, because the Remainders are their Titles, and to those A. is collateral; and it seems, that *such a Warranty* does still bar the Remainders, because it is *not within this Act*, which speaks only of Warranties made by them who have no Estate of Inheritance in the Land &c. Sed Q. If a Warranty made by the Donor shall be a Bar, inasmuch as tho' it be collateral, and made by an Ancestor who has an Inheritance in the Land, yet the Estate of the Donees doth not depend on the Donor's, but his on their's. Hawk. Co. Litt. 474.

It is a *common Mistake, that all Collateral Warranties are taken away by this Statute*; whereas it only makes void all Warranties by Tenant for Life, and all Collateral Warranties made by any Ancestor, not having an Estate of Inheritance in Possession. So that if A. be Tenant in Tail, Remainder to B. his next Brother, (which is a very common Case, arising almost on every Marriage-Settlement) and A. being in Possession makes a Feoffment, or levies a Fine, with Warranty from him and his Heirs, and dies without Issue, this is a Collateral Warranty, (for B.'s Title is by way of Remainder, to which his elder Brother is collateral) which shall bar B. notwithstanding the Statute, tho' no Assets descend. Et sic de similibus. Rob. of Gav. 125. cap. 6.

26. Tho' a *Collateral Warranty will not give a Right, yet it will bar one*, and when it is barr'd by a Warranty, it is as much as if it were barr'd by the Statute of Limitations. After the *Mise join'd in a Writ of Right*, the Grand Assise is to try whether the Demandant has more mere Right than the Tenant; and in such Case a *Collateral Warranty will neither bar nor make a Right*; *but in all Possessory Actions it is otherwise*, *As* in an Ejectment; for there a Collateral Warranty will make a Title, according to 10 Rep. **Seymour's Case.** And in 16 Ass. 16. a Title was made in an *Assise* under a Collateral Warranty. A Fortiori, it may be done in Ejectment. MS. Rep. Mich. 5 Ann. B. R. Smith v. Tindall.

27. A collateral Warranty will *hinder a Remitter*; [As] if a Man be Tenant for Life, Remainder to his Wife for Life, Remainder to their first Son in Tail, here, if the Husband after the Son comes of Age, makes a Feoffment to another and his Heirs with Warranty, and after that an Estate is granted back to the Husband, and then he dies, this collateral Warranty will hinder a Remitter to the Son. MS. Rep. Mich 5 Ann. B. R. Per Cur. in Case of Smith v. Tindall.

(U. b. 4) Warranty collateral. *What* is.

See (U b. 3) —(W. b.) pl. 3. Bishop's Case, in the Note there.

1. *Every Warranty of the Tenant for Life is collateral to him in Remainder, and* the Warranty *of him in Remainder is collateral to every other Tenant for Life* &c. because it is collateral *to the Title*, tho' it be lineal in Blood; and so of Warranty which is collateral of Blood, this is a Bar also. Br. Formedon, pl. 67. cites Old Nat. Br. 148.

2. If *Tenant in Tail discontinues* the Tail, and *hath Issue, and dies*, and the *Uncle of the Issue releases to the Discontinuee with Warranty* &c. *and dies without Issue*, this is collateral Warranty to the Issue in Tail, because

The *Reason*, wherefore the Warranty of the

Uncle, having no Right to the Land intail'd, ſhall bar the Iſſue in Tail, *is*, for *that the Law preſumes the Uncle would not unnaturally diſherit his lawful Heir, being of his own Blood, of that Right which the Uncle never had*, but came to the Heir by another Mean, *unleſs he would leave him greater Advancement*; Nemo præſumitur alienam poſteritatem ſuæ prætuliſſe. And in this Caſe the Law will admit no Proof againſt that which the Law preſumes. And ſo it is of all other collateral Warranties; for no Man is preſum'd to do any thing againſt Nature. Co Litt. 273. a.

cauſe the Warranty deſcends upon the Iſſue that cannot convey himſelf to the Entail by means of his Uncle. Litt. S. 709.

3. If 3 *Coparceners alien in Fee with Warranty*, each Warranty ſhall be collateral; Per Brian and Fairfax J. but Brooke ſays, Quære inde; for it ſeems to him that the Warranty of the one is collateral to the other two for the Parts of the other two; for they cannot claim their own proper Parts by their Siſter, but as to the Part of her who warrants, it is only lineal to the other Daughters, if ſhe dies without Iſſue; for they may claim the Part of their Siſter, who made the Warranty, by her who made it. Et ſic nota bene. Br. Garranties, pl. 56. cites 4 H. 7. 18.

4. If the *Baron and Feme alien the Land of which ſhe is dowable*, there, to have collateral Warranty, it is good to have the *Warranty of the Feme* againſt her and her Heirs, and then *if ſhe has Iſſue by the Baron*, and ſhe and the Baron die, the Warranty *ſhall be collateral to the Iſſue*, becauſe the Land comes by the Father, and not by the Mother. Br. Garranties, pl. 79. cites 31 H. 8.

5. *Tenant in Tail has Iſſue two Daughters, and dies*, the *eldeſt enters into the whole*, and thereof *makes a Feoffment with Warranty*, and *dies without Iſſue*; this is *collateral to the youngeſt* as to the one Moiety which belong'd to her, *and lineal as to* the Moiety belonging *to the eldeſt*. Litt. S. 710.

6. If there be *Father and 3 Sons*, and *Land is given to the Father for Life*, the Remainder *to the 2d Son in Tail*, Remainder *to the eldeſt and youngeſt Son in* * *Fee*; and afterwards the *2d Son releaſes to the Father, his Heirs, and Aſſigns, all his Right* in the Land, *with Clauſe of Warranty againſt him and his Heirs for ever*; After which the *Father deviſes the Land to a Stranger in Tail*, and *dies*, and then the *2d Son dies without Iſſue*, and then the *youngeſt dies without Iſſue in the Life of the Deviſee*, and then the *eldeſt Son enters upon the Deviſee*. The Court were of Opinion that his Entry was lawful for the whole during his Life, becauſe this Warranty is not collateral to him, for that his Remainder never was diſcontinued. Bendl. 225. pl. 256. Trin. 16 Eliz. Anon.

* In Tail, And. 37. pl. 97. S.C. that this Warranty ſhall not bind the Eldeſt, becauſe he never was out of Poſſeſſion of his Remainder; and that if the Father had made a Feoffment, it ſeems the Eldeſt had not been bound by the Warranty, if the Feoffee was in, and continued Poſſeſſion at the Time of the Warranty made; for the Intereſt of the Eldeſt was not bound by the Warranty at the Time of the making it, nor was this Intereſt warranted, nor was the Warranty during this annex'd to the Lands.

7. A. ſeiſed in Fee, infeoff'd B. in Fee, *to the Uſe of M. his* (A.'s) *Wife, and of the Heirs of A. which he ſhould beget of the Body of M.* Remainder *to the Iſſue of the right Heirs of M.* They have Iſſue. Afterwards A. makes a Feoffment in Fee with Warranty, and dies; M. enters and dies. The Court held that this Warranty was collateral to the ſame Iſſue, becauſe it deſcended upon him in the Life of the Baron. Quære. Bendl. 264. pl. 276. Trin. 17 Eliz. Cadbury's Caſe.

8. *Releaſe* with Warranty *of Tenant by the Curteſy*, or in *Dower*, or *Tenant for Life, to the Diſſeiſor*, was collateral Warranty by the Common Law, and ſhould bind the Heir; but this is to be intended *when there was no Covin* or Colluſion *to make Diſſeiſins*; but after Diſſeiſins made without Covin, there, ſuch Releaſe in Caſe of the Tenant by the Curteſy, or Baron ſeiſed in Right of his Feme before the Statute of Glouceſter, or of the Tenant in Dower or in Jointure before the 11 H. 7. was a Bar, as a Re-

a Releaſe by other Tenant for Life is at this Day. But Releaſe at this Day, by Tenant for Life made to the Diſſeiſor, or any other without Covin, and yet with Intent to bar him in Reverſion, ſhall bar him; for Intention, without Covin and Diſſeiſin, ſhall not avoid the Warranty; As if the Father Tenant for Life, had made Feoffment in Fee with Warranty, and died, this Warranty ſhall bind the Son, tho' it was of Purpoſe to bar him, becauſe there was not any ſuch Diſſeiſin; and therefore ſuch Warranty cannot be avoided by Averment of Covin; and Warranty commencing by Tort cannot be avoided, but Warranty which commences by Diſſeiſin. 5 Rep. 80. a. b. in a Nota of the Reporter in Fitzherbert's Caſe.

(U. b. 5) *Original Intention* of Collateral Warranty.

1. NO *Reaſon* can be given *for a collateral Warranty*; Per Cur. 4 Mod. 211. Paſch. 5 W. & M. in B. R. in Caſe of the Attorney General v. Dr. Lancaſter.

But Holt Ch. J. ſaid, That the true Reaſon of collateral Warranty was the *Security of Purchaſers*, and for their Encouragement; as alſo for the eſtabliſhing and *ſettling the Eſtates of ſuch as were in by Title or Deſcent caſt*; and this was the only Security ſuch Perſons could have at Common Law. And becauſe the Eſtate of ſuch Perſons as are in by Title, are much favour'd in Law, theſe Covenants that were for ſtrengthening of them were favour'd likewiſe. And in thoſe Days there was no Need of a lineal Warranty; but, however, the Force of that is taken away by the Statute of Donis; and Common Recovery is not upon the Suppoſition of Recompence in Value, and never was within the Statute, but always as much out of it as if it were ſo mentioned by expreſs Words. And this, he ſaid, was my Lord Hale's Opinion. 12 Mod. 512. Paſch. 13 W. 3. Anon.

(U. b. 6) Collateral Warranty. *Bar. Of what Eſtates and* what *Heirs.* Gavelkind &c.

1. TReſpaſs upon the Statute of R. 2. by 4. Pigot ſaid that thoſe 4 *are Heirs in Gavelkind*, and that A. Uncle to them had releaſed with Warranty, whoſe Heirs they are; Judgment if Action contrary to the Warranty. And by all the Juſtices it is no Bar; but it was argued that it is no Bar but *againſt the Heir at Common Law*, and not againſt the other younger Sons. Br. Treſpaſs, pl. 363. cites 22 E. 4. 10.

2. Warranty never goes with Borough Engliſh or Gavelkind Land to the ſpecial Heir, nor can it deſcend to one of the Half-blood; and neither Collateral Warranty nor Lineal did ever bind the Heir &c. unleſs it deſcended on him. Hawk. Co. Litt. 487.

Every Warranty doth deſcend upon him that is *Heir* to him that made the Warranty *by the Common Law.* Co. Litt. 376. a.

(U. b. 7) Warranty collateral. *Defeated.*

1. IF Anceſtor collateral releaſes with Warranty, and the *Heir enters in the Life of him who warrants*, the Warranty is gone for ever. Br. Garranties, pl. 71. cites 9 Aſſ. 15.

Contra if the Tenant for Life had enter'd before the Deſcent of the Warranty; for then the Poſſeſſion upon which &c. had been defeated, and ſo the Warranty defeated. Ibid.

2. If *Tenant for Term of Life is diſſeiſed*, and an *Anceſtor collateral of* him in *Reverſion releaſes with Warranty, and dies without Iſſue*, and after the *Tenant for Life enters*, the Reverſion by this is not recontinued, but remains to the Diſſeiſor, by Reaſon of the Warranty which is *deſcended before the Entry of the Tenant for Life*; Per Kirton, quod Finch conceſſit. Br. Garranties, pl. 51. cites 44 Aſſ. 35.

3. It was agreed, that where collateral Warranty is *deſcended upon one within Age*, he may enter within Age to defeat the Warranty, or at full Age, by reaſon of the Nonage before; Quod nota. *But* it ſeems, that if a *Deſcent be meſne between the full Age and the Entry*, that then he cannot enter. Br. Garranties, pl. 62. cites 18 E. 4. 13.

(W. b) *Lineal* Warranty *with Aſſets. Bar*, in what Caſes. *And what is* a lineal Warranty.

Br Aſſets per Deſcent, pl. 31. cites S. C.

1. IT was found by Office, that *King H.* 3. was *ſeiſed* in Fee *of the Manor of C.* and *gave to E. C. in Tail*, and *that E. died without Iſſue*, by which the Land ought to revert to the King, and it was return'd in Chancery; and *M. came, and* not confeſſing the Tail *ſaid that E. the Donee infeoff'd W. her Baron in Fee, with Warranty in Exchange for another Manor which W. gave to E. and his Heirs, and that E. was Anceſtor of King E.* 1. *Grandfather to the King which now is, and ſhew'd how, and that Aſſets deſcended to the ſaid King E.* 1. *by the ſame E. the Feoffee in Fee ſimple*, viz. ſuch Land in the County of S. and demanded Judgment if againſt the Deed with Warranty, and Aſſets deſcended &c. by which the Right of the Reverſion was extinct in King E. 1. Que Eſtate W. M. has; and demanded Judgment if the King ſhall impeach; and Search was made, and found that E. died ſeiſed of the Aſſets which deſcended to E. 1. by which M. had Reſtitution; quod nota. Br. Garranties, pl. 52. cites 45 Aſſ. 6.

2 If *Tenant in Tail of an Advowſon in groſs aliens with Warranty*, and has Iſſue, and dies, and *Aſſets deſcend*, the Iſſue brings *Quare Impedit*, the Warranty and Aſſets is a good Bar; and if the Heir has no Aſſets at the Time &c. but Aſſets deſcend after, the Alienee ſhall have Scire facias to have in Value; Per Mombray, which none denied. Br. Aſſets per Deſcent, pl. 32. cites 43 E. 3. 26.

* As where *A. Tenant in Tail has Iſſue 2 Sons, B.* the eldeſt, *and C.* the youngeſt, and *A. and B. make a Feoffment with Warranty*, and *B. dies*, and then *A. dies*, and *C. brings his Formedon.* The Feoffment of B. with Warranty is pleaded in Bar. Upon Demurrer Judgment is given for C. for it is but a lineal Warranty, and then without Aſſets it is no Bar; for tho' B. died in the Life of A yet the younger Son by Poſſibility might have had the

3. Note, that *lineal Warranty* is no Bar in Formedon * *without Aſſets.* Br. Formedon, pl. 73. cites Old Nat. Brev.

the Land as Heir to him. Hutt. 22. Mich. 16 Jac. Biſhop's Caſe.—By Force of the Stat. of Weſtm 2. Lineal Warranty without Aſſets, is no Bar of an Eſtate Tail, but it is ſtill a Bar to an Eſtate in Fee. Hawk. Co. Litt. 473.

4. But it is a * good Bar with Aſſets *by the Equity of the Statute of Glouc. which* Statute *was made before the Statute W.* 2. of the Tail. Br. Formedon, pl. 73. cites Old Nat. Br.

* *As if Tenant in Tail has Iſſue, and aliens with Warranty, and leaves Aſſets and dies,* the Iſſue cannot recover by Formedon; for the Warranty and Aſſets is a Bar. Br. Taile & Dones &c. pl. 33. cites 24 H. 8.——S. P. Br. Garranties, pl. 28. (bis) cites 38 E. 3. 23.

5. But *collateral Warranty* is a good Bar *without Aſſets*; for this remains at Common Law, notwithſtanding the Statute. Br. Formedon, pl. 73. cites Old Nat. Brev. tit. Formedon.

6. *But* if *Tenant in Tail aliens in Fee with Warranty, and dies, and Aſſets deſcend, and the Heir enters and aliens the Aſſets,* yet he is barr'd for his Life; but when he dies, his Iſſue ſhall not be barr'd; for he ſhall not have the Aſſets. Br. Formedon, pl. 73. cites Old Nat. Brev.

S. P. Br. Taile & Dones &c. pl. 33. cites 24 H. 8.——S. P. Becauſe the lineal Warranty deſcends only to him without Aſſets; for neither the pleading the Warranty without the Aſſets, nor the Aſſets without the Warranty, is any Bar in the Formedon in the Deſcender. Co. Litt. 393. b.

7. *But* if *he who aliens the Aſſets brings Formedon, and is barr'd by the Warranty and Aſſets* pleaded *by Judgment in Court of Record, and dies,* his Iſſue cannot recover the Land by Formedon, becauſe his Father was barr'd by Judgment; Quod nota Diverſity. Br. Formedon, pl. 73. cites 7 H. 6.

S. P. Br. Taile & Dones &c. pl. 33. cites 24 H. 8. but Brooke ſays, Quære inde; for it is contra in the Old Natura Brevium in Formedon in the Deſcender.——S. P. For a Bar in a Formedon in the Deſcender, which is a Writ of the higheſt Nature that an Iſſue in Tail can have, is a good Bar in any other Formedon in the Deſcender, brought afterwards upon the ſame Gift. Co. Litt. 393. b.

8. *But* where a *Man aliens the Land of his Feme with Warranty, which is Fee-ſimple, and dies, and Aſſets deſcend,* and the *Heir aliens the Aſſets, and dies,* his Heir ſhall not have Cui in Vita of the Land alien'd; *for* if a Man be *once barrable of Fee-ſimple,* he and his Heirs ſhall be barr'd thereof for ever. Contra of Tail, by reaſon of the Stat. W. 2. Br. Formedon, pl. 73. cites 7 H. 6.

9. In Avowry *by the Iſſue in Tail for Rent-charge intail'd,* a *Feoffment of the Anceſtor of the Land out of which* &c. *diſcharg'd of the Rent with Warranty and Aſſets deſcended, is no Plea*; for the *Avowant* is not to recover any Rent; for he *is in Poſſeſſion by his Avowry, and ſhall have only Return*; and therefore it is no Bar. Br. Avowry, pl. 79. cites 21 H. 7. 9. 10.

Contra in *Cui in Vita, Formedon, Aſſiſe of Mortdanceſter* &c. where Land or Rent may be recover'd by Judgment. Br. Avowry, pl. 79. cites 21 H. 7. 9. 10.

10. Lineal Warranty *of Tenant in Tail,* if it had not been for the Statute of Glouceſter 6 E. 1. 3. *had no more bound the Right of the Eſtate Tail by the Statute de Donis with Aſſets* deſcending, *than it does without* Aſſets; Per Vaughan Ch. J. Vaugh. 365. Mich. 25 Car. 2. C. B. in Caſe of Bole v. Horton.

See (Y. b) pl. 3.

(X. b) Warranty *lineal with Aſſets. What thing ſhall be Aſſets.*

An *Advowſon* is no Aſſets in Formedon, for it is not valuable; per Keble. But Davers and Vavaſor contra; for it ſhall be valued for *every* 20 *l. per Ann. of the Advowſon at* 20 *s.* Br. Aſſets per Deſcent, pl. 21. cites 5 H. 7. 37.——Cro. E. 359, 360. S. P. cites 12 H. 8. 8. and ſays that other Books are, that it ſhall be valued at 12 d. in the Pound.

1. AN Advowſon **ſhall be Aſſets** in a Formedon, **becauſe it is an Advantage to him to advance his Blood or Friend.** 9 H. 6. 52. b. 57.

2. A Reverſion in Fee expectant upon a Leaſe for Years **upon which** a Rent is reſerv'd, **ſhall be Aſſets.**

3. So **ſuch Reverſion ſhall be Aſſets,** tho' no Rent **be reſerv'd upon the Leaſe.** 16 E. 3. Age 45.

4. A Reverſion in Fee expectant upon an Eſtate for Life, **upon which** a Rent is reſerv'd, **ſhall be Aſſets.** 16 E. 3. Age 45.

5. So **ſuch Reverſion ſhall be Aſſets,** tho' no Rent **be reſerved upon the Leaſe.**

6. If Tenant in Tail leaſes for Life, reſerving a Rent, and dies, the Reverſion and Rent deſcending upon the Iſſue in Tail, **ſhall not be any Aſſets, becauſe it is to be defeated by the Formedon brought by the Iſſue.** 16 E. 3. Age 45.

* Keilw. 104. b. pl. 14. S. P.

7. A *Seigniory in Frankalmoigne* is no Aſſets, becauſe it is not valuable, and therefore not to be extended; and ſo it ſeems of a *Seigniory of* * *Homage and Fealty.* Co. Litt. 374. b.

(Y. b) Warranty lineal, with Aſſets. *What Eſtate* ſhall be Aſſets.

Br. Recovery, pl. 13. cites S. C.—*As* if the *Grandfather be ſeiſed* of Land, and the *Father makes Warranty* to J. N. *of other Land, and dies*, and after *the Grandfather dies ſeiſed*, the Son ſhall not render this Land in Value; for the Father was not ſeiſed of it, and he has it as *immediate Heir to his Grandfather*; per Thorp. Br. Aſſets per Deſcent, pl. 19. cites 24 E. 3. 47.

And where there is Grandfather, Father, and Son, and *the Grandfather leaſes Land for Life*, and the *Father warrants other Land*, the *Grandfather dies*, and the *Father is ſeiſed of the Reverſion, and dies*, the Tenant for Life after dies, the Heir ſhall not render in Value by this Land; for the Father was not ſeiſed of the Land; per Thorp. Quære inde; for Reverſion is good Aſſets, as it is ſaid elſewhere. Br. Aſſets per Deſcent, pl. 19. cites 24 E. 3. 47.——Br. Recovery, pl. 13. cites S. C.——*But if the Father had been ſeiſed, and leaſed for Life, and died in the Life of the Tenant for Life*, this is good Aſſets to bind the Heir. Br. Aſſets per Deſcent, pl. 19. cites 24 E. 3. 47. Per Wilby.——Br. Recovery, pl. 13. cites S. C.

1. AN Eſtate Tail by Deſcent from the ſame Anceſtor, **ſhall not be any Aſſets in Formedon.** 16 E. 3. Age 45.

2. The Heir ſhall not render in Value by Warranty of the Anceſtor, if the Aſſets do not *deſcend by the ſame Anceſtor who made the Deed.* Br. Aſſets per Deſcent, pl. 19.

3. Note, *Aſſets* requiſite to make a lineal Warranty a Bar, muſt have 6 Qualities: 1ſt, It *muſt be* Aſſets (that is) *of equal Value*, or more, *at the Time of the Deſcent*. 2dly, It muſt be of Deſcent, and *not by Purchaſe*

chaſe or Gift. 3dly, It muſt be Aſſets *in Fee-ſimple*, and not in Tail, or for another Man's Life. 4thly, It muſt *deſcend to him as Heir to the ſame Anceſtor* that made the Warranty, as Littleton ſaith. 5thly, It muſt be *of Lands or Tenements*, or *Rents, or Services valuable, or other Profits iſſuing out of Lands or Tenements*, and *not Perſonal Inheritances*, as * Annuities, and the like. 6thly, It muſt be *in State or Intereſt*, and *not in Uſe, or Right of Actions, or* Rights of *Entry*; for they are no Aſſets until they be brought into Poſſeſſion. But if a *Rent in Fee-ſimple, iſſuing out of the Land of the Heir, deſcends unto him*, whereby it is extinct, yet this is Aſſets; and to this Purpoſe hath, in Judgment of Law, a Continuance. Co. Litt. 374. b.

* Kelw. 124. b. pl. 82. Caſus incerti Temporis.

(Z. b) Warranty with Aſſets. *What* ſhall be *Aſſets in Formedon.*

See (X. b)

1. IF Land deſcends **to the Heir, this is Aſſets** before Entry; **for he may enter at his Will.** 43 E. 3. 9. b.

2. But **an Eſtate deſcended,** not of the Value of the Land demanded, **ſhall not be Aſſets.**

3. As **if the** King has Land in Extent for Debt of the Anceſtor, **the Franktenement and Inheritance which is in the Heir ſhall not be Aſſets. Dubitatur** 43 E. 3. 9. b. **(It ſeems that if the** Franktenement and Inheritance **which he has in him, be of the Value of the Land demanded to be ſold, conſidering the Time of the King's Extent, it ſhall be Aſſets, otherwiſe e contra.)**

4. **If** Rent-Charge iſſues out of the Aſſets to the Value of the Land, **this Land ſhall not be Aſſets.** 43 E. 3. 9. b.

5. **The** Land deſcended **ſhall not be Aſſets, but** according to the Value **of the Land** at the Time of the Death of the Anceſtor, **not having Regard to that which they have** built and amended ſince **the Death of the Anceſtor.** 18 E. 2. **Aſſets by Deſcent, 4. by Herle.**

6. **The Land deſcended** ſhall not be any Bar for more Land than the Value of that which is deſcended. 18 E. 3. 51. b. 21 E. 3. 9. b. 22 E. 3. 26. **Adjudged** 18 E. 2. **Aſſets by Deſcent, 4.** Fol. 775.

7. **If** Seigniory deſcends **to the Heir,** and then a Tenancy eſcheats, **this ſhall be Aſſets. 6 H. 4. pl. 1.** It was objected that the Land did not deſcend from the Anceſtor to the Heir, becauſe the Eſcheat came after his Death, and ſo is a Profit accruing to the Heir by reaſon of the Seigniory, and not by reaſon of any Poſſeſſion which was in the Father. But Keble held e contra; for tho' he had not the Land immediately by his Father, yet he had it from him by a Mean; for the Seigniory deſcended from the Father to him, as Heir to the Father the which Seigniory was the Cauſe of the Eſcheat; and in Action againſt him for the Land, he ſhould have his Age, ſo that it came not by his own Act. Kelw. 104. b. pl. 14. Caſus incerti Temporis.

8. **If a** Rent deſcends to the Tenant of the Land, **it ſhall be Aſſets, (tho' it be extinct.)** 19 E. 3. **Aſſets by Deſcent, 5.**

9. **If** Aſſets deſcend, **it** ſhall continue Aſſets, tho' he aliens it before the Action brought. 19 E. 2. **Aſſets by Deſcent,** 3. If *Tenant in Tail diſcontinues*, and dies, and Aſſets deſcend, and *the Iſſue aliens* the Aſſets, and brings Formedon, he ſhall be barr'd. Br. Aſſets per Deſcent, pl. 18. cites 19 H. 6 45, 46. Per Newton.

10. *Aſſets by Tenant in Tail taken in Exchange* ſhall not bind the Heir in Tail, if the Heir does not agree to it, but waives the Poſſeſſion; and yet

yet 'tis otherwiſe of other Land deſcended. Br. Aſſets per Deſcent, pl. 20. cites 14 H. 6. 2.

(A. c) Warranty Lineal. Aſſets in Formedon. What Thing ſhall be Aſſets. *In Reſpect of the Value.*

1. IF a Man demands 3 Carves of Land againſt 3 diverſe Tenants by 3 Præcipes by Form of the Gift made to his Anceſtor, and he has one Carve by deſcent in Fee from this Anceſtor, **it ſeems that he ſhall not be barr'd by all 3 of all the 3 Carves by this Aſſets, but only of the 3d Part of every one of them, upon ſhewing of the Matter to the Court according to the Aſſets which he has in Truth.** 1 E. 3. 9. by Shard.

(A. c. 2) Aſſets in Formedon. *Pleadings.*

1. IN Formedon the Tenant pleaded *Warranty with Aſſets by Deſcent*, and the other pleaded Riens per Deſcent, and ſo to Iſſue, by which the Jury came, and *found that he had by Deſcent and not to the Value*; and Wilby held that he ſhould be barr'd by his falſe Plea; for he might have pleaded that he had *nothing by Deſcent but only ſo much*, and then he ſhould not be barr'd but only of Parcel, but now he ſhall be barr'd of the Whole, by which the Demandant was nonſuited; tamen quære Legem inde. Br. Aſſets per Deſcent, pl. 16. cites 21 E. 3. 28.

2. In Formedon the Tenant pleaded Warranty and Aſſets, and *pray'd that the Parol demur for Nonage of the Plaintiff*; Per Clain, you muſt ſhew where the Aſſets lie; but per Finch, you need not ſhew it till you come *to full Age*, and plead Riens per Deſcent, then *ſhew where the Aſſets lie*; and *the Parol demurr'd* &c. Br. Aſſets per Deſcent, pl. 14. cites 38 E. 3. 24.

3. If *Land be intail'd to a Feme who has Iſſue two Daughters by one Baron, and one Daughter by another Baron*, and the *ſecond Baron aliens the whole*, and *leaves Aſſets to the third Daughter*, and dies, and the *third* Daughter *brings* Formedon, the Tenant ſhall plead in Bar againſt the third Daughter of her Portion, and vouch her of two other Parts. Br. Voucher, pl. 103. cites 40 Aſſ. 37.

S. P. Br. Aſſets per Deſcent, pl. 22. cites 9 H. 7. 15. Per Kingſmill and Grevil.

4. In Formedon or *Debt* againſt the Heir where Aſſets by Deſcent is in Iſſue, he need not to *ſhew how the Aſſets are, nor what, but Aſſets at ſuch a Place*; Per Cur. Br. Aſſets per Deſcent, pl. 2. cites 3 H. 6. 3.

5. In Formedon, if the Tenant plead Warranty and Aſſets, the Demandant may *reply that after the Deſcent J. N. has recover'd the Aſſets by elder Title.* Br. Aſſets per Deſcent, pl. 25. cites 1 E. 5. 3.

(A. c. 3) Re-

(A. c. 3) *Rebutter, what* it is.

1. REbouter is a French Word, and is in Latin Repellere, to repel, or bar, that *is*, in the Underſtanding of the Common Law, *the Action of the Heir by the Warranty of his Anceſtor*; and this is call'd to rebut or repel. Co. Litt. 365. a.

2. A Rebutter is where a Man *grants Land* [which he has] to the Uſe of *himſelf, and the Iſſue of his Body to another in Fee with Warranty*, and the *Donee leaſes out the Land to a 3d Perſon for Years*, the *Heir of the Donor impleads the Tenant* alleging the Land was entail'd to him; the *Donee comes in, and by* Virtue of *the Warranty* made by the Donor *repels the Heir*, becauſe tho' the Land was entail'd to him, yet he is Heir to the Warrantor likewiſe. Heath's Max. 74.

3. *So* if I *grant to the Tenant to hold Abſque Impetitione Vaſti, and afterwards implead him for Waſte* made, he may debar me of this Action by ſhewing my Grant; which is likewiſe a Rebutter. Heath's Max. 74. cites Bro. Abr. Tit. Bar. 23. 25. Nov. Lib. Intr. verbo Rebutter. Co. 1 Inſt. 365. a. 6 H. 7. 4.

(B. c) Rebutter. *How* it may be. *Without ſhewing Deed of Aſſignment.*

1. IN Aſſiſe the Tenant may plead the Releaſe of the Anceſtor of the Plaintiff with Warranty to J. S. then Tenant **of the Land**, his Heirs and Aſſigns, and that after J. S. died and W. S. enter'd as Heir, Que Eſtate he has, **and ſo rebut the Plaintiff without ſhewing any Deed of Aſſignment, or ſhewing how he comes to the Land.** 26 Aſſ. 8.

2. The Aſſignee of him who takes Land *in Exchange*, may rebut by the Exchange without Deed; for the *Exchange is a Warranty in Law*, but he cannot vouch. Br. Deputy, pl. 13. cites 3 E. 3. and Fitzh. Formedon, 44.

3. In Aſſiſe the *Tenant rebutted by the Warranty of the Anceſtor of the Plaintiff, whoſe Heir* &c. and was not ſuffer'd without ſhewing Deed of Aſſignment, no more than he can vouch as Aſſignee. Br. Garranties, pl. 47. cites 22 Aſſ. 88.

But he may rebut *by Que Eſtate* without ſhewing how he has his Eſtate.

Ibid. cites 42 E. 3. 19.—Where Aſſignee rebuts by the firſt Deed, and ſhews it and [the Deed of] him whoſe Eſtate he has, there, he *need not ſhew how he has his Eſtate.* Br. Voucher, pl. 5. cites 3 H. 6. 21.

(C. c) Rebutter. * *Who may be rebutted,* [† *and who may rebut.*]

* See (E c)
† See (D. c)

1. HE who might be vouch'd if a Stranger had brought the Action may be **rebutted**, if himſelf be Plaintiff, **becauſe he then cannot be vouch'd.** 18 E. 3. 52. b.

2. If Feoffee with Warranty to him and his Heirs and Aſſigns aſſigns over, and the Feoffor and his Heir brings an Action, **the Aſſignee may rebut them, becauſe he cannot vouch them being Demandants.** 18 E. 3. 52. b. 22 Aſſ. 88. **Admitted** 26 Aſſ. 8. 39.

3. So **the** Aſſignee of the Aſſignee **may rebut him.** 38 E. 3. 21. b. **Adjudged.** 26 Aſſ. 8. 39.

4. If Feoffee, with Warranty to him and his Heirs and Aſſigns, be diſſeiſed, and the Diſſeiſee releaſes to the Diſſeiſor, **the** Diſſeiſor may rebut the firſt Feoffor **by this Warranty; for he is an** Aſſignee **by the Releaſe.** 26 Aſſ. 39.

Fol. 776.

5. [So] **If Feoffee, with Warranty to him, his Heirs, and** Aſſigns, **be diſſeiſed,** Diſſeiſor may rebut the Feoffor. 26 Aſſ. 8. **will prove this; for the** Que Eſtate **implies as much. Contra** 26 Aſſ. 39.

6. [So] **If a Feoffment with Warranty be made to another,** and his Heirs or Succeſſors, **he** who has the Eſtate of the Feoffee **may rebut the Feoffor and his Heirs.** 28 Aſſ. 18. **per Curiam.**

7. [And] **The** Aſſignee of the Aſſignee **may rebut by Force of ſuch Warranty. Contra** 24 E. 3. 32. **Adjudged.**

8. If Feoffee, with Warranty to him his Heirs and Aſſigns, aliens in Fee, and retakes Eſtate to him and his Feme, **they may rebut the Heir of the firſt Feoffor.** 26 E. 3. 56. b. **Curia.**

9. Formedon of a *Gift to W. and M. his Feme.* The *Tenant pleaded a Feoffment of R. Grandfather of the Donee, to W.* and M. his Feme, by a ſtrange Name, *in Fee with Warranty*, whoſe Heir the Demandant is, and the Feme died, and the Baron ſurvived, Que Eſtate he has, and demanded Judgment ſi Actio againſt the Deed of his Anceſtor, whoſe Heir he is. The *Demandant ſaid, that R. is the ſame Perſon who was Donor, and W. and M. are the Donees*, Judgment. Et non allocatur, becauſe the *Tenant relied upon the Warranty* by the Demandant's demanding Judgment, becauſe he *convey'd by Que Eſtate, and did not ſhew How*, & non allocatur, becauſe it is *by way of Rebutter*, which every *Stranger* may do if he has the Deed, but e contra by way of Voucher; wherefore the Demandant ſaid, that it was not the Deed of his Anceſtor. Br. Formedon, pl. 16. cites 42 E. 3. 19.

10. If a *Feme, Heir of a Diſſeiſor, infeoffs me with Warranty, and marries with the Diſſeiſee*, if after the Diſſeiſee brings a Præcipe againſt me, I ſhall rebut him, in reſpect of the Warranty of his Wife, and yet he demands the Land in another's Right. Co. Litt. 365. b.

(D. c) Rebutter. *What Perſon may rebut.*

Every *Stranger who has the Deed* may rebut, but cannot vouch.

1. A Stranger to the Warranty and Eſtate **ſhall not rebut by Force of the Warranty.** 20 H. 6. 19. b.

Br. Formedon, pl. 10. cites 42 E. 3. 19.

If a Man makes a *Feoffment* with Warranty *to the Feoffee his Heirs and Aſſigns*, and the *Feoffee leaſes to R. for Life*, the *Remainder over in Fee*; in Aſſiſe againſt the *Tenant for Life he ſhall rebut the Feoffor* by this Warranty.

2. But **if a** Feoffee with Warranty leaſes to another for Life, **the** Leſſee **may well rebut.** 20 H. 6. 19. 28 Aſſ. 18.

Br. Voucher, pl. 130. cites 11 Aſſ. 3.

If *a Man*, at this Day, be *infeoff'd with Warranty to him his Heirs and Aſſigns*, and he *makes a Gift in Tail*, the *Remainder in Fee*, the *Donee makes a Feoffment in Fee*,

3. **If a** Feoffee, with Warranty to him and his Heirs, aliens in Fee, **the** Aſſignee **may rebut the Feoffor, tho' he cannot vouch.** 18 E. 3. 29. b.

Fee, that *Feoffee ſhall not vouch as Aſſignee*; becauſe no Man ſhall vouch as Aſſignee, but he that comes in Privity of Eſtate; but he muſt vouch his Feoffor, and he to vouch as Aſſignee, but ſuch an Aſſignee may rebut. Co. Litt. 385. a.

4. If Feoffee with Warranty takes Baron, has Iſſue, and dies, **the Baron**, Tenant by the Curteſy, **may rebut the Heir of the Feoffor by Force of this Warranty.** 36 Aſſ. 9.

5. If a Villein purchaſes Land with Warranty to him and his Aſſigns, **and the Lord enters**, the Lord, **who is in** En le Poſt, **may rebut the Feoffor and his Heirs. Contra** 18 E. 3. 29. b. The Lord may rebut, but cannot vouch. Br. Voucher, pl. 132. cites 22 Aſſ. 37.——S. C. cited Vaugh. 391. in Caſe of Bole v. Horton.

6. [So] **If a Villein purchaſes Land**, with a Collateral Warranty to him and his Aſſigns, and the Warranty deſcends upon the Heir **of him who created the Warranty, and after** the Lord enters, **he ſhall rebut the Heir by this Warranty, tho' he comes in En le Poſt, inaſmuch as the Villein might have done it.** 22 Aſſ. 37. **Curia.** Br. Choſe en Action, pl 8. cites S. C.—— Br. Garranties, pl. 45. cites S. C.

——Br. Voucher, pl. 132. cites S. C.——S. C. cited by Vaughan Ch. J. Vaugh. 391. in Caſe of Bole v. Horton.

7. If Feoffee with Warranty forfeits the Land, **by which it eſcheats to the Lord, (that is to ſay, by Attainder)** the Lord by Eſcheat **may rebut the Feoffor and his Heirs, tho' he be in En le Poſt. Contra** 18 E. 3. 29. b.

8. If a collateral Warranty be made to a Villein and his Aſſigns **upon a Purchaſe of the Villein, and the** Lord enters **into the Land** before the Warranty deſcends upon the Heir **who is to be bound by this collateral Warranty, and after it deſcends upon him, the Lord ſhall not rebut him by this Warranty, becauſe he is in** En le Poſt before the Warranty deſcended **upon the Heir.** 22 Aſſ. * 22. **Co.** 3. *Lincoln College* 62. So if Collateral Warranty be made *to a Baſtard and his Heirs*, and living the Anceſtor, the *Baſtard dies without Iſſue*, and the *Lord by Eſcheat enters*, and then the Anceſtor dies, this Warranty ſhall not bind 3 Rep. 62. a. b. Mich. 37 & 38 Eliz. C. B. in Lincoln College's Caſe, cites 29 Aſſ. 34. But ſays there is a great Diverſity between thoſe Caſes of Villein and Baſtard, and where one comes to the Land by Limitation of an Uſe, or by Common Recovery, for there he comes to it by the Limitation and Act of the Party; and therefore he that has a Reverſion by Limitation of an Uſe, or by Common Recovery, tho' he be in En en le Poſt in both Caſes, yet he ſhall take Benefit of a Condition, as Aſſignee, within the Statute 32 H. 8. cap. 34. But when the Lord of the Villein enters, he comes to the Land in reſpect of a Title Paramount, viz. in reſpect of the Villeinage, and the Lord by Eſcheat, in reſpect of the Seigniory, which was a Title Paramount; and both thoſe are in merely En le Poſt, and not by any Limitation or Act of the Party.

Lord Vaughan ſays, Quære in the Caſes of 22 Aſſ. p. 37. and 29 Aſſ. p. 34. whether, notwithſtanding the Warranty had deſcended upon the Heir, while the Lands were in the Poſſeſſion of the Villein in the 1ſt Caſe, and of the Baſtard in the 2d Caſe, before any Entry made by either Lord, the Lands [Lords] could have rebutted or vouch'd by reaſon of thoſe Warranties, being in Truth Strangers to the Warranty, and not able to derive it to themſelves any Way. But if after the Warranty deſcended upon the Villein or Baſtard, the Villein or Baſtard had been impleaded by the Heir, and had pleaded the Warranty againſt the Heir, and had Judgment thereupon by way of Rebutter, then the Lords might have pleaded this Judgment as concluſive, and making the Villein's or Baſtard's Title good againſt the Heir, and the Heir ſhould never have recover'd againſt the Lord's. And this ſeems the Meaning of the Book 22 Aſſ. p. 37. if well conſider'd, (tho' in **Dyer and Benet's** Caſe no ſuch Difference is obſerv'd.) Vaugh. 392. 393. in Caſe of Bole v. Horton.

* It ſeems miſprinted for 22 Aſſ. 37.

9. If he to whom a Collateral Warranty is made ſuffers a Common Recovery, and after the Anceſtor, who created the Warranty, dies, **yet the Recoveror ſhall rebut by this Warranty, tho' he was in** partly En le Poſt before the Warranty deſcended; **for he is not in merely En le Poſt in this Caſe. Co.** 3. *Lincoln College* 62.

10. So **if the** Tenant **of the Land** who has a collateral Warranty, makes Feoffment to Uſes before the Warranty deſcends upon the **Heir who is to be bound by the Warranty,** and after it deſcends **upon the Heir, he ſhall be bound by it, and** Ceſty que Uſe, **who has the Eſtate by** the This Caſe was ſtrongly objected to by Serjeant Maynard;

* Fol. 777. but the Court said it was founded on so good Reason, that Conveyances since have gone according to it. Mod. 192. 193. Hill. 26 & 27 Car. 2. C. B. in Case of Williamson v. Hancock.

the Statute of 27 H. 8. may * rebut him by this Warranty, tho' he was in En le Post before the Warranty descended; for he is not merely in the Post, but partly by Limitation and Act of the Party. Co. 3. *Lincoln College* 62. Resolv'd.

11. Mortdancestor *against W. and A.* which *A. said that she had nothing* &c. and *W. answer'd as sole Tenant, and pleaded in Bar the Warranty of the Mother of the Demandant to his Father, whose Heir he is* &c. The *Demandant said that W. had nothing, unless jointly with the said A.* Judgment if he may plead the Warranty sole without A. And the Demandant was awarded by the Court to *answer to the Bar*; quod nota, and e contra of Voucher; for the one cannot vouch without the other. E contra of Rebutter, as here; the Reason seems to be inasmuch as *Voucher is in Lieu of the Action; contra of Bar.* Br. Bar, pl. 58. cites 9 Ass. 18.

12. Where 3 *bring Action*, and the *Tenant has Warranty of the one*, he shall rebut for the 3d Part, and shall vouch this same for 2 Parts. Br. Voucher, pl. 49. cites 11 H. 4. 19.

Brook says, *Hence* it seems that if *Assignee* was *in the Deed*, that Assignee *shall have Action, which runs with the Land, and Thing which is in Lieu of Action*, as *Voucher*; for Land is a Thing which may be assign'd over. But quære of Annuity; for this is a Thing of such Nature, that it cannot be granted over. Br. Deputy, pl. 4.

13. *Avowry* by the Earl of Glouceſter *for Fine for Alienation made by one of his Tenants*; the *Plaintiff* in the Replevin *pleaded Deed that G. C.* who was &c. *was seised, and gave to R. and his Heirs to hold by such Services only, for all Services and Demands, Que Estate he has* &c. And it was awarded that the Tenant shall plead the Deed well enough, as here, *by way of Rebutter*, tho' he be Assignee, and *no Assignee is express'd in the Deed*; but he *cannot vouch nor have Contra formam Feoffamenti* &c. which sounds in Action, where no Assignee is in the Deed. Br. Deputy, pl. 4. cites * 14 H. 4. 5.

* Br. Avowry, pl. 46. cites S. C.

S. P. in the Case of Williamson v. Hancock, by Ellis J. 2 Mod. 15.

14. He, that *has the Possession of the Land*, shall rebut the Demandant himself, without shewing how he came to the Possession of it; for it suffices for him to defend his Possession, and bar the Demandant; and the Demandant against the Warranty cannot recover the Land. 3 Rep. 63. a. by the Reporter in Lincoln College's Case.

3 Rep. 63. a. in Lincoln College's Case, Ld Coke in a Note there, cites 38 E. 3. 26. S. P.——Vaugh. 388. in Case of Bole v. Horton, says Sir Edward Coke in Lincoln College's Case, cites the Book of 38 E. 3. f. 26. as adjudg'd to prove that the bare Possession of the Land is sufficient for the Tenant to rebut; for that the Assignee may rebut a Warranty made only to a Man and his Heirs. But Lord Vaughan says, If that were so, it were to his Purpose; but there is no such Case in 38 E. 3. f. 26. But the Case intended is 38 E. 3. f. 21. and he quotes the Folio truly in his Littleton. But the Case is not, That an Assignee may rebut, or have Benefit of a Warranty made to a Man and his Heirs only, but that a Warranty being made to a Man, his Heirs and Assigns, the Assignee of the Heir, or the Assignee of the Assignee, tho' neither be Assignee of the first Grantee of the Warranty, shall have like Benefit of the Warranty, as if he were Assignee of the first Grantee, which has been often resolv'd in the old Books.

15. If the Warranty be made *to a Man and his Heirs, without* this Word (*Assigns*) yet the * Assignee, or any Tenant of the Land, may rebut. Co. Litt. 385. a.

* S. P. So that the Warranty is annex'd to the Land, and shall go wherever the Land goes; but a Voucher shall go no further than it is limited. MS. Rep. Mich. 5 Ann. B. R. in Case of Smith v. Tindall.

S P. Per Cur. Mod 193. in Case of Williamson v. Hancock, cites Co. Litt. 385. and F. N. B. 135.——S. P. Per Cur. MS. Rep. Mich. 5 Ann. B. R. in Case of Smith v. Tindal.—

16. Albeit no Man shall vouch or have a Warrantia Chartæ, either as Party, Heir, or Assignee, but in Privity of Estate, yet *any that is in of another Estate*, be it *by Disseisin, Abatement, Intrusion, Usurpation, or otherwise*, shall rebut by the Force of the Warranty as a thing annex'd to the Land, which sometime was doubted in our Books. Co. Litt. 385. a.

dal.——*But* herein is a *Diverſity* to be obſerv'd, *when* in the Caſes aforeſaid, *he* that rebuts *claims under* the Warranty, *and when* he that would rebut claims *above the Warranty*; for there he ſhall not rebut: And therefore, if any *Lands be given to two Brethren in Fee-ſimple, with a Warranty to the eldeſt and his Heirs*, the *eldeſt dies without Iſſue*, the *Survivor, albeit he be Heir* to him, yet *ſhall* he *not rebut, becauſe his Title* to the Land *is* by Relation *above the Fall of the Warranty, and* he *comes not under the Eſtate of him to whom the Warranty is made*, as the Diſſeiſor &c. doth. Co. Litt. 385. a.

17. *Perſons* may rebut, and perhaps vouch, who are *neither Heirs nor formally Aſſignees* to the Garrantee, but have the Eſtate warranted, Diſpoſitione & inſtituto Legis, which he conceives not to differ materially whether they have ſuch Eſtate warranted by the Common Law, or by Act of Parliament. The firſt of this kind is *Tenant by the Curteſy*. The 2d is the *Lord of a Villein*. The 3d is *Baſtard*, where the Anceſtor grants Lands to him with Warranty. And many other Eſtates are of this Kind; as *Tenant in Dower*, if *endow'd of all the Land warranted*; an *Occupant*, *Tenants by the Statute of* 6 *R.* 2. *cap.* 6. where the Feme conſents to the Raviſher; *Tenant by* 4 *&* 5 *Ph. & M.* becauſe the Ward conſented to her taking away without the Guardian's Conſent; *Lands* warranted, which *after become forfeited* to the King or other Lords &c. Per Vaughan Ch. J. Vaugh. 390, 391, 392. in Caſe of Bole v. Horton.

18. A. deviſed Lands to M. his Wife in Fee. M. married T. and they two by Indenture covenanted to levy a *Fine to the Uſe of them for their Lives, Remainder to T. and his Heirs with Warranty*. A Fine was levied accordingly. *T. deviſed the Premiſſes to E.* [his Daughter and Heir at Law] *and died*; and afterwards *M. died*. It was objected to the Title of E. that the Warranty was here executed upon an Eſtate of Uſe, where the Heir comes in En le Poſt; and therefore E. could not take Advantage of this Warranty, and that the *Warranty is only to T. and M. and to the Heirs of T. and not to the Heirs and Aſſigns of T.* and that E. could not rebut by Reaſon of this Warranty, and ſo cannot make a Title under it. But it was held per Cur. that the Heir of T. here might rebut, tho' ſhe comes in En le Poſt before the Warranty had attach'd, as well as he might do after the Warranty attach'd, contrary to the Opinion of Lord Vaughan; tho' one that comes in En le Poſt cannot vouch. MS. Rep. Mich. 5 Ann. B. R. Smith v. Tindal.

2 Salk. 685. Paſch. 4 Ann. S. C. held, that tho' Ceſty que Uſe is in En le Poſt, yet he may take Advantage of a Warranty annex'd to his Eſtate, according to Lincoln College's Caſe, becauſe by the Statute of Uſes the Eſtate in Law in Poſſeſſion is transferr'd to his Uſe, and he is Tenant of the legal Eſtate, and has all Advantages which the Tenant before had to defend his Eſtate, and therefore he may rebut; for that is to defend his Eſtate, but cannot vouch; for that is to recover in Value for the Loſs.——It was ſaid Per Cur. Mod. 195. that they had adjudg'd lately that Ceſty que Uſe might rebut, in the Caſe of Fowle v. Doble.—— And that ſo it was held Cro. C. in Caſe of Spirt v. Bence. And Jo. 199. in Caſe of Kendall v. Fox.

(E. c) Rebutter. What Perſons *may be rebutted.*

See (C. c)

1. IF diverſe Heirs in Gavelkind demand Land by Writ, **the Defendant may rebut them, as well as the Eldeſt, by a Warranty created by him from whom the Land comes, (which is lineal;) for they ought to be vouch'd together, if it was demanded by a Stranger. 17 E. 3. 61. 21 Aſſ. pl. 8. 21 E. 3. 21. But quære.**

Warranty *is no Bar but to the Eldeſt, tho'* it be of Land in *Gavelkind or Borough-Engliſh*; for this ſhall enſue the Order of the Common Law; but Releaſe ſhall enſue the Order and Nature of the Land or Inheritance, and ſhall be a Bar to all that may claim the Land; quod non negatur. Br. Garranties, pl. 69. cites 21 E. 3. 21. and 22 E. 4 10.

2. [But] the **Defendant cannot rebut them** by a collateral Warranty of the Anceſtor of the Plaintiffs, from whom the Land does not come,

 becauſe

because the Plaintiffs could not be vouch'd if the Land should be demanded by another without Aſſets. 17 E. 3. 61.

3. But he may rebut them by a collateral Warranty with Aſſets; for there they ought to be vouch'd by Reaſon of their Poſſeſſion, if the Action was brought by a Stranger. 17 E. 3. 61.

(F. c) Rebutter. *In what Caſes* it may be.

1. WHere the Tenant may vouch he ſhall not rebut. 25 E. 3. 50.

But if it be admitted that a Man *cannot vouch by* Force of *Warranty created with an Uſe, yet he may rebut by it*; and ſo the Warranty is of Effect. 2 Roll. 787. pl. 1. in Caſe of Tebbe v. Popplewell.

2. If Feoffee with Warranty to him and his Aſſigns aliens and retakes Eſtate to him and his Wife, and after they are impleaded by the Heir of him that created the Warranty, they ſhall not rebut him, becauſe they may vouch the Baron, and ſo come at the Warranty. 25 E. 3. 50. per Curiam.

3. If the *Baron has Cauſe of Action to the Land of which his Feme is bound to warranty*, he ſhall be barr'd and rebutted by the Warranty of his Feme if ſhe be alive at the Time &c. Br. Voucher, pl. 131. cites 11 Aſſ. 10.

S. P. Br. Voucher, pl. 97. cites 13 Aſſ. 10. — Br. Garranties, pl. 43. cites S. C. and M. 13 E. 3. ——— Ibid. pl. 70. cites S. C.

4. Treſpaſs *for taking of Toll contrary to the Grant of H.* 3. the *Defendant pleaded a Grant of King John of the ſaid Cuſtom*, the *Plaintiff alleged a Compoſition between the 2 Vills, and that the Defendant by taking &c. has broke the Compoſition*; and per Knivet, clearly he ſhall plead as here, and ſhall not be drove to the Writ of Covenant, and by Conſequence may rebut in ſuch Caſe. Br. Barre, pl. 107. cites 39 E. 3. 13.

5. If 2 *exchange* Lands, and the *one enters* by the Exchange into the Land of the other, *and enfeoffs the other of his Land which the other had in Exchange*, and after the Feoffee is impleaded and vouches by the Exchange, the other may rebut him of the Voucher, inaſmuch as he is *in by the Feoffment* and not by the Exchange, as it is ſaid. Br. Voucher, pl. 148. cites 45 E. 3. 20.

6. Where I *grant* to my Tenant *to hold without Impeachment of Waſte, or* that he *ſhall not be impeach'd by Ceſſavit*, in this Caſe the Tenant may rebut by it, and *ſhall not be compell'd to ſue Writ of Covenant*. Br. Barre, pl. 25. cites 19 H. 6. 62.

7. If one gives Land in *Frankalmoigne* or *Frank-Marriage*, he cannot have a Contra Formam Feoffamenti, becauſe there is no certain Service contain'd in the Feoffment or Gift, and therefore out of the Statute of Marlbridge, cap 9. but he may rebut. 2 Inſt. 118.

(G. c) Rebutter.

(G. c) Rebutter. What Perſon. In Reſpect of Eſtate. *In of other Eſtate.*

1. **He who is in of other Eſtate may rebut,** as if the Warranty be annex'd to an Eſtate Tail, and Donee leaſes for Life, by which he gains a Fee, **yet if he be received upon Default of Leſſee, he may rebut the Donor.** 45 E. 3. 18. b.

A Man may be received in Scire facias &c. by *Reverſion in Fee*, and yet ſhall rebut the Plaintiff or Demandant *by Warranty of Fee Tail.* Br. Barre, pl. 13. cites 45 E. 3. 18. *As* where a *Gift in Tail* is made *to the Baron and Feme with Warranty*, and *they leaſe for Life*, and the *Tenant is impleaded by one who is Heir to the Warranty, and makes Default after Default*, and the Baron and Feme are received by this Reverſion becauſe they leaſed for Life the Reverſion to them, yet they may rebut the Plaintiff by the Warranty of Tail. Br. Ibid.——*And yet if they had vouch'd*, the *Vouchee ſhould not be compell'd to warrant, but only Eſtate Tail*; note a Diverſity. Br. Ibid.

2. A. ſeiſed in Fee *infeoffed J. S. and W. R. to the Uſe of himſelf* and M. his *Wife for their Lives*, Remainder *to B. their eldeſt Son in Tail*, Remainder *to C. the 2d Son in Tail* &c. Remainder *to his Daughters in Tail*, Remainder *to the right Heirs of his Daughters* [*of A.*] Afterwards *A. by Deed with Livery and Seiſin gave to C. and K. his Wife and to the Heirs of the Body of C. of K. begotten*, Remainder *to the Heirs of his Body* rendering to A. and M. a Rent, *with Warranty againſt all Men.* Afterwards A. levied *a Fine with Proclamations to 2 Strangers* [*and their Heirs with Warranty againſt all Perſons*] who *render'd to A. for Life*, [for a Week] Remainder *to C. and K. as before.* A. died. M. enter'd. B. ſurvived, and was Heir to A. M. died. B. enter'd. It was objected, that after the Fine levied by A. with Render to him for Life, Remainder to C. and K. they were in of other Eſtate than that to which the Warranty was annex'd. But reſolved contra; for the Fine operated upon the Reverſion of A. and is in Confirmation of the firſt Eſtate of C. and K. but admit that he be in of other Eſtate, yet he may rebut well enough by Force of the Warranty. And therefore Judgment in Ejectment was given for the Leſſee of C. Jo. 199. pl. 15. Mich. 4 Car. B. R. Kendal v. Fox.

Cro. C. 145. pl. 23. S. C. and what is between the the [ ] is as the Caſe is ſtated in Cro. C. differently from what it is in Jo. but in Cro. the Point of being in of other Eſtate is not mention'd.

(H. c) *Proceſs and Proceedings* in Voucher &c.

1. IF the Tenant *vouches Foreigner*, the Voucher *ſhall be determined in Banco*, and if the *Vouchee* be *return'd ſummon'd*, and *makes Default*, the *Aſſiſe ſhall be remanded in Pais without re-ſummoning the Vouchee*, and if the *Demandant recovers* there againſt the Tenant, the *Tenant ſhall make the Record come into Bank*, and there ſhall have Judgment over in Value. Br. Voucher, pl. 90. cites 3 Aſſ. 10.

Br. Mortdanceſtor, pl. 15. cites S. C.

2. When the Heir is *vouch'd within Age, and the Demandant ſays that there is no ſuch* &c. for he died in the Life of his Father, *Writ ſhall not iſſue to ſummons him*, by which the Death may be return'd, *nor the Demandant cannot ſay that he is of full Age, and pray that he may be view'd*; for there is no ſuch. Br. Counterple de Voucher, pl. 39. cites 7 Aſſ. 4.

3. *Præcipe* quod reddat *againſt Baron and Feme Tenant in Dower*, who was received &c. and *vouch'd the Heir* within Age, and pray'd that the Parol demur for his Nonage, *and pray'd that he be ſummon'd in this County and in 2 others*; and the Demandant ſaid that he has Aſſets in this County where &c. and pray'd that the Proceſs be continued there; Et non allocatur. Br. Voucher, pl. 65. cites 21 E. 3. 34.

4. In

4. In Præcipe quod reddat, if the Tenant vouches *at the Day of the Summons return'd, the Demandant ſhall not have Counterplea that the Vouchee is now Dead*, but *ſicut alias* ſhall be awarded, and this ſhall come *by Return of the Sheriff*; but at the Day that the Tenant vouch'd, the Demandant might have ſaid that the Vouchee is Dead; but contra when it is incurr'd in Proceſs. Br. Counterple de Voucher, pl. 30. cites 21 E. 3. 36.

5. *Præcipe quod reddat* was brought, and the *Tenant vouch'd*, and *Proceſs ſued againſt the Vouchee to the Sequatur Sub ſuo periculo, which was return'd Tarde*, and the *Vouchee did not come*; and the Demandant had Judgment to recover againſt the Tenant, and the Tenant in Miſericordia. Br. Sequatur, pl. 1. cites 42 E. 3. 13.

And per Finch, in Dower if the *Tenant vouches the Heir of full Age in the ſame County*, the *Judgment ſhall be that ſhe recover againſt the Heir if he has [Aſſets] and that the Tenant hold in Peace*, and otherwiſe that ſhe recover againſt the Tenant, and he over in Value againſt the Heir when he has [Aſſets]. But when the Heir is vouch'd in Ward there every one ſhall anſwer for his Portion, and the Demandant ſhall recover againſt the Tenant, aud he over againſt every one for their Portion, ſo that before the Tenant has recover'd in Value againſt them, he ſhall have their Portion extended; for tho' the one has Aſſets to make in Value, yet every one ſhall render according to his Portion. Ibid.

6. In *Dower* the *Tenant vouch'd the Heir of full Age to Parcel and ſhew'd Deed*, as he ought, *and for other Parcel* he *vouch'd the Heir in Ward of S. for Parcel*, who had Parcel of the Land, *and in Ward of W. who had the reſt*, as he ought, and *pray'd that they may be ſummon'd in this County and in divers others*, viz. the one Guardian of the Body in this County, and in another County, and the Heir in this County ſolely, and the other Guardian in another County; and ſummons to Warranty iſſued, and the Guardian who was vouch'd in the foreign County came, and the other who was vouch'd in the ſecond County made Default, and where the Heir was vouch'd of full Age he was eſſoign'd, and this Guardian who appear'd ſaid that he has the Body of the Heir, and part of his Land, of the Grant of the King, till full Age, and demanded Judgment Rege Inconſulto &c. Belke ſaid, you ſhall not be received to ſay any thing in Delay of the Demandant till the other comes; but per Finch, in Præcipe quod reddat, it is as you ſay, the one ſhall have *Idem Dies* till the other comes; But *upon Voucher in Ward in* Writ of *Dower*, *every one is vouch'd for his Portion*, and *he who comes firſt ſhall be received to ſpeak for his Portion*. Br. Voucher, pl. 38. cites 48 E. 3. 5.

7. *Grand Cape* ſhall not iſſue till the Extent be return'd, and Idem Dies given to the Eſſoign. Br. Voucher, pl. 38. cites 48 E. 3. 5.

Br. Juriſdiction, pl. 41. cites S. C.

8. Formedon in the County of Cheſter, the Tenant *vouch'd* to Warranty *two*, who ſhall be ſummon'd *in the ſame County, and J. N. who ſhall be ſummon'd in the Counties of D. and N.* becauſe he had nothing in Cheſter, and pray'd that they be ſummon'd in the ſame County, or in all the Counties as the Law will, by which the *Juſtices of Cheſter ſent the Record into Bank*; and Hamur would have had Proceſs againſt the two in Cheſter, and Idem Dies given to the third, and Proceſs here againſt the third; But per Belk, *Proceſs ſhall be made againſt them in Common, and at one and the ſame Time*; for if the one appears, he ſhall not be put to warrant before the other comes, or till the Proceſs be determin'd againſt him, and therefore Proceſs ſhall be made here againſt all, as in Curia magis digna; by which it was awarded that *Proceſs ſhall Iſſue to the Prince to ſummons the two in Cheſter, and* Proceſs *to the Sheriff of D. and N. to ſummon the other there*, and when the Warranty is Determin'd here in Bank, all ſhall be *remanded*; Quod nota. Br. Voucher, pl. 41. cites 49 E. 3. 9.

9. Where *three Writ* are *return'd and none of them ſerved againſt the Vouchee*, the Demandant ſhall recover againſt the Tenant, and he ſhall not have in Value againſt the Vouchee; *Contrary where any Writ is ſerv'd againſt him*, and he makes Default at the Sequatur. Br. Voucher, pl. 86. cites 14 H. 6. 7. 19. 20.

10. Præcipe

10. Præcipe quod reddat, the Tenant vouch'd, and *Summons ad Warrantizandum* iſſued, and the Sheriff *return'd Quod Mandavit Ballivo* &c. *qui nullum dedit reſponſum*; by which iſſued *Non omittas*, and the Sheriff *return'd quod nihil habet* &c. *nec eſt inventus* &c. as he ought in this Caſe, contra of the Tenant in Formedon; for he may be ſummon'd in Terra Petita, by which iſſued *Pluries*, and after *Plus Pluries*, and then *Sequatur ſub ſuo Periculo*, and the *Writ was not ſerved*, and the *Tenant ſaid that he deliver'd the Writ to the Sheriff, and* ſaid *that the Vouchee is dead*, and that he died *after the iſſuing of the Writ of Sequatur*; and the beſt Opinion was that the Writ of Non omittas ſhall ſtand for none of the Writs which is ordinary Proceſs upon the Sequatur; for he *ſhall have Summons, Alias, Pluries, Plus Pluries, & Sequatur, over and above the Writ of Non omittas*; quære. Br. Sequatur, pl. 3. cites 14 H. 6. 7. 20.

11. In ſome Caſe *two Sequaturs* ſhall be awarded, *As where a Man vouches one within Age, and prays that the Parol demur, and the Demandant ſays that he is of full Age, by which iſſues ſummons to be view'd, and Alias, and Pluries, and Sequatur*, and if he *appears at the Sequatur, and is awarded to be of Age*, then Proceſs ſhall iſſue againſt him as Vouchee, viz. by Summons ad Warrantizandum, Alias, Pluries, and Sequatur; for the firſt Proceſs was but to be view'd, and not to warrant the Land, and ſo two Sequaturs; Per Vampage. Br. Sequatur, pl. 3. cites 14 H. 6. 7. 20.

12. The Sequatur *ought to be ſued by the Tenant to the Sheriff*, and he make Suit to him *to ſerve it at his Peril*. Br. Sequatur, pl. 3. cites 14 H. 6. 7. 20. Per Aſcue.

It is call'd a Sequatur ſub ſuo Periculo, becauſe the Tenant ſhall loſe his Land without Recompence in Value; unleſs he upon that Writ can bring in the Vouchee to warrant the Land unto him. Co. Litt. 101. b. 102. a.

13. If at the Sequatur the Writ *is not return'd ſerved*, the *Vouchee may enter voluntarily*; for at the Sequatur the Land is to be loſt; *but at the Return of the Summons and other Proceſs*, he cannot enter without Proceſs; for the Land is not there to be loſt. Br. Sequatur, pl. 3. cites 4 H. 6. 7. and 20. Per Darrantyne.

14. In Præcipe quod reddat, the *Tenant vouch'd two*, who *enter'd into the Warranty and vouch'd the Tenant by a ſtrange Name*, and ſhew'd Cauſe; the Voucher was granted, and Proceſs iſſued againſt him; quod nota; tho' he was the Tenant who had appear'd, and had vouch'd before; quod nota. Br. Proceſs, pl. 115. cites 11 E. 4. 7.

15. If the *Tenant vouches* and the *Sheriff returns him ſummon'd*, and he does not come, by which *Grand Cape* ad Valentiam iſſues, and the Sheriff *returns* [*that the Vouchee had*] *nothing*, the Demandant ſhall recover, (for there is no more Proceſs to be made) and the Tenant over, upon a Default. Br. Voucher, pl. 140. cites 4 H. 7. 18. Per Huſſey Ch. J. Br. Recovery, pl. 17. cites S. C.—Br. Proceſs, pl. 157. cites S. C.

16. The Proceſs whereby the Vouchee is call'd, is a *Summoneas ad Warrantizandum*; whereupon, if the Sheriff returns that the Vouchee is ſummon'd, and he *makes Default*, then a *Grand Cape ad Valentiam* is awarded; and if he *makes Default again*, then *Judgment is given againſt the Tenant, and he* over *to have in Value againſt the Vouchee*. If the Vouchee *appears, and after makes Default*, then *Parvum Cape ad Valentiam* is awarded; and if he *makes Default again*, then *Judgment as before*. But if the *Sheriff returns that the Vouchee hath nothing*, then, after Writs of *Alias* and *Pluries*, a Writ of *Sequatur ſub ſuo Periculo* ſhall be awarded; and *if the like return be made*, then ſhall the *Demandant have Judgment againſt the Tenant, but not to recover in Value, becauſe the Vouchee was never warn'd*, and it appears that he has nothing. But in the Cape ad Valentiam, it appears that he has Aſſets; and his making Default after Summons, is an implied Confeſſion of the Warranty. Co. Litt. 101. b. S. P. Co. Litt. 393. a.

(I. c) *Pleadings by Tenant.*

When the Tenant in *Præcipe* quod reddat *of Rent vouches of the Land diſcharged of the Rent,*

1. WHERE Rent Charge is demanded *by Formedon* &c. the Tenant may vouch, but then he ought *to ſay that the Rent in Demand is Rent Charge, and that J. N. was ſeiſed of the Land out of which* &c. *diſcharg'd of the Rent, and inſeoffed him* &c. *and vouch of the Land*; Per Littleton, quod non negatur. Br. Voucher, pl. 112. cites 10 E. 4. 9.

there *he need not to ſhew how* it was diſcharged in the Hands of the Feoffee; for the Demandant has nothing to do with the Warranty; for he is not to be charged with it. But when the Vouchee comes in, there he who vouches ought to ſhew Cauſe; for the Vouchee is to be charged. Br. Voucher, pl. 88. cites 21 H. 7. 9.——Br. Recovery, pl. 15. cites 21 H. 6. 10.

2. If Feoffor will implead one that comes in en le Poſt, the Tenant may in his Plea ſet forth the Matter and *conclude his Plea Si contra Warrantiam ſuam he ſhould be impleaded*; but in this Caſe the Plea cannot be concluded generally; but he that will make Uſe of this Plea coming in en le Poſt muſt conclude in this Special Manner. And if the Party may do this againſt the Feoffor himſelf, why may he not do it againſt the Heir? There is no Odds when the Warranty deſcends; for it is the Eſtate that is warranted. MS. Rep. Mich. 5 Annæ B. R. Per Cur. in Caſe of Smith v. Tindal.

(K. c) Pleadings *by Vouchee.*

1. IN Admeaſurement of Paſture the Tenant by his Warranty was received to ſay *that the Demandant was his Tenant*; Judgment of the Writ brought by the Tenant againſt the Lord. Theloal's Dig. of Writs, Lib. 13. cap. 10. S. 17. cites Tempore E. 1. Admeaſurement, 11.

2. It is ſaid that the Vouchee may plead *Variance between the Original Writ and the Pone*, and the like. Theloal's Dig. of Writs, Lib. 13. cap. 10. S. 3. cites Tempore E. 1. Br. 861.

S. P. in Formedon in the Reverter, Ibid. S. 11. cites Mich.

3. Vouchee may plead *Omiſſion of Blood in the Deſcent* in Writ of Right. Theloal's Dig. of Writs, Lib. 13. cap. 10. S. 3. cites Tempore E. 1. Br. 861.

18 E. 3. 42. and Trin. 27 E 3. 78. and Paſch. 21 H. 6. 39.—— S. P. Ibid. S. 8. cites Hill. 18 E. 2. Formedon, 59.——So in Writ of Aiel by Parceners the Tenant by his Warranty was received to abate the Writ for *Repugnancy in the Deſcent apparent in the Count*. Theloal's Dig. of Writs, Lib. 13. cap 10. S. 9. cites Trin. 3 E. 3. Joinder in Action, 29.

4. The Vouchee cannot plead *to the Form of the Writ*. Theloal's Dig. of Writs, Lib. 13. cap. 10. S. 1. cites M. 3 E. 2. Voucher 250. 2 E. 3. 40. and 2 E. 3. Br. 251.

The Vouchee ſhall not plead *that the Place where* the Tenements

5. It was ſaid, that where the *Tenant admits the Writ good in a Hamlet*, the Vouchee by this may counterplead the Lien. Brook ſays, Quære inde, and this in Plea of the Land; it ſeems to be Præcipe quod reddat. Br. Counterple de Garrantie, pl. 9. cites 5 E. 2. and Fitz. Voucher 251.

are ſuppoſed to be, *is not a Vill but a Hamlet*. Theloal's Dig. of Writs, lib. 13. cap. 10. S. 1. cites M. 5 E. 2. Voucher 251. and with this agrees T. 22 E. 3. 8.

Pracip

Præcipe quod reddat is *brought in S. whereas the Land is in D.* and the *Tenant accepted the Writ, and vouch'd, and the Vouchee enter'd into the Warranty, and pleaded in Bar*, where *he might have pleaded* this Matter *to the Place*; and ſo he loſt the Advantage: for he cannot abate the Writ by this Miſtake of the Vill, becauſe the Tenant has affirm'd it, but hereby he might have drove him from the Place. Br, Brief, pl. 186. [187] cites 22 H. 6. 12. 13.

6. Tenant by his Warranty ſhall plead the *Miſnoſmer of the Demandant*. Theloal's Dig. of Writs, lib. 13. cap. 10. S. 4. cites Hill. 7 E. 2. Voucher 259.

It was ſaid that the Tenant by his Warranty ſhall plead *Miſnoſmer of the Mother of the Demandant*. Theloal's Dig. of Writs, lib. 13. cap. 10. S. 20. cites H. 10 E. 3. 490.——S. P. viz. that ſhe had another Name of Baptiſm. Ibid. S. 19. cites Hill. 44 E. 3. Eſtoppel 8.——But Ibid. S. 21. cites Mich. 15 E. 3. Eſtoppel 238. That in Writ of Coſinage the Tenant by his Warranty ſhall not plead to the Writ, *that the Anceſtor of the Demandant of whoſe Seiſin &c. had another Name of Baptiſm.*

7. In Writ of *Entry in the Poſt againſt Baron and Feme, ſuppoſing that the Feme ſole enter'd* &c. the Tenant by his Warranty may have Challenge to the Writ, and ſhew this Matter in Abatement of the Writ, inaſmuch as the Entry of both ought to be ſuppoſed. Theloal's Dig. of Writs, lib. 13. cap. 10. cites Mich. 9 E. 2. Br. 812.

But this Challenge to the Writ muſt be before the View, otherwiſe it will not abate the Writ. Fitzh. Brief, pl. 812. cites S. C.

8. In Writ of Entry within the Degrees, the Vouchee was receiv'd to ſay *that he enter'd by another*. Theloal's Dig. of Writs, lib. 13. cap. 10. S. 2. cites 3 E. 3. It. North. Br. 742. 22 H. 6. 15.

So in Writ of Entry out of the Degrees, the Vouchee was received to *plead in Abatement* of the Writ, *giving Writ within the Degrees*. Theloal's Dig. of Writs, lib. 13. cap. 10. S. 2. cites H. 22 E. 3. 1. and 24 E. 3. 32. 40.

9. Tenant by his Warranty may plead *Parcenary* of the Part of the Demandant in Abatement of the Writ. Theloal's Dig. of Writs, lib. 13. cap. 10. S. 5. cites Mich. 9 E. 3. 467.

Where I *infeoff* 2, and the *one is impleaded*, and vouches me, I ſhall not abate the Writ by the *Jointenancy*, but *ſhall ſhew it upon the Lien*, and ouſt him of the Warranty. Br. Voucher, pl. 70 cites 21 H. 6. 36.——The Vouchee cannot plead *Jointenancy or ſeveral Tenancy* after Entry into the Warranty in Abatement of the Writ, but they are good Counterpleas of the Lien. Theloal's Dig. of Writs, lib. 13. cap. 10. S. 16. cites M. 22 H. 6. 15.

10. In Formedon the Tenant by his Warranty was receiv'd to ſay, *that an Anceſtor of the Demandant, to whom the Demandant is not made Heir, was laſt ſeiſed* &c. Theloal's Dig. of Writs, lib. 13. cap. 10. S. 4. cites Mich. 6 E. 3. 288. and 21 H. 6. 39.

11. The Vouchee *before Entry* into the Warranty, may ſay *that the Tenant is dead*. Theloal's Dig. of Writs, lib. 13. cap. 10. S. 6. cites Paſch. 19 E. 3. 503. * 5 H. 7. 40. and 14 H. 6. 7.

But in Writ againſt Baron and Feme, the Vouchee can *not* ſay *that the Feme is dead* before Entry into the Warranty. Theloal's Dig. of Writs, lib. 13. cap. 10. S. 13. cites Mich. 29 E. 3. 62.——*But after Entry* he ſhall plead *that one of the Tenants is dead.* Theloal's Dig. of Writs, lib. 13. cap. 10. S. 13. cites Mich. 44 E. 3. Voucher 67.

* Br. Voucher, pl. 105. cites 5 H. 7. 38. 39. S. C. That the Vouchee may plead the Death of the Tenant.

12. The Vouchee ſhall plead *Diſcontinuance of the Proceſs*. Theloal's Dig. of Writs, lib. 13. cap. 10. S. 6. cites Paſch. 10 E. 3. 503. 5 H. 7. 40. and 14 H. 6. 7.

He was receiv'd to allege *Omiſſion of a Word in the Summons* ad Warrantizandum. Theloal's Dig. of Writs, lib. 13. cap. 10. S. 15. cites H. 3 H. 4. 11.

13. Tenant by his Warranty may plead to the Matter of the Count and Writ, As *Repugnancy between the Writ and the Count in Matter*. Theloal's Dig. of Writs, lib. 13. cap. 10. S. 8. cites Mich. 10 E. 3. 537.

14. The

Entry in the Poſt againſt 2, who vouch'd the Heir of the Diſſeiſor, who *ſaid that the Diſſeiſor died ſeiſed, and he enter'd as Heir, and indow'd the Feme of the Diſſeiſor nam'd in the Writ, and alien'd the two Parts Reſidue to another nam'd in the Writ,* and *ſo the Demandant may have Writ within the Degrees* ; Judgment of *Writ in the Poſt*, and the Writ was abated by Award ; for it ſhall be againſt the *Feme* in the Per ; for ſhe *is in by her Baron*, and ſhall be againſt the other in the Per & Cui ; for per Wilby, it ſhall not be in the Poſt where it may be within the Degrees. Br. Voucher, pl. 78. cites 24 E. 3. 70.———Br. Brief, pl. 46. cites S. C.———Br. Enter en le Per, pl. 23. cites S. C.

14. The Vouchee in *Entry in the Poſt, pleaded to the Writ that the Demandant might have had Writ of Entry within the Degrees.* Br. Enter en le per &c. pl. 38. cites 22 E. 3. 1. and Fitzh. Voucher 131.

In *Formedon*, the Tenant *vouch'd one J. as Couſin* and Heir of B and ſhew'd How Couſin. And per tot. Cur. He *need not ſhew how Couſin* in this Action, and the Record was enter'd without the Coſinage &c. Br. Voucher, pl. 76. cites 15 E. 4. 4.

15. Cui in Vita in the Poſt, the Tenant vouch'd W. Couſin and Heir of W. Knivet bid him ſhew *How he is Couſin and Heir*; but Fencot ſaid he ſhall *not upon the Voucher but upon the Warranty deraigned*; quod non negatur. Br. Voucher, pl. 57. cites 38 E. 3. 15.

16. A Man vouch'd the Heir by Lien Anceſtrel, who came and pleaded *Riens per Diſcent*, and the other econtra. Br. Voucher, pl. 128. (bis) cites 38 E. 3. 22.

Br. Mortdanceſtor, pl. 2 cites S. C. Brook ſays, And ſo ſee that Mortdanceſtor ſhall be taken in the County, and that a Man may vouch at large in Mortdanceſtor.—Brook ſays the Caſe ſeems to be, that 4 *Daughters* were *Heirs*, the *one enter'd into the whole*, and *took Baron*, and *had Iſſue a Daughter, and died* ; the Baron Tenant by the Curteſy *made Leaſe to the Tenant for his own Life*, the *two Aunts and the Niece join'd in Mortdanceſtor againſt the Tenant*, and *he vouch'd the Tenant by the Curteſy*, and *pray'd Aid of his own Daughter, one of the Demandants* ; and after the Niece was nonſuited, ſummon'd and ſever'd. Br. Voucher, pl. 16.

17. Mortdanceſtor by 4, where the Tenant *vouch'd* to Warranty *in a foreign County*, by which the Record was ſent into Bank, and Proceſs made againſt the *Vouchee*, who came and *enter'd ſimply into the Warranty, and ſaid that A. was ſeiſed in Fee, and took him to Baron, and had Iſſue J. and died, and he is Tenant by the Curteſy*, the *Reverſion to J. and pray'd Aid* of him, and that the Parol demur by Nonage ; and there it is agreed, that tho' he enter'd ſimply into the Warranty, yet *he warrants only ſuch Eſtate as he has in Poſſeſſion*, viz. the Tenant who has vouch'd him. And ſo ſee that he *may ſay that the Tenant has only the Eſtate for Life, and that he himſelf has only Eſtate for Life* ; nota. Br. Voucher, pl. 16. cites 41 E. 3. 7.

18. Tenant by his Warranty may *ſay that the Demandant has another Writ pending* &c. Per Finchden. Theloal's Dig. of Writs, lib. 13. cap. 10. S. 14. cites Paſch. 41 E. 3. 11. and ſays, See Trin. 5 H. 7. 39. Quære.

19. In Præcipe quod reddat, if the *Vouchee* comes and *demands the Lien*, he ſhall not ſay after this, that the Tenant is not Tenant; quod nota bene. Br. Counterple de Garrantie, pl. 11. cites 45 E. 3. 2.

Br. Brief, pl. 78. [79] cites S. C.

20. *Præcipe* quod reddat *againſt A. of 2 Acres*, and *another Præcipe in the ſame Writ againſt B. of 2 Acres*, and *A. vouch'd B. who* came, and *ſaid that the Land demanded againſt him* in the one Præcipe *is the ſame Land which is demanded againſt A.* who vouch'd in the firſt Præcipe, Judgment of the Writ ; and no Plea, becauſe *A. who vouch'd, has affirm'd the Writ good.* Br. Voucher, pl. 36. cites 46 E. 3. 33.

S. P. Br. Voucher, pl. 78. cites 24 E. 3. 70.

21. In *Formedon* &c. the *Vouchee ſhall not have Plea to the Writ, where the Tenant has admitted* the Writ, *unleſs in Matter apparent, and Things which trench to the Miſchief of Warranty.* Br. Voucher, pl. 70. cites 21 H. 6. 36. Per Newton.

Br. Garranties, pl. 33. cites S. C. ——Vouchee

22. In Formedon the *Tenant vouch'd*, and the *Vouchee* came, and *enter'd into the Warranty*, and *pleaded Releaſe with Warranty* of Anceſtor *collateral* of the Demandant, whoſe Heir &c. to J. N. then Tenant &c. Que

Eſtate

Eſtate he has; and a good Plea, and yet the *Vouchee* is *Tenant by the Warranty*, but *not* Tenant *in Fact*. Br. Voucher, pl. 72. cites 22 H. 6. 12.

may plead Releaſe made to the Tenant after the Entring into the Warranty. Br. Voucher, pl. 105. cites 5 H. 7. 38, 39.——*And* per Port, if the *Demandant releaſes all his Right to the Vouchee, after that he is enter'd into the Warranty*, this is a good Bar; for after this he *is Tenant in Law*, and comes in Loco Tenentis. Br. Voucher, pl. 72. cites 22 H. 6. 12.

23. If *in Writ of Entry in the Per & Cui*, the *Tenant vouches him in the Per*, he may enter into the Warranty, and *plead in Abatement* of the Writ, *by falſifying the Entry*; per Port. Quod tota Curia conceſſit. Br. Voucher, pl. 72. cites 22 H. 6. 12.

Br. Brief, pl. 186. [187] cites S. C.

24. In Præcipe quod reddat the *Tenant vouch'd one within Age*, and pray'd that the Parol demur. The Demandant *replied*, that he was *of full Age*, priſt. Brown ſaid, That the Form now is that the Voucher ſhall ſtand, and after he may ſay that he is of full Age. Per Cur. by his ſaying that he is of full Age, is *included that the Voucher is granted*; and after the Plea was admitted, and the other averr'd that he was within Age; quod nota. Br. Voucher, pl. 75. cites 22 H. 6. 48.

25. In Præcipe quod reddat, per Opinionem Cur. the Tenant by Receipt may ſay that the Land is *ancient Demeſne*. Contrary of the Vouchee; per Littleton, & Opinionem Cur. Br. Voucher, pl. 136. cites 2 E. 4. 27.

26. The Vouchee may have *divers Pleas to the Perſon, Writ, and Action, after the laſt Continuance*, as the Tenant himſelf might have; for he is in Loco Tenentis. Br. Continuances &c. pl. 81. cites 5 H. 7. 40.

As that the *Demandant has taken Baron*, or is *outlaw'd* or *excommunicated after the laſt Continuance*. Theloal's Dig. of Writs, Lib. 13. cap. 10. S. 18. cites Trin. 5 H. 7. 40.——Br. Voucher, pl. 105. cites 5 H. 7. 38, 39. S. C. & P.

(L. c) Pleadings by Vouchee, *where there is a Voucher over.*

1. THE *ſecond* Tenant by his Warranty *may ſay that the firſt* Tenant by his Warranty *is dead*. Theloal's Dig. of Writs, Lib. 13. cap. 10. S. 12. cites Paſch. 18 E. 3. 17.

Br. Voucher, pl. 167. cites S. C.——Br. Reſummons, pl. 39. cites S. C.——But the *firſt* Tenant by his Warranty *ſhall not plead the Death of the ſecond* Tenant by his Warranty, *after* that *the ſecond* Tenant *has enter'd into the Warranty*, and has *pleaded*. Theloal's Dig. of Writs, Lib. 13. cap. 10. S. 22. cites Trin. 12 R. 2. Voucher 81.

2. Formedon *againſt A. who vouch'd E.* who *enter'd into the Warranty, and vouch'd D.* and Proceſs returnable Octabis Michaelis; at which Day *D. came, and ſaid that T. had brought Formedon againſt A. the Tenant, and recover'd by Action tried*, Judgment of this Writ; and he ſhall have the Plea, per Finchedon J. clearly; for *he is in Place of the Tenant*, and the Tenant himſelf cannot now have it; for he is out of Court. Br. Brief, pl. 506. cites 41 E. 3. 10. 11.

Theloal's Dig. of Writs, Lib. 13. cap. 10. S. 14. and Lib. 14. cap. 7. S. 9. cites S. C.——In Formedon the *Tenant vouch'd one who enter'd* into the Warranty *upon Summons, and vouch'd B. who* was ſummon'd, and *enter'd* into the Warranty, *and vouch'd C. and pray'd that the Parol demur, becauſe C. is an Infant within Age*, and ſo it did; and after *Reſummons was ſued againſt the Tenant, the firſt Vouchee, and the ſecond Vouchee*, but *not againſt the Infant* who was vouch'd; and good; for he was not ſummon'd, and therefore cannot be reſummon'd; and the *ſecond Vouchee pleaded in Bar, that during the Time* that *the Parol demurr'd, J. S. brought Formedon againſt him Tenant of the Land, and he confeſs'd the Action, and Demandant recover'd, and enter'd, Que Eſtate the Tenant has*; Judgment of the Writ; and *averr'd the Life of him who recover'd the Eſtate Tail*, as he ought, becauſe it is a *particular Eſtate*, and *that the Title of the Demandant was meſne*

 between

between the Title of him who recover'd and the Judgment. And it ſeems there, that this Plea does not belong to the Vouchee; for it was not in Eſſe when he was vouch'd; for all Pleas which then were in Eſſe were put in the Mouth of the Vouchee, and therefore the Vouchee ſhall not have this Plea; for he is a Stranger to it, and this Matter was not in Eſſe at the Time of the Voucher to Warranty. But per Townſend & Keble, The Vouchee ſhall have thoſe Pleas, and ſeveral others, which happen of later Time. Tamen quære inde. Br. Voucher, pl. 105. cites 5 H. 7. 38, 39.

Br. Brief, pl. 332. cites 5 E. 4. 116. S C. For he remains Tenant of this Part which is counterpleaded; and he is alſo Tenant of the reſt, till the ſecond Vouchee has enter'd into the Warranty. Quod nota.——S. P. And if the Vouchee dies, they ſhall recover. And per Cur. This Plea goes to all the Writ, and he need not make other Anſwer of the reſt; for the Entry into Part ſhall abate the whole Writ; for he has falſify'd his own Writ by his own Act, and therefore the Inqueſt was diſcharged as well of the Counterplea as of the reſt. Br. Voucher, pl. 109. cites S. C.——Theloal's Dig. of Writs, Lib. 14 cap. 7. S. 6. cites 14 H. 6. 21.

3. The *Vouchee for Parcel vouch'd over*, and Summons ad Warrant' was awarded; and as to the Reſidue, the Voucher was counterpleaded &c. And at the Day given the *firſt Vouchee* came, *and ſaid that the Demandant had enter'd into Parcel after the laſt Continuance*, and held a good Plea in his Mouth. Theloal's Dig. of Writs, Lib. 13. cap. 10. S. 17. cites M. 5 E. 4. 117.

(M. c) Pleadings *by Tenant after Voucher* &c.

But *at the Sequatur* ſub ſuo Periculo *return'd*, the Tenant cannot ſay *that the Demandant has diſſeiſed him after the laſt Continuance.*

1. IN *Formedon againſt Baron and Feme and another*, all vouch'd, *and Proceſs was awarded againſt the Vouchee*; and after the *Baron made Default*, and the Feme was received; and the other and the *Feme pleaded that the Demandant had diſſeiſed them pending the Writ &c.* And after, at another Day, it was adjudged that they ſhould have the Plea after the Voucher, becauſe the Demandant had accepted their Plea at the firſt Day. Theloal's Dig. of Writs, Lib. 14. cap. 7. S. 1. cites Trin. 4 E. 3. 148.

Theloal's Dig. of Writs, lib. 14. cap. 7. S. 6. cites Paſch. 20 E. 3. Voucher 127.

2. After Voucher the Tenant ſhall not plead to the *Form of the Writ.* Theloal's Dig. of Writs, Lib. 14. cap. 7. S. 2. cites M. 5 E. 3. 223.

3. Nor to the *Variance between the Writ and Specialty*, notwithſtanding that he has waived the Voucher. Theloal's Dig. of Writs, Lib. 14. cap. 7. S. 2. cites Paſch. 6 E. 3. 265.

4. In *Mortdanceſtor of Rent againſt* 2, the *one vouch'd*, and the *other pleaded to the Writ*, and the *Demandant counterpleaded* the Voucher, *inaſmuch as the Rent was Rent-Service*; and yet he who had the Voucher after pleaded *ſeveral Tenancy* in Abatement of the Writ. Theloal's Dig. of Writs, Lib. 14. cap. 7. S. 3. cites H. 9 E. 3. 448.

5. After Voucher the *Sheriff return'd*, that the *Vouchee* was *dead*; upon which the *Tenant*, *being an Infant*, *would have pleaded Jointenancy*, and was not received. Theloal's Dig. of Writs, Lib. 14. cap. 7. S. 4. cites H. 18 E. 3. 6.

Præcipe quod reddat *by two Femes*, the *Tenant vouch'd*, and Proceſs continued till the Summons ad Warrantizandum ſicut Pluries, and the *one Plaintiff had taken Baron pending the Writ*, and was *nonſuited and ſever'd*; by which the Writ was awarded good for the other, and did not abate in all, notwithſtanding that the Tenant pleaded it to the Writ, and it was inſiſted for the Defendant, that becauſe the Tenant firſt vouch'd, and after pleaded to the Writ, that there-

6. The Tenant after Voucher, and the *Waiver of the Voucher*, may ſay that the Demandant has *taken Baron after the laſt Continuance.* Theloal's Dig. of Writs, lib. 14. cap. 7. S. 5. cites 22 E. 3. 1.

fore

fore he has waiv'd the Voucher, and all Advantages of the Plea, Judgment &c. Et non allocatur. Br. Voucher, pl. 83. cites 39 E. 3. 16.

7. In Præcipe quod reddat, the Tenant *vouch'd M.* and *Day given by Roll, but no Proceſs awarded*; and *at the Day the Tenant came, and ſaid that after the laſt Continuance M. died, and vouch'd J. as Son and Heir of M. within Age, and pray'd that the Parol demur.* The *Demandant ſaid that* to the Voucher he ſhall not be receiv'd; for *J. is a younger Son*, and S. is an elder. The *Tenant ſaid Proteſtando that J. is Heir*, and *Pro placito* that *he enter'd as Heir after the Death of M.* Judgment, and pray'd the Voucher, and becauſe the Demandant could not deny but that J. enter'd as Heir, the Voucher ſtood. Br. Counterple de Voucher, pl. 25. cites 38 E. 3. 27. Br. Voucher, pl. 60. cites S. C.

8. He who *vouches himſelf* cannot allege *Diſcontinuance of Proceſs* in his own Suit. Theloal's Dig. of Writs, lib. 13. cap. 10. S. 13. cites M. 40 E. 3. 36.

9. Note, that after the *Tenant has vouch'd, and the Summons ad Warrant' awarded*, the Demandant cannot counterplead, Per Finchd. nor *ſay that he who appears as Vouchee is the ſame Perſon who was vouch'd*; but the Tenant may ſay that he is another Perſon of the ſame Name, and pray Proceſs with Addition, and ſhall have it. Br. Counterplea de Voucher, pl. 14. cites 45 E. 3. 6.

10. If a Man vouches, and the Vouchee enters into the Warranty, the Tenant cannot plead *Releaſe made after the Voucher, and after the laſt Continuance*; Per tot. Cur. for he is *out of Court* by the Entry of the Vouchee into the Warranty. Br. Voucher, pl. 86. cites 14 H. 6. 7. 19. 20.

11. In Præcipe quod reddat the Tenant vouch'd, and *Summons ad Warrantizandum* iſſued; the Sheriff *return'd Quod Mandavit Ballivo* &c. *qui nullum dedit reſponſum*; by which iſſued *Non omittas*; and the Sheriff *return'd Quod nihil habet* &c. *nec eſt inventus*, by which iſſued *Pluries*, and after *Plus pluries*, and then *Sequatur ſub ſuo periculo*, and the *Writ was not ſerv'd*, and the *Tenant ſaid he deliver'd the Writ to the Sheriff*, and ſaid *that the Vouchee is dead*, and that he died *after the iſſuing of the Writ of Sequatur*. And the beſt Opinion was, that where the *Tenant vouches one who enters into the Warranty, and vouches over, and the ſecond Vouchee enters into the Warranty*, the *Tenant may ſay that the firſt Vouchee is dead*; for otherwiſe he cannot have good Judgment; and therefore it ſeems reaſonable to permit him to have the Averment here. But Brook ſays it is not alike; for where the Vouchee enters, Judgment ſhall be given againſt him if &c. *but* here *where the Vouchee never enter'd into the Warranty, nor no Writ ſerv'd againſt him, no Judgment ſhall be againſt him*, but the Tenant ſhall loſe the Land; but he ſhall not have Judgment over in Value againſt him who never appear'd, nor any Proceſs ſerv'd againſt him; and therefore it ſeems that he cannot have the Averment of the Death. Quære. And per Aſcue, he cannot have the Averment of the Death, as above, but it ought to come in by Return of the Sheriff. And per Paſton, if the Tenant has 3 Writs againſt the Sheriff, tho' neither of them is ſerv'd, the Land is loſt, by which &c. And ſo it ſeems by him, that he ſhall not have the Averment of the Death; and after the Parties agreed, therefore Quære legem. But it ſeems that he ſhall not have the Averment. Br. Sequatur, pl. 3. cites 14 H. 6. 7. 20. Br. Voucher, pl. 86. cites S. C. — Theloal's Dig. of Writs, lib. 14. cap. 7. S. 6. cites S. C. That it was held that the Tenant may plead that the Vouchee is dead at the Day of the Sequatur return'd and not ſerv'd.

12. Where the *Tenant will not attend the Counterplea*, he ſhall be put over to another Anſwer, and there he may plead *Outlawry in the Demandant*, tho' it be no Anſwer in chief. Br. Voucher, pl. 117. (bis) cites 21 E. 4. 54. S P. Theloal's Dig. of Writs, lib. 14. cap. 7. S. 7. cites Mich. 21 E. 4. 64.

13. In Formedon, the *Tenant vouch'd one who enter'd* into the Warranty *upon Summons, and vouch'd B. who* was ſummon'd, and *enter'd* into the Warranty, *and vouch'd C. and pray'd that the Parol demur, becauſe C. is an Infant* within Age, and ſo it did, and after *Reſummons was ſued againſt* Br. Bar, pl. 72. cites S C ſays the Vouchee, who had

vouch'd the Infant, pleaded the ſame Plea, and the Plea was held a good Plea in Bar for the Tenant, becauſe he ſaid that the Title of the Demandant was meſne between the Title of him and the Judgment; for there is Title; and

againſt the Tenant, the firſt Vouchee, and the ſecond Vouchee, but *not againſt the Infant*, who was vouch'd, and good; for he was not ſummon'd, and therefore cannot be reſummon'd; and the *Tenant ſaid that during the Time* that *the Parol demur'd, J. N. brought Formedon againſt him Tenant of the Land, and he confeſs'd the Action, and* the *Demandant recover'd and enter'd, Que Eſtate the Tenant has*; Judgment of the Writ, and *averr'd the Life of him who recover'd the Eſtate Tail*, as he ought, becauſe it is *a particular Eſtate*, and *that the Title of the Demandant was meſne between the Title of him who recover'd, and the Judgment.* And it ſeems that this is no Plea to the Writ for the Tenant, but a good Plea in Bar for him, quod nota per Judicium. But now becauſe the Tenant has Day in Court again by the Reſummons, and is Tenant and Party to receive Judgment, (for the Judgment ſhall be given againſt the Tenant notwithſtanding the Voucher) and alſo this Matter is happen'd of latter Time, therefore the Tenant ſhall have this Plea. Br. Voucher, pl. 105. cites 5 H. 7. 38. 39.

that upon Action on an elder Title, the Tenant may well confeſs the Action; and in ſuch Caſe there is no Covin. And the Reaſon why this goes to the Action, and not to the Writ, is (as it ſeems) becauſe the Tenant himſelf has purchas'd the Land from him who recover'd pending this Writ which is reſummon'd.——Theloal's Dig. of Writs, lib. 14. cap. 10. S. 2. and cap. 7. S. 8. cites S. C. accordingly.

For more of Voucher in general, See **Age, Aid, Formedon, Recovery-common, Warrantia Chartæ**, and other Proper Titles.

Uſes.

Fol. 779.

* See (E)

(A) At the Common Law. *What Perſons* ſhall be *ſeiſed to the firſt Uſe.* In Reſpect of their Eſtates without * Notice.

This is in a Nota of the Reporter in Twine's Caſe.

1. IF Feoffee to Uſe infeoffs his Son, **or any of his Blood**, without any valuable Conſideration, **he ſhall be ſeiſed to the firſt Uſe; for Conſideration of** Blood **ſhall not take away the Uſe raiſed by valuable Conſideration.** 3 **Rep.** 81. b. **Twine's Caſe.**

A Nota in Twine's Caſe.

2. **But if** Feoffee of an Uſe, **which is raiſed by Conſideration of** Blood, **makes Feoffment to one of his Blood** without other Conſideration, **there he ſhall not be ſeiſed to the firſt Uſe; for they are in equal Degree.** 3 **Rep.** 81. b.

D. 12. b. pl. 55. Trin. 28 H. 8. in Caſe of the Abbot of

3. **If Feoffee** to an Uſe **infeoffs another** without Conſideration, **he ſhall be ſeiſed to the firſt Uſe.** 3 **Rep.** 81. b. **[a Nota of the Reporter in] Twine's Caſe.**

Bury v. Buckenham.——And Ibid. Marg. cites S. P. reſolv'd accordingly by the two Chief Juſtices and Chief Baron at Serjeant's-Inn, Mich. 8 Jac. in Brown's Caſe.——S. P. in Chudleigh's Caſe, Arg. 1 Rep. 122. b. cites 5 E. 4. 7. b.

S. P.

S. P. Per Broke and Pollard J. Tho' the Heir of the Feoffees has no Notice of the firſt Uſe; Per Pollard J. But if it be upon Conſideration, and to him who has no Notice, the Uſe is chang'd; Per Broke and Pollard J. But if it be upon Notice and Conſideration, the firſt Uſe remains; Per Pollard J. Br. Feoffments al Uſes, pl. 10. cites 14 H. 8. 4.

4. The *Grandfather in Tail infeoff'd* ſeveral, *and declar'd* by his Will *that the Feoffees ſhould hold* the Land *till his Debts were paid, and after ſhould infeoff his Heir of his Body*, and died; the *Father enter'd, and made a Feoffment, the Debts not paid*, and levied a Fine, and *ſuffer'd a Recovery*, and cauſed a *collateral Warranty* to be made, and died, and the Son enter'd. And by ſome, the Feoffees may enter and execute the Eſtate to him, according to the Will of the Grandfather; and Per Huſſey and Brian Ch. Juſtice, and others, except Fairfax and Townſend, the Son ſhall be barr'd by the collateral Warranty, and the Warranty of the Father, and the Recovery, which the Son ſhall not avoid by the Statute 1 R. 3. But per Fairfax and Townſend, the Feoffees are not bound, for here was an Uſe in Tail; yet it ſeems to be there admitted, that the Feoffment of the Father was good before the Debts paid; but it ſeems to me the ſecond Feoffees ſhall be ſeiſed to the firſt Uſe of the Debt till they are paid, and then to the Uſe of the Eſtate Tail. Br. Feoffments al Uſes, pl. 21. cites 3 H. 7. 13.

If a Man has Feoffees ſeiſed to his Uſe, and declares by his laſt Will that they ſhall ſell the Land, and dies, and the Feoffees infeoff others to the firſt Uſe; per Kingſmill, the *ſecond Feoffees* may ſell his Land. Br. Feoffments al Uſes, pl. 12 cites 14 H. 7. 33. But Brooke makes a Quære; for 15 H. 7. 11. is contrary.——*And* per Tremail J. and Reede and Fineux Ch. Juſtices, If a Man declares his Will, *that his Feoffees ſhall alien to J. S.* and he dies, and they make a Feoffment over, the *ſecond Feoffees* may alien to J. S. for there is in a manner a Uſe in J. S. Br. Feoffments al Uſes, pl. 12. cites 14 H. 7. 33. and 15 H. 7. 11.

5. The *Feme of the Feoffee ſhall be endow'd to her own Uſe*; for her Eſtate is made by the Law, tho' ſhe be adjudg'd in by the Baron; for yet it is by the Law, whether the Husband will or no. Br. Feoffments al Uſes, pl. 10. cites 14 H. 8. 4. Per Newdigate Serjeant.

S. P. where ſhe is indow'd by the Common Law; Per Broke J. by the Feoffee.

Contra it ſeems of the Dower ex aſſenſu Patris, or ad Oſtium Eccleſiæ; for thoſe are in Br. Feoffments al Uſes, pl. 10. cites 14 H. 8. 4.

6. The *Baron of a Feme who is ſeiſed to an Uſe ſhall be Tenant by the Curteſy*, and is in the Poſt to his own Uſe. Br. Feoffments al Uſes, pl. 10. cites 14 H. 8. 4. Per Newdigate Serjeant.

7. If *Feoffee in Uſe be of a Seigniory*, and the *Land eſcheats*, he ſhall have the Land to the ſame Uſe as he had the Seigniory; for this comes in Lieu of the Seigniory. *Contra where Feoffee in Uſe dies without Heir, and the* * *Land eſcheats*; Per Fitzherbert J. Nota, good Diverſity. Br. Feoffments al Uſes, pl. 10. cites 14 H. 8. 4.

S. P. and S. C. cited G. Law of Uſes &c. 12. 13. for a Seigniory ſuppoſes an old Property after the preſent Fee is determined; and ſince the Feoffee in Uſe has taken it up to the Uſe of B. when the Tenancy comes in, he ſhall have it to thoſe Uſes to which the Property was at firſt granted.

* In this Caſe the Lord ſhall be ſeiſed to his own Uſe; Per Newdigate Serjeant. Br. Feoffments al Uſes, pl. 10.——*And* if the *Heir of the Feoffee be within Age*, he ſhall be in Ward of the Lord, and the Lord ſhall have the Profits; Per Newdigate Serjeant. Br. Ibid.

8. If Feoffee in Uſe *recovers Land in Value upon Voucher*, this ſhall be to the firſt Uſe; per Fitzherbert J. & Pollard concord' Br. Feoffments al Uſes, pl. 10. cites 14 H. 8. 4.

S. P. Gilb. Law of Uſes &c. 13. For the Recompence muſt enſue the Loſs, and Ceſty que Uſe loſt his Uſe by the Recovery.

9. If Feoffee in Uſe makes a *Gift in Tail*, the Donee ſhall be ſeiſed to his own Uſe; for *there is a* Conſideration, viz. a *Tenure*, between them, *unleſs he expreſs an Uſe upon* the Gift, *or in the Gift*; per Brooke J. Br. Feoffments al Uſes, pl. 10. cites 14 H. 8. 4.

But if the Feoffees to Uſe *make a Leaſe for Life*, the *Remainder for Life*, the *Remainder in Fee*, and they have Notice of the Uſe, they ſhall be ſeiſed to the firſt Uſe, notwithſtanding the Diviſion of their Eſtates; per Brudnel Ch. J. Br. Feoffments al Uſes, pl. 10. cites 14 H 8. 4.

10. *If* the *Feoffee* in Uſe makes a *Leaſe for Life*, he ſhall have *Fealty*; for this is to the Uſe of the Leſſee, if an Uſe be not expreſsly reſerved &c. Per Brooke J. Br. Feoffments al Uſes, pl. 10. cites 14 H. 8. 4.

11. *So of Deviſe* by Teſtament, the Deviſee ſhall be ſeiſed to his own Uſe, unleſs it be otherwiſe expreſs'd; for there is a Conſideration imply'd. Br. Feoffments al Uſes, pl. 10. cites 14 H. 8. 4. Per Brooke J.

So if Feoffees *ſeiſed to an Uſe of an Eſtate Tail, make Aſſurance by Bargain and Sale to W. S. and his Heirs, to the Uſe of the ſaid W. S. and his Heirs, expreſs'd* in the Deed, there *W. S. ſhall be ſeiſed to his own Uſe*, and not to the Uſe of Ceſty que Uſe in Tail, nor of his Heirs, tho' the Bargainor had *Notice* of the Uſe of the Eſtate Tail at the Time of the Bargain, becauſe the Uſe was expreſs'd in the Deed; and in the Time of H. 8. Fitzherbert J. was of the ſame Opinion. Br. Feoffments al Uſes, pl. 57. cites 5 E. 6. Per Mont. & Hales J.

12. *If Feoffees* to an Uſe of an Eſtate Tail *ſell* the Land *to him who has Notice of the firſt Uſe, yet the Bargainor ſhall not be ſeiſed to the firſt Uſe*, but to his own Uſe, by reaſon of the Bargain and Sale; for the Feoffees have the Fee-ſimple, and therefore their Sale is good. Br. Feoffments al Uſes, pl. 57. cites the Time of H. 8. Per Fitzherbert J.

Br. N. C. pl. 60. cites S. C.—— 2 And 136. in Corbet's Caſe, Arg. ſays, that notwithſtanding the Opinion of late Time, if A. gives Land to B. in Tail, to the Uſe of C. and his Heirs, this Limitation of Uſe is utterly void; and cites this Caſe, and that the Statute 1 R. 3. diſables ſuch Ceſty que Uſe from charging, demiſing, or granting the Land, as has been held.

13. A Man made a *Feoffment in Fee to A, to his own Uſe*, and the Feoffees *made a Gift in Tail to a Stranger without Conſideration, who had no Conuſance of the firſt Uſe*, To hold *in Tail to the Uſe of Ceſty que Uſe and his Heirs*. The Tenant in Tail ſhall not be ſeiſed to the firſt Uſe, but to his own Uſe; for the Statute of W. 2. cap. 1. wills, that Voluntas Donatoris in omnibus obſervetur, that a *Man ought to refer his Will to the Law, and not the Law to his Will.* And alſo here *is Tenure* between the Donors and the Donee, which is Conſideration that the Tenant in Tail ſhall be ſeiſed to his own Uſe. Br. Feoffments al Uſes, pl. 40. cites 24 H. 8.

14. *So* of the *Tenant for Years and* Tenant for *Life*; there Fealty is due. Br. Feoffments al Uſes, pl. 40. cites 24 H. 8.

15. *Where Rent is reſerved*, there, tho' the Uſe be *expreſs'd to the Uſe of the Donor* or Feoffor, yet this is Conſideration that the Donee or Leſſee ſhall have it to his own Uſe. Br. Feoffments al Uſes, pl. 40. cites 24 H. 8.

16. Where a *Man ſells his Land for 20 l. by Indenture, and executes Eſtate to his own Uſe*, it is a void Limitation of the Uſe; for the Law, by the Conſideration of the Money, makes the Land to be in the Vendee. Br. Feoffments al Uſes, pl. 40. cites 24 H. 8.

17. If a Man *delivers Money to J. S. to buy Land for him, and he buys it for himſelf, and to his own Uſe*, this is to the Uſe of the Buyer, and not to the Uſe of him who deliver'd the Money; and there is no other Remedy but Action of Deſceit; per Norwich. Br. Feoffments al Uſes, pl. 40. cites 24 H. 8.

18. Feoffees ſeiſed to the Uſe of B. before the Statute of Uſes, made a *Feoffment by Conſent of B. to J. S. and his Heirs, to the Uſe of J. S. and his Heirs*, of the ſame Lands. *J. S. had Notice of the firſt Uſe.* All the Juſtices held, that J. S. ſhould be ſeiſed to his own Uſe, becauſe the Uſe was ſo expreſs'd upon the Feoffment. Goldsb. 82. pl. 23. Hill. 30 Eliz. Staples v. Lark.

19. If a *Feoffment* be made *to A. for Life, Remainder in Fee to the Uſe of J. S.* and *A. aliens in Fee, with Notice*, the Alienee ſhall not ſtand ſeiſed to

to the firſt Uſes; for the Tenant for Life has no Power ſo to alien, and now the *Feoffee is in of an Eſtate by Wrong*, quite *different from that to which the Truſts were annex'd.* G. Law of Uſes and Truſts, 10.

(A. 2) Uſes at the Common Law. *Averment* of an Uſe. See (O. 6) Common Law.

1. IF Baron and Feme, Jointenants in Fee, ſuffer a Common Recovery, this may be averr'd to be to the uſe of the Baron. Quære. D. 3 & 4 Ma. 143. 52.

(A. 3) Uſe. *What* it is. *And the Antiquity and Original* thereof.

1. AN Uſe, by the Conſent of all our Books, *is a Confidence and Truſt*, which Ceſty que Uſe, that is, he, that makes the Eſtate, hath for him and his Heirs, in the other and his Heirs, to whom the Eſtate is given, and there *muſt be a Privity of Eſtate between them*; for there be ſundry Perſons that cannot ſtand ſeiſed to an Uſe, eſpecially where this Privity fails. *This Confidence* and Truſt, which makes the Uſe, *is not iſſuing out of the Thing given, but is collateral and annex'd to the Perſon*; for the Uſe is Uſus fructus, which is reſerved to the *Giver* when he hath given away the Property to another; for he hath *neither jus in Re, neq; jus ad Rem*, but only a Confidence, which, if it be broken, he hath no Remedy but a Subpœna in Chancery. There were two Inventers of Uſes, Fear and Fraud; Fear, in Time of Trouble and Civil War, for ſaving their Inheritance from Forfeiture; and Fraud, in Time of Peace, to defeat Debts, Wards, Eſcheats, Mortmains &c. Per Doddridge J. Jo. 127. 1 Car. 1. in the Ld. Willoughby's Caſe. G. Law of Uſes &c. 175. ſays it is an *equitable Right to have the Profit* of Lands, the legal Eſtate whereof is in the Feoffee, according to the Truſt and Confidence repoſed in him; which equitable Right alſo *extends itſelf to thoſe that come to the Lands in Privity of Eſtate to the Feoffee, and under the ſame Truſt* and Confidence that he did; ſo that, to every Uſe, 2 Things are incident, a Confidence in the Perſon, and a Privity of Eſtate; and when any of theſe fail'd, the Uſe was either ſuſpended or deſtroy'd.

2. Br. Feoffments al Uſes, pl. 20. cites 8 Aſſ. 1. to prove that Uſes were before that Time.—And Ibid. pl. 9. cites 44 E. 3. 25. to ſhew that there were Feoffees in Truſt at that Time. The Opinion was, that an *Uſe was at Common Law before the Statute of Quia Emptores terrarum, but* Uſes *were not common* before the ſame Statute; *for upon every Feoffment, before* this Statute, there *was Tenure between the Feoffors and the Feoffee*, which was a Conſideration that the Feoffee ſhall be ſeiſed to his own Uſe. *But after* this Statute the *Feoffee ſhall hold of the chief Lord*, and then there is no Conſideration between the Feoffee and the Feoffor, without Money paid, or other ſpecial Matter declar'd, for which the Feoffee ſhould be ſeiſed to his own Uſe. Br. Feoffments al Uſes, pl. 40. cites 24 H. 8.——But Manwood J. ſaid, That the Commencement of Uſe has been *as long as Mankind have been guided by Reaſon.* And altho' no Mention is made of Uſes in our ancient Books, yet that is no Argument that Uſes have been but of late Times. Uſes were not common, therefore were not at all, is a Non Sequitur. But Dyer Ch. J. conceived the Beginning of Uſes to be *immediately after the Statute of Mortmain*, 7 E. 1. Stat. de Religioſis; for which Cauſe they were driven to find out other Shifts, not provided for by the Statute. See 2 Le. 15. &c. pl. 25. Brent's Caſe.——And Holt Ch. J. in delivering the Opinion of the Court, 12 Mod. 162. in Caſe of **Jones v. Porley**, ſays, That they are indeed ſtrange Things in their Nature, and of new Invention in the Law; that the Original of them was

to

to avoid the Statute of Mortmain, and cites Brent's Caſe, 2 Le. 14. For when thoſe Statutes prohibited the conveying Eſtates to the *Clergy*, they found out this Way to have the *Eſtate convey'd to a Lay-Perſon*, under ſecret Truſts, to their Uſe, which in thoſe Days affected the Conſcience of the People: And till the Time of *H. 8. Clergymen ſat in Chancery*, who, having Power over Men's Conſciences, inforced them to perform thoſe Uſes. Indeed *for a Time Uſes were kept ſecret*, and did not much appear till the Differences *between the Houſes of York and Lancaſter*; wherein the whole Nation being engaged, both Parties finding thoſe Uſes convenient, and fit to *preſerve their Eſtate*, agreed to ſupport them; ſo that in E. 4th's Time we find more Mention of them than before, and they being thus *brought in by a General Conſent*, were afterwards lick'd into Form: So that, at length, if a Man for Money alien'd and granted his Land to one and his Heirs, by this an Uſe was raiſed by Conſtruction, and it amounted to a Bargain and Sale.—— G. Law of Uſes &c. 3. 4. ſays, The Original of them was from a Title under the *Civil Law*, which *allows* of an *Uſufructuary Poſſeſſion, diſtinct from the Subſtance of the Thing itſelf*, and *that it was brought over* to us *by the Clergy*, who were Maſters of the Civil Law; for when they were prohibited from taking any Thing in Mortmain, and after ſeveral Evaſions, by purchaſing Lands of their own Tenants ſuffering Recoveries, and purchaſing Lands round the Church, and making them Church-yards by Bull from the Pope, at laſt this Way was invented of conveying Lands to others, to their own Uſe: And this being properly Matter of Equity, it *met with a very favourable Conſtruction from the Judge of the Chancery-Court, who was in thoſe Days commonly a Clergyman*; and the Clergy thought this a Statute contrary to Natural Juſtice, and ſo could eaſily tolerate any Act in evading it. Thus this way of Settlement began; but it more generally prevail'd among all Ranks and Conditions of Men, by reaſon of the Civil Commotions between the Houſes of Lancaſter and York, to ſecrete the Poſſeſſions, and to preſerve them to their Iſſue, notwithſtanding Attainders. And hence began the Limitation of Uſes, with Power of Revocation. G. Law of Uſes and Truſts, 3, 4.

3. A. *ſeiſed of one Acre by Priority, and another by Poſteriority makes a Feoffment in Fee of both to his Uſe.* It was adjudged, that tho' both paſs at one Inſtant, yet the Law ſhall make a Priority of the Uſes as if it were of the Land it ſelf, which proves that the *Uſe is not any new Thing*; for then there ſhould be no Priority in the Caſe. 13 Rep. 56. cites 28 H. 8. D. 11. Lord Roſſe's Caſe.

See Tit. Conveyances. (A. 4) *The ſeveral Sorts of* Conveyances to Uſes, *and their Operations.*

* But ſee Tit. Feoffment (B. 2) pl. 3. Benicomb v. Parker.

1. THERE are but 3 *Sorts of Conveyances to Uſes*; the two firſt of which only will feed a Contingent Uſe. 1. Covenant to ſtand ſeiſed to Uſes. 2. Feoffment, Fine, or Common Recovery to Uſes. 3. Bargain and Sale to Uſes. * By this laſt Conveyance only, *no Contingent Uſe* can be *ſupported*. 2 Sid. 158. Per Newdigate J. Paſch. 1659. B. R. in Caſe of Heyns v. Villars.

See Tit. Conveyances. (B) *What Perſon may diſpoſe of it, and to whom.* What Perſon.

1. IF an Infant Ceſty que Uſe had made a Will of the Uſe, this was void. 21 E. 4. 24. b.

2. If an Infant makes Feoffment of Gavelkind Land, warranted by the Cuſtom, and this is to his own Uſe, if he after makes a Will of the Uſe, this is void, unleſs the Cuſtom will warrant it. 21 E. 4. 24. b.

3. If *Feoffees in Uſe* are *diſſeiſed*, and after the *Diſſeiſor infeoffs Ceſty que Uſe, and he enfeoffs a Stranger*, by this the Right of the Feoffees in Uſe are extinct; for he had Right of an Uſe, and therefore this Feoffment,

ment extinguiſhes the firſt Uſe; but where he *ſells the Land and after ſuffers a Recovery*, this is void; for by the Sale, his Uſe and Right are gone; Per Fitzherbert J. but Deinſil contra, therefore Quære. Br. Feoffments al Uſes, pl. 8. cites 27 H. 8. 29.

(C) Uſes. *Who may be ſeiſed* to an Uſe.

Fol. 780.

See (A)

1. IF a Man poſſeſſed of a Term for Years in Truſt for another be attainted of Treaſon, by which the Intereſt of the Term comes to the King by Forfeiture, the King is not ſubject to this Truſt becauſe he comes in in the Poſt, and * cannot be ſeiſed to an Uſe, P. 8 Jac. Agreed. *Week's* Caſe.

S. P. and the Law diſpoſing the Property of all Criminals to the Uſe of the King, he cannot take it under the Truſt limited. G. Law of Uſes and Truſts. 12.

* Br. Feoffment to Uſes, pl. 31. S. P. cites 5 E. 4. 7. ——— A Perſon Attaint cannot be ſeiſed to an Uſe. Poph. 72. in Caſe of Dillon v. Fraine. —— 1 Rep. 122. a. in Chudleigh's Caſe. —— By the Attainder the Uſe is deſtroy'd. Arg. Mo. 390. cites 26 Eliz. Sir Francis Throgmorton's Caſe. ——After Office found, the King's Title ſhall prevent the Uſe and relate above it, but until Office the Ceſty que Uſe is ſeiſed of the Land. Ld. Bacon's Reading on the Statute of Uſes, 348. ——— G. Law of Uſes &c. 5. ſays, he is not capable of an Uſe, becauſe he cannot take for any Man's Benefit but the King's ——S. P. Ibid. 170.

2. At Common Law before 27 H. 8. of Uſes, a Man could not give in Tail to the Uſe of another, becauſe Tenant in Tail could not make Feoffment to bind the Iſſue by Reaſon of the Statute De Donis Conditionalibus. H. 13 Ja. B. R. Per Curiam between *Cooper and Franklin*.

Cro. J. 400. pl. 9. Paſch. 14 Jac. B R. the S. C. ſays the Opinion of the Court upon the Argument inclined that he was Tenant in Tail, and the Limitation of

3. So after the Statute 27 H. 8. of Uſes, a Man cannot give in Tail to the Uſe of another, becauſe the Statute doth not intend to enable thoſe who could not ſtand ſeiſed to an Uſe before the Statute H. 13 Ja. B. R. between *Cooper and Franklin*. Per Curiam. Co. Litt. 19 b.

the Uſe out of the Tail is void as well after the Statute as before; and that the Chancery could not compel him at the Common Law to execute the Eſtate. ——3 Bulſt. 184. Trin. 14 Jac. B. R. the S. C. accordingly, that Tenant in Tail cannot ſtand ſeiſed to an Uſe.—Roll. Rep. 332. pl. 40. Hill. 13 Jac. S C. adjornatur.——Ibid. 384. pl. 6. Trin. 14 Jac. B R. the S. C. and S. P. agreed; and Haughton J. ſaid it would be repugnant to the Eſtate, the Tenant in Tail ſhould ſtand ſeiſed to an Uſe. —— Godb. 269. pl. 375. S. C. by Name of Franklyn's Caſe, ſays it was reſolved that Tenant in Tail might ſtand ſeiſed *to an Uſe expreſſed*; but that ſuch Uſe cannot be averr'd.—— If I give Land in Tail by Deed ſince the Statute to A. to the Uſe of B. and his Heirs; B. has a Fee-Simple determinable upon the Death of A. without Iſſue. And like Law, tho' doubtful before the Statute, was, for the Chief Reaſon, which bred the Doubt before the Statute, was, becauſe Tenant in Tail could not execute an Eſtate without Wrong; but that, ſince the Statute, is quite taken away, becauſe the Statute ſaves no Right of Intail, as the Stat. 1 R. 3 did; and that Reaſon likewiſe might have been anſwer'd before the Statute, in Regard of the Common Recovery. Ld. Bacon on the Statute of Uſes, 347.

None can be ſeiſed to the Uſe of another but he who can execute Eſtate to Ceſty que Uſe, which ſhall be perfect in the Law, which *Tenant in Tail* cannot do, for if he executes Eſtate his Iſſue ſhall have Formedon; and alſo the Stat. of 1 *R.* 3. *is that all Gifts*, Feoffments, and Grants *of Ceſty que Uſe ſhall be good againſt all &c. ſaving to all* Perſons *their Rights and Intereſts in Tail*, as if this Statute had not been made; and therefore Tenant in Tail ſhall not be ſeiſed to an Uſe. Br. Feoffment al Uſes, pl. 40. cites 24 H. 8. —— S. C. cited by Plowden, Pl. C. 555. in Walſingham's Caſe. ——— S. C. cited by Doderidge J. and by Coke Ch. J. 3 Bulſt. 185, 186. Trin. 14 Jac. B. R. in the Caſe of Cowper v. Franklin. —— Eſtate Tail implies an Uſe in the Donee, but by a Writing it may be averr'd to be to the Uſe of the Donor. D. 311. b. 312. a. pl. 14. Paſch. 14 Eliz. in Caſe of Andrews v. Blunt ——Eſtate Tail cannot by expreſs Limitation be to the Uſe of another. 2 Rep. 78. a. Hill. 43 Eliz. C. B. in Ld. Cromwell's Caſe cites S. C. of 24 H. 8. ——2 And. 87. in Ld. Cromwell's Caſe cites S. C.—Ibid. 136. in Corbett's Caſe, cites S. C.——Tenant in Tail cannot ſtand ſeiſed to an Uſe, *becauſe* the Statute has ſo incorporated the Eſtate Tail to the Tenant in Tail, that it cannot be deveſted. Arg. 3 Le. 190. in Venable's Caſe.——S. P. So that the Chancery which is bound by the Act of Parliament, cannot turn it to any other Purpoſe. G. Law of Uſes &c. 11.

He cannot be ſeiſed to an *Uſe expreſſed*, for the Statute De Donis has ſo fixed the Eſtate Tail, that the Donee nor his Iſſue can execute this Uſe, *nor* can he be ſeiſed *to an implied Uſe*, for the Tenure

makes the Conſideration; *but* in the Caſe of *Fines ſur Grant and Render* and *Cauſa Matrimonii Prelocuti*, they may be *averr'd by Deed* in Writing to be another Uſe or Intent; for in theſe two laſt Caſes, the Eſtates *are not veſted by Act of Parliament*, as in the Caſe of a Gift in Tail. Jenk. 195. pl. 1. cites Cowper's Caſe, and 2 Rep. 69. Cromwell's Caſe.

G. Law of Uſes &c. 205, 206. ſays Tenant in Tail cannot ſtand ſeiſed to a Uſe; for the Intent of the Statute De Donis was that he ſhould have the Lands and the Profits of them, and he cannot execute the Eſtate to the Uſe, and therefore cannot anſwer the End of the Creation of Uſes, viz. that the Tertenant ſhould make Eſtates according to the Directions of Ceſty que Uſe; and it appears by the Intent and Scope of the Act, that the Makers did never intend that the Tenant in Tail ſhould ſtand ſeiſed to an Uſe, for they have reſtrain'd him to alien to prejudice his Iſſue; but if he were to ſtand ſeiſed to an Uſe, as it was a Part of the Truſt repoſed in him to make Eſtates according to the Direction of Ceſty que Uſe, ſo it would be a Prejudice to the Iſſue; and the Statute would never have ſo carefully preſerved the Land to the Iſſue, if he might have it only to another's Uſe.

S. P. per Markham Ch. J. For

4. The *King* cannot be ſeiſed to the Uſe of another but only to his own Uſe. Br. Feoffment to Uſes, pl. 31. cites 5 E. 4. 7.

the King ſhall be adjudged indifferent to every Man, and if he ſhould be infeoffed to the Uſe of another, he would be partial. Br. Feoffments to Uſes, pl. 37. cites 7 E. 4. 16. ——R. 3. before his aſſuming the Eſtate Royal was infeoffed to the Uſe of others, the Law was taken to be, that upon his becoming King the Uſe was gone. And therefore an Act was made in the 1ſt Year of his Reign, cap. 5. that the Land ſhould be in Fee in Ceſty que Uſe, and the Reaſon why the Uſe was gone by the Common Law, was not becauſe the Capacity of his Body Natural was confounded by the Dignity Royal; For this Capacity remain'd after his becoming King, and in this Capacity he held the Land after; But the Reaſon was, becauſe to the Body Natural, in which he held the Land, the Body Politick was aſſociated and conjoin'd during which Aſſociation or Conjunction the Body Natural participates of the Nature and Effects of the Body Politick. And the Body Politick cannot be ſeiſed of an Uſe; neither can the Body Natural, during the Time that they are together, but is drawn to the Quality and Effects of the Body Politick, which is the greater. For R. 3. disjoin'd from the King does not hold the Land, but R. being King holds it, who cannot ſo far debaſe himſelf as to have Land to another's Uſe; And ſo the Body Natural by Participation of the other, is not of the ſame Degree as it would be if it were disjoin'd from it, nor the Land which he holds in the ſame Manner. Pl. C. 238. b. per Walſh, in Caſe of Willion v. Ld Berkley. ——— The King ſhall not be ſeiſed to the Uſe of another, becauſe he is not compellable to perform the Confidence. Poph. 72. in Caſe of Dillon v. Fraine.—S. P. Gilb. Law of Uſes &c. 5, 6. He is not compellable; for the Chancery has only a Delegated Power from the King over the Conſciences of his Subjects; and the King, who is the Univerſal Judge of Property ought to be indifferent, and not take upon him the Particular Defence of any Man's Eſtate as a Truſtee ——— The King cannot be ſeiſed to an Uſe; becauſe he is en le Poſt, and is Paramount the Confidence. Jenk. 190. pl. 92. —— The King cannot be ſeiſed to an Uſe. Cro. J. 50, 51. pl. 22. per Curiam, Mich. 2 Jac. C. B. in Caſe of Atkins v. Longvill, 5 E. 4. 7 E. 4 and Pl. C. 238. —— He cannot be compell'd to execute the Poſſeſſion to the Uſe by a Subpœna, becauſe if he diſobeys he cannot be compell'd by Impriſonment. Jenk. 195. pl. 1. —— Nor can he be ſeiſed in Truſt for another *ſo as to have Remedy againſt the King for it* ſo as to compel him to reconvey, but only to have an *Amoveas Manum*. Arg. Hard. 466. and per Hale Ch. Baron, 467. in Caſe of Pawlet v. the Attorney General. ——— But ſee Vern. 439. per Maſter of the Rolls, in Caſe of Ld. Kildare and Euſtace, relating to the Iriſh Forfeitures, where he ſays he takes the King to be in Nature of a Truſtee, notwithſtanding the general received Opinion to the contrary.

If the King be ſeiſed of Land in the Right of his Dutchy of Lancaſter, and covenants by his Letters Patents under the Dutchy Seal to ſtand ſeiſed to the Uſe of his Son, nothing paſſeth. Ld. Bacon's Law of Uſes, 346.—G. Law of Uſes &c. 170. ſays that of all the Lands whereof the King is ſeiſed, he is ſeiſed in Jure Coronæ for the Maintenance and Support of his Crown and Dignity, and well Government of the Commonwealth, which is a Uſe the Law deſign'd him Primitus, and conſequently 'tis excluſive of all other Uſes: Neither can it be imagined that the King ſhould in Point of Honour ſtand ſeiſed of Lands only to the Benefit and Advantage of another, and ſo to be a Sort of Bailiff to him.

5. The *Queen* (ſpeaking not of an Imperial Queen, but *by Marriage*) cannot be ſeiſed to an Uſe; tho' ſhe be a Body enabled to grant and purchaſe without the King, yet in Regard of the Government and Intereſt the King hath in her Poſſeſſion, ſhe cannot be ſeized to an Uſe. Ld. Bacon on the Statute of Uſes, 347.

Ibid. pl. 40. cites 24 H. 8. That the beſt Opinion was that an

6. Where *Feoffment* is made *to an Abbot or Corporation*, this ſhall be to their own Uſe, unleſs it be otherwiſe expreſſed; Per Brooke J. & Quære tunc. Br. Feoffments al Uſes, pl. 10. cites 14 H. 8. 4.

Abbot, Mayor and Commonalty, nor other Corporations ſhall not be ſeiſed to an Uſe; for their Capacity is only to take to their own Uſe. And cites 8 H. 6. 1. accordingly.——Br. N. C. pl. 60. cites 24 H. 8.

A *Corporation* cannot be ſeiſed to an Uſe, becauſe none can have Confidence committed to him but Body Natural, which has Reaſon, and which by the Order of the Chancellor of England may be compell'd by Impriſonment to perform it, this being the Way to have it perform'd, and no Corporation conſiſting

ſiſting of ſeveral Perſons can be impriſon'd, and their Body Natural ſhall not be impriſon'd for the Offence of their Body Corporate. Arg. Pl. C. 538. b. at the End of the Caſe of Croft v. Howel.——Poph. 72. in Caſe of Dillon v. Fraine S. P.——— Jenk. 195. pl. 1. S. P.——— S. P. per three Juſtices, Roll. Rep. 385. Trin. 14 Jac. B. R. in Caſe of Cooper v. Franklin.

A Writ of Right by a College was Quod clamat eſſe Jus & Hæreditatem ſuam without ſaying in Jure Collegii, and the Writ was awarded good, becauſe the Words in the Writ are of the ſame Effect with the other Words; for a Corporation cannot have Land but in Right of their Corporation, nor can they demand Land unleſs the Right is in Right of the Corporation; and ſo the ſeveral Ways of Expreſſion are all of the ſame Effect. And. 272. pl. 280. Paſch. 33 Eliz. All Souls College in Oxford's Caſe v. Tamworth——Le. 153. pl. 212. Trin. 31 Eliz. C. B. S. C. accordingly. And Anderſon Ch. J. ſaid that if a Parſon pleads that he is ſeiſed, he ſhall ſay in Jure Eccleſiæ, becauſe he has two Capacities, and without ſuch Words as here he ſhall be intended ſeiſed in his own Right; but if an Abbot pleads that he was ſeiſed, there needs not ſuch Words; for he has no other Capacity; and ſo of a Dean and Chapter, Mayor and Commonalty.——A Corporation aggregate could not be ſeiſed to an Uſe, it being held that no Subpœna lay againſt them. Per Holt Ch. J. 2 Vern. 399. Mich. 1700. in Caſe of the Attorney General v. the Mayor &c. of Coventry.——G. Law of Uſes &c. 5. ſays Bodies Politick are not capable of an Uſe or Truſt, becauſe they are Bodies framed at the Will of the King, and are no further capable than he wills them, and 'tis his Will that they ſhould purchaſe for the common Benefit, and for the Ends of their Creation, and not that they ſhould take any Thing in Truſt for others; alſo being incorporate, the Chancery had no Proceſs on the Perſons to compel them to diſcharge their Truſt.——Ibid. 170. S. P.——A Corporation cannot be ſeiſed to an Uſe, becauſe their Capacity is to a Uſe certain; again, becauſe they cannot execute an Eſtate without doing Wrong to their Corporation or Founder; but chiefly becauſe of the Letter of this Statute, which (in any Clauſe, when it ſpeaks of the Feoffee) reſteth only upon the Word (Perſon,) but when it ſpeaks of Ceſtuy que Uſe, it adds Perſon or Body Politick. Ld. Bacon on the Statute of Uſes, 347.

7. *Occupant ſhall not be ſeiſed to any Uſe*; Per Brudnel. Br. Feoffments al Uſes, pl. 10. cites 14 H. 8. 4.

But G. Law of Uſes and Truſts 11 ſays an *Occupant* may be ſeiſed to an Uſe, for an Occupant continues the Eſtate for Life as his Subſtitute, and ſo muſt take it as he had it.——S. P. Hard. 468. in Caſe of Pawlet v. the Attorney General.

8. Thoſe who are *in by Recovery* are ſeiſed to their own Uſe, and not the Uſe of another. Br. Feoffments to Uſes, pl. 40. cites 24 H. 8.

9. The *Wife* may be ſeiſed *to the Uſe of her Baron* by a Feoffment to the Baron and the Feme and others, where the Baron only paid the Purchaſe Money. Br. Feoffment to Uſes, pl. 51.

A *Feme Covert* and an *Infant*, tho' under Years of Diſcretion, may be ſeiſed to an Uſe; for as well as Land might deſcend unto them from a Feoffee to Uſe, ſo may they *originally be infeoffed to an Uſe*; yet if it be before the Statute, and they had (upon a Subpœna brought) executed their Eſtate during the Coverture or Infancy they might have defeated the ſame; and then they ſhould have been ſeiſed again to the Uſe, and not to their own Uſe; but ſince the Statute no Right is ſaved unto them. Ld. Bacon's Reading on the Statute of Uſes. 348.

10. *Tenant for Years* cannot at this Day be ſeiſed or poſſeſſed to any Uſe, he has only a Poſſeſſion and not Seiſin, which the Statute of Uſes requires. Jenk. 195. pl. 1.

11. *Lord by Eſcheat* ſhall not be ſeiſed to an Uſe, becauſe upon the Eſcheat he is in En le Poſt, and paramount the Confidence. Jenk. 190. pl. 92.

Br. Feoffments to Uſes, pl. 40. cites 24 H. 8.——Jenk. 195. pl. 1. S. P.——1 Rep. 122. a. in Chudleigh's Caſe accordingly, that he is in Paramount the Uſe, viz. by Force of a Condition in Law annex'd to the Land at the Time of the Creation of the Seigniory, and the Tenancy comes in Lieu of his Seigniory which he has to his own Uſe; and the Writ of Eſcheat ſays, that ad ipſum reverti debet tanquam Eſcaeta ſua; and he is not in en le Per, but en le Poſt, and the Lord by Eſcheat loſes his Seigniory.——S. P. Gilb. Law of Uſes &c. 172. and ſays further, That he has the Lands in Satisfaction for his Services that are now gone; but what Satisfaction will it be, if he is ſtill to hold the Land charg'd with the Uſe.

12. *So* of a *Lord of a Villein*, and for the ſame Reaſon. 1 Rep. 122. a. Arg. in Chudleigh's Caſe.

Br. Feoffments to Uſes, pl. 40. cites 24 H. 8.——S. P.

13. *So* of a *Lord that enters for Mortmain*, and for the ſame Reaſon. 1 Rep. 122. a. Arg. in Chudleigh's Caſe.

1 Gilb. Law of Uſes 10, 11. ſays, that in

14. *So* of a *Lord that recovers in Ceſſavit*, and for the ſame Reaſon. 1 Rep. 122. a. Arg. in Chudleigh's Caſe.

theſe and in the above Caſe of Lord by Eſcheat, they claim by the general Laws and Statutes of the Kingdom, which the Chancery has no Power to alter, and do not take as Subſtitutes under thoſe private

vate Contracts to which Truſts are annex'd, and ſo cannot be puniſh'd as corrupt Breakers of the Truſt which they never undertook.

Br. Feoffments to Uſes, pl. 40. cites 24 H. 8. ——She is bound by a Truſt, becauſe ſhe comes in in the Per; Per Hale Ch. B. Hard. 469. in Caſe of Pawlet v. the Attorney General.—And Gilb. Law of Uſes 11. ſays that ſhe claims by the Marriage Agreement; and a ſufficient Proviſion is made for her by Law, which is a 3d Part of his Eſtate; and ſince a private Contract is the Original of her Title, ſhe continues the Eſtate of her Husband as he purchas'd it, and under the ſame Truſt and Agreements.——But Ibid. 171. ſays, that becauſe ſhe comes to the Eſtate by the Diſpoſition of Law, for the Advancement and Encouragement of Matrimony, and this Eſtate is given for her own Maintenance, and is conſequently excluſive of all other Uſes for the Advantage of other People.

15. *Tenant in Dower* ſhall not be ſeiſed to an Uſe; for the Law gives her her Eſtate in Conſideration of Marriage, and ſhe is not in in Privity of Eſtate. 1 Rep. 122. a. Arg. in Chudleigh's Caſe.

Br. Feoffments to Uſes, pl. 40. cites 24 H. 8. ——Tenant by the Curteſy ſhall not be bound by a Truſt, becauſe he comes in in the Poſt. Per Hale Ch. B. Hard. 469. in Caſe of Pawlett v. the Attorney General.——Gilb. Law of Uſes 171. gives the ſame Reaſon for Tenant by the Curteſy as are before mention'd for Tenant in Dower.

16. *So* of a *Tenant by the Curteſy*, and for the ſame Reaſon. 1 Rep. 122. Arg. in Chudleigh's Caſe.

S. P. accordingly. Ibid. 139. b. Per Popham Ch. J. but he ſaid that Ceſty que Uſe ſhall compel the Feoffees in Chancery to enter upon the Diſſeiſor, or to recover the Land againſt him at the Common Law; and then Chancery will compel the Feoffees to execute the Eſtate according to the Uſe, and the Chancellor ought to direct the Uſes according to the Rules of Law.——S. P. Gilb. Law of Uſes &c. 10. ſays the Diſſeiſor &c. take under no Truſt, but defeat the Eſtate to which the Truſt was ſubjoin'd; and that upon a Bill by Ceſty que Uſe againſt the Feoffee to the Uſe, the Chancery will order him to try the Title with the Diſſeiſor at the Common Law.

17. A * *Diſſeiſor*, *Abator*, or *Intruder*, ſhall not be ſeiſed to an Uſe, tho' he has Notice; for the Uſe was not annex'd to the Poſſeſſion of the Land which any of them has, but to the Privity of Eſtate which neither of them has; for they are not in in Privity of the Eſtate, to which the Uſe was annex'd, but En le Poſt. And ſince the Ceſty que Uſe had no Remedy but in Chancery, and that the Chancellor had no Power to determine Right of Inheritances, therefore they cannot ſtand ſeiſed to an Uſe. 1 Rep. 122. a. Arg. in Chudleigh's Caſe.

* Br. Feoffments to Uſes, pl. 10. cites 14 H. 8. 4. Per Brudenell.

1 Rep. 122. a. in Chudleigh's Caſe. ——A. infeoff'd an Alien and another to the Uſe of himſelf and his Wife in Tail, Remainder to his own right Heirs; it ſeems that if an Office be found, the King ſhall have a Moiety to his own Uſe by his Prerogative, and the other Uſe in this Moiety is gone for ever. D. 283. b. pl. 31. Paſch. 11 Eliz. The King v. Jaſper Bois.——Mo. 390. Arg. cites S. C——Roll. Rep. 333. Arg. and 385. cites S. C—— S. P. Ld Bacon's Reading on the Statute of Uſes 348. but ſays the Uſe is not void ab initio. ——He cannot take for any Man's Benefit but the King's. Gilb. Law of Uſes &c. 5.—S. P. Ibid. 170. and thereby others are excluded; neither can an Alien have Lands, and conſequently cannot be ſeiſed to an Uſe.

18. An *Alien* cannot be ſeiſed to an Uſe. Poph. 72. in Caſe of Dillon v. Fraine.

19. If a *Biſhop* bargain or ſell Lands whereof he is ſeiſed in the Right of his Fee, this is good during his Life; Otherwiſe it is where a Biſhop is infeoff'd to him and his Succeſſors, to the Uſe of J. D. and his Heirs, that is not good; no, not for the Biſhop's Life, but the Uſe is merely void. Ld Bacon's Reading on the Statute of Uſes 347.

20 *Jointenants* may be ſeiſed to an Uſe, tho' they come to it at ſeveral Times, it being derived out of the ſame Fountain or Freehold. 13 Rep. 56. in Samme's Caſe.

But if Mention be made of Perſons En le Poſt,

21. One that comes in *En le Poſt* ſhall not be liable to the Truſt, without expreſs Mention made by the Party; and the Rules for executing a Truſt have often varied, and therefore they only are bound by it who come

come in in Privity of Eſtate; Per Hale Ch. B. Hard. 469. Trin. 19 Car. 2. in Scacc. in Caſe of Pawlet v. the Attorney General. it ſeems, by the Opinion of the Lord Hale, that they ſhall be liable to the Truſt. Gilb. Law of Uſes and Truſts 12.

(D) Uſes at Common Law, *and Truſts* now. *Who ſhall have them. By Deſcent.* See (O. 5)

1. THE Uſe ſhall be of the ſame Nature of the Land, to deſcend as the Land ought.

2. As of Borough Engliſh Land upon general Feoffments, the Uſe ſhall deſcend to the youngeſt. 21 E. 4. 24. b. D. 3 & 4 Ma. 134. S. P. Gilb. Law of Uſes 18. 19. As the Court of Chancery cannot alter

3. So of Gavelkind Land to all the Males. 21 E. 4. 24. b. 5. E. 4. 7. b.

the Deſcent of the Land, ſo it cannot alter the Law and Cuſtom of a Place; for all immemorial Cuſtoms and Uſages are Part of the Laws of the Land.

4. So if a Man ſeiſed of Lands of the Part of the Mother, makes Feoffment generally, the Uſe ſhall deſcend to the Heirs of the Part of the Mother. D. 3 & 4 Ma. 134. [pl. 9] Gilb. Law of Uſes 17. cites S. C.

5. The ſame Law, if he had expreſs'd that the Uſe ſhould be to him and his Heirs. This ſhould enſue the Land, and the Heirs of the Part of the Mother ſhall have it. Co. 1. *Shelly*, 100. b. Contra D. 3 & 4 Ma. 134. 9. (Quære ceo.) for the Land would have gone to the Heirs of the Part of the Mother, and

an Uſe is but an Eſtate in Equity, Part of the Eſtate in the Land; for the Rule of Law, that tends to the Eſtabliſhment of Families and Encouragement of Induſtry, is, That thoſe that take Benefit as Repreſentatives ſhould convey it all along in the Blood of the firſt Purchaſor, from whom the Benefit was derived; and [in this Caſe] the Uſe and Benefit was derived from the Mother, and the Uſe was never parted with, but the Poſſeſſion only; ſo the Uſe muſt be all along convey'd to the Heirs on that Side.

If a Rent had been reſerved to him and his Heirs, the ſame ſhould go to the Heir of the Part of the Father; but here the Land and Living moving from the Part of the Mother, therefore in Equity the Uſe, which is nothing but a Truſt and Confidence, ſhould go alſo to the Heirs of the Part of the Mother. 1 Rep. 100. b. in Shelly's Caſe, cites 7 H. 6 4 b. and 5 E. 4. 7. b.——Br. Feoffments to Uſes, pl. 10. cites 14 H. 8. 4. S. P.——See Tit. Heir, (W. 2) pl. 9. 10. Godbold v. Freeſtone.

6. But it ſeems of Borough Engliſh Land it would be ſo clearly; (for there, it ſeems, a Man cannot make any other to have it by Deſcent, but the youngeſt.) 5 E. 4. 7. b. S. P. 13 Rep. 56. cites it as ſo holden in 5 E. 4. 7. and cites 4 & 5 Ph. & M. D. 163.——Br. Deſcent, pl. 59. cites 37 & 38 H. 8. S. P.——Br. Done &c. pl. 42. cites S. C. and S. P. that the eldeſt Son ſhall have it.——Hob. 31. in Caſe of Counden v. Clerke, Hobart Ch. J. cites ſame Caſes; and ſays that this is out of the Cuſtom, and ſo muſt run to the Heir at the Common Law.

7. If, by a Cuſtom of a Manor, Land in Fee ought to deſcend to the eldeſt Daughter only, excluding the other Daughters, there being no Son, and a Truſt in Equity deſcends to the Heir, this ſhall go to the eldeſt Daughter only, to be relieved thereupon in Equity, according to the Cuſtom for the Land. P. 10 Car. B. R. between *Jones and Lady Reasbie.* The ſaid Cuſtom found in B. R. by a Jury at Bar, and thereupon the ſame Term decreed in Chancery, That the Truſt ſhall go to the eldeſt Daughter alſo. G. Law of Uſes &c. 19. S. C.

8. The *Poſſeſſio Fratris of an Uſe* follows the Analogy of Deſcents at Law. And ſo if a Man, ſeiſed in Fee of an Uſe, had Iſſue a Son and a

Daughter by one Venter, and a Son by another Venter, and deviſes it for Years, and dies during the Term, the Daughter ſhall have it, and not the Son; otherwiſe it had been, if he had deviſed it for Life. G. Law of Uſes &c. 18.

See (A)

(E) Uſes, Truſts at the Common Law. *Who* ſhall be ſaid *ſeiſed to the firſt Uſe.* [*Notice.*]

Fol. 781. The Conſideration imports a Seiſin to C.'s own Uſe; but the Notice imports a Seiſin to the former Uſes; and where the Act is capable of a double Interpretation, that muſt be taken which conſiſts moſt with Equity. G. Law of Uſes &c. 7. 8.

1. IF A. agrees with B. to leaſe Bl. Acre to him for certain Years, and after, before he has made the Leaſe, according to the Promiſe, he enfeoffs C. of the Land for a valuable Conſideration, C. having Notice of the Promiſe before the Feoffment made, C. ſhall be compell'd in Chancery to make the Leaſe to B. according to the Promiſe, becauſe of his Notice. P. 8 Ja. in the Exchequer. Per Curiam.

2 Roll Rep. 105. S C. and Ld. C. Bacon ſaid, That tho' it is true that a Conſideration to deſtroy an Uſe, ought to be more ſtrong than a Conſideration to raiſe an Uſe need be, yet it would be miſchievous if J. S. who married in Conſideration of this Land, ſhould not avoid the Truſt; for he loſes thereby the Advancement he might perchance have had by another Wife, and ſo by a Mean the Conſideration given by him is valuable; beſides that he has no Means to ſearch and find out this ſecret Truſt: Whereas on the other Side, the Miſchief is not ſo peremptory and concluſive; for tho' Ceſty que Truſt has no Remedy againſt the laſt Feoffee that comes in upon the Conſideration of Marriage, yet he may have Subpœna againſt the firſt Feoffee who broke the Truſt in him repoſed, and ſo may aid himſelf. But adjornatur.

2. If A. ſeiſed of Land in Truſt for B. covenants with J. S. in Conſideration that he will marry D. his Daughter, that he himſelf will ſtand ſeiſed to the Uſe of J. S. for Life, Remainder to D. in Fee, The Marriage takes Effect, J. S. not having Notice of the Truſt. It ſeems that the Eſtate for Life of J. S. nor the Remainder of D. ſhall not be ſubject to the Truſt, becauſe they come in for a valuable Conſideration, ſcil. Marriage, and have no Notice of the Truſt. Tr. 17 Ja. *Sir Geo. Reynolds and Peacock*, in Chancery. Dubitatur.

3. If A. ſeiſed in Fee before 27 H. 8. to the Uſe of B. and the Heirs Males of his Body, and for Default of ſuch Heirs to the Uſe of C. in Fee, and after A. gives the Lands to B. and to the Heirs general of his Body, and after B. dies without Heir Male, and his Heir general of his Body enters, he is ſeiſed to the Uſe of C. to whom the Remainder in Uſe in Fee was limited, in Caſe that B. at the Time of the Gift made to him by A. had Notice of the firſt Uſe limited to him and his Heirs Males. Kelw. 22 H. 7. 93. Per all the Juſtices, in the Caſe between the *Lord Chamberlain, Daubney, and Chicheſter.*

Ld. Bacon, in his Reading upon the Statute of Uſes, 312. cites this Caſe, and 28 H. 8 and ſays, That thoſe and diverſe Books prove, that if the Feoffee ſells the Land for good Conſideration to one that has Notice, the Purchaſor ſhall ſtand ſeiſed to the ancient Uſe; and that the Reaſon is, becauſe the Chancery looks further than the Common Law, viz. To the corrupt Conſcience of him that will deal in the Land, knowing it in Equity to be another's, and therefore if there were Radix Amaritudinis, the Conſideration purgeth it not, but it is at the Peril of him that gives it; ſo that Conſideration,

4. It was held that where Feoffees in Uſe be, that their Heirs, and Feoffees, and *all that are in in the Per, without Conſideration, or upon Conſideration, if they have Notice of the firſt Uſe*, ſhall be ſeiſed to the firſt Uſe. Contra of thoſe who come in *in the Poſt*. Br. Feoffments al Uſes, pl. 10. cites 14 H. 8. 4.

ſideration, or no Conſideration, is an Iſſue at the Common Law; but Notice, or no Notice, is an Iſſue in Chancery.

5. If A. *covenants* with B. *that when A. ſhall be enfeoff'd by B. of three Acres* in D. that *then* the ſaid *A. and his Heirs, and all others ſeiſed of the Land of the ſaid A. in S. ſhall be ſeiſed thereof, to the Uſe of the ſaid B. and his Heirs*; there if A. makes a Feoffment of his Land in S. and after B. enfeoffs A. of the ſaid 3 Acres in D. there A.'s Feoffees ſhall be ſeiſed to the Uſe of B. notwithſtanding that he had no Notice of the Uſe; for the Land is and was bound with the Uſe aforeſaid, * to whoſe Hands ſoever it ſhall come; and it is not like to where the Feoffee in Uſe ſells the Land to one who has no Notice of the firſt Uſe; for in this firſt Caſe the Uſe was not in Eſſe, till the Feoffment be made of the 3 Acres, and then the Uſe commenced. Br. Feoffments al Uſes, pl. 50. cites 30 H. 8.

S. C. cited by Wray Ch. J. Le. 260. pl. 345. 18 Eliz. B. R. in Caſe of Manning v. Andrews. —S. C. cited out of Le. 260. G. Law of Uſes, 237. ſays, That it ſeems it muſt be underſtood that the Feoffment was made without Conſideration. And Quære then; for if it were made with Conſideration, then there is no more Reaſon the Land ſhould be charged with the Uſe into whoſe Hands ſoever it came, by reaſon of the Covenant, than there is by reaſon of a Uſe actually raiſed; for a Covenant cannot extend beyond the Thing itſelf.

* 2 Sid. 98. ſays, That this was denied in Chudley's Caſe.

6. If one had made a Feoffment before the Statute 27 H. 8. to the Uſe of the Feoffor and his Heirs, and the *Feoffees had made a Leaſe, reſerving a Rent to one who had no Notice of the Uſe*, the Leſſee ſhould have the Land to his own Uſe, and the Notice is not material. And. 314. in Caſe of Dillon v. Fraine, cites Br. Feoffments to Uſes, pl. 47. 30 H. 8.

Br. N. C. pl. 136. cites S. C.—— G. Law of Uſes, 7. cites S. C. and gives for Reaſon, that Words of Demiſe equally paſs an Uſe, as if there were expreſs Words to transfer it.

7. If *A.* be *indebted to the Queen*, and *enfeoffs B. and C. to the Uſe of A. and his Heirs*, and *J. S. having Notice* thereof *purchaſes Parcel* of the Land of the Feoffee, he ſhall be ſeiſed to the firſt Uſe of which he had Notice, that the Land purchaſed was not in Conſcience the Land of thoſe who enfeoff'd him, but in Truſt to retain it for the Uſe of Ceſty que Uſe. But *otherwiſe* it is, *if* A. had enfeoff'd B. and C. *to take the Profits, or to ſell for Payment of Debts*, and one who has Notice thereof buys the Land, this ſhall be to his own Uſe. Sav. 15. pl. 39. Paſch. 22 Eliz. Sir Thomas Ragland's Caſe.

8. A Feoffment in Fee was made to the Uſe of *A. for Life, Remainder to B. for Life, Remainder to C. in Fee*, and afterwards *A. enfeoff'd J. S.* who had *Notice* of the Uſe. The ſame takes away all the other Uſes; and tho' J. S. had Notice of the Uſe, yet he ſhall not be ſeiſed to the firſt Uſe; for the Eſtate, out of which the firſt Uſe did ariſe, is taken away, and then alſo the Uſes. Arg. 3 Le. 158. pl. 205. Mich. 29 & 30 Eliz. in Caſe of Cadee v. Oliver, cites Delamere's Caſe.

9. A *Feoffee of a Manor, to the Uſe of J. S. releaſes to the Tenants*, they ſhall not have it to the Uſe of J. S. For the Seigniory is drown'd in the Tenancy which they had to their own Uſe, and there can be no Truſt without an Eſtate in Being. G. Law of Uſes and Truſts, 9.

But by the modern Courſe of Chancery, if the *legal Eſtate* be *merged, and the Owners of the Land have Notice of the Truſt*, the Land is inveſted with it, and they ſhall be inforced by a Decree in Chancery to ſet it up again; for the Land was at firſt bound and attendant to anſwer the Truſt; and where the Owners of the Land knew of this Truſt, 'tis Iniquity in them to deſtroy it. G. Law of Uſes and Truſts, 9. 10.

(F) Uſes

See (O. 5) (F) Uſes at Common Law. *To whoſe Uſe* it ſhall be. *By Implication of Law.*

D. 146. b. pl. 71. Paſch. 3 & 4 Ph. & M. in Caſe of Villers v. Beaumont.

1. IF Feoffment be made at this Day without any Conſideration expreſs'd, this ſhall be to the Uſe of the Feoffor. D. 3 & 4 Ma. 146. 71. Tr. 5 Ja. B. Per Curiam.

2. So if a Man ſuffers a Common Recovery, without limiting to whoſe Uſe it ſhall be, or Conſideration expreſs'd, it ſhall be to the Uſe of the Recoveror. D. 3 & 4 Ma. 146. 70.

There is no Uſe implied upon a Fine; Per Weſton J. And by Dyer, if the Render be made in Tail, the Cognizee is ſeis'd of the Reverſion to his own Uſe. And to this the Serjeants agreed. Mo. 46. pl 138. Mich. 5 Eliz. Anon.

3. The ſame Law it is of a Fine. D. 3 & 4 Ma. 146. 70.

If a Fine be levied to a Man and his Heirs, to the Uſe of him and his Heirs, in this Caſe he ſhall take by the Common Law, and not by way of Uſe; and in this Caſe there may be a *Parol Averment to prevent a reſulting Uſe* to the Conuſor in Fee; for when the Fine is levied, an Uſe does immediately ariſe, either to the Conuſor and his Heirs, or to the Conuſee and his Heirs; and when there is a ſubſequent Deed, it only ſhews what the Intent of the Parties was at the Time of the Fine levied. 9 Co. Bowman's Caſe; ſo that when a Fine is levied, an Uſe does ariſe by Implication of Law to the Conuſee and his Heirs; and conſequently this Caſe is excepted out of the Statute of 29 Car. 2. cap. 3. Gilb. Equ. Rep. 17. Paſch. 8 Ann. Altham v. Angleſey.

4. But if before the Statute of Quia emptores Terrarum, a Man had made Feoffment in Fee without Conſideration, the Feoffee ſhould have this to his own Uſe, becauſe there was a Tenure created by the Law between them. D. 3 & 4 Ma. 146. 71.

5. So if a Man gives in Tail at this Day, this ſhall be to the Uſe of the Donee for the Cauſe aforeſaid. D. 3 & 4 Ma. 146. 71.

Such Leaſe, or the Grant of it over, is to the Uſe of the Leſſee or Grantee;

6. So if a Man leaſes for Life or Years, this ſhall be to the Uſe of the Leſſee.

7. If Leſſee for Life or Years grants over his Eſtate without expreſſing to whoſe Uſe, this ſhall be to the Uſe of the Grantee; for there is a Conſideration implied, as to pay Rent to him in Reverſion, * and to be ſubject to Forfeitures, and to be puniſhed in Waſte. Tr. 5 Ja. B. Per Curiam. † Caſtle v. Dodd.

* Fol. 782.

for (as is ſaid) the Uſe of the Country to declare Lands to be ſafely kept, has made the meer Delivery of Poſſeſſion no Evidence of Right, without a valuable Conſideration. But theſe leſſer Eſtates were not us'd to be deliver'd to be kept for the future Support and Proviſion of the Family; and therefore the meer Act of delivering Poſſeſſion paſs'd a Right without Conſideration, ſince there is no Preſumption from the Uſe of the Country, that theſe Eſtates were transferr'd under ſecret Truſts, eſpecially ſince Rents were uſually reſerv'd, and they ſubject to Waſte and other Forfeitures. Gilb. Law of Uſes &c 65.

† Cro. J. 200. 201. pl. 32. S. C accordingly, the Grant being made by Fine, without any Conſideration. —— S. C. cited Arg. Lane 94. in Caſe of Wentworth v. Stanley, as adjudg'd 8 Jac. in C. B.

Cro. J. 201. S. C. & S. P. admitted.

8. If Leſſee for Life or Years grants to another his Eſtate, and limits the Uſe but of Parcel of the Eſtate to the Grantee, the Remainder of the Eſtate ſhall be to the Uſe of the Grantee by Implication of Law, and not to the Grantor. Tr. 5 Ja. B. Per Curiam. Caſtle v. Dodd.

9. A Man *purchas'd* Land, *and caus'd an Eſtate to be made to him and his Feme, and to three others in Fee*; this ſhall be taken to be to the

the Uſe of the Baron only, and not to the Uſe of the Feme, without ſpecial Matter to induce it. And ſo ſee that a Feme may be ſeiſed to the Uſe of her Baron, and ſuch Feoffment was Anno 3 H. 7. and intended ut ſupra; Quod nota. Br. Feoffments al Uſes, pl. 51. cites 34 H. 8.

10. L. made a *Feoffment to the Uſe of himſelf for Life, and after his Death, and the Death of P. his Wife, to T. his Son in Tail.* It was held that no implied Uſe did ariſe to P. and therefore the Eſtate to T. was contingent. Poll. 94. in the Caſe of Carpenter v. Smith, cites it as the Caſe of Weale v. Lower. Poll. 54 to 70. Jan. 31. 1672. in Canc. S. C.

11. A. *ſeiſed* in Fee *of Bl. Acre and Wh. Acre, had two Siſtees E. and F. and* had *B. a Son by a former Wife*, and *on his Marriage with M. a 2d Wife*, he *convey'd* the whole to W. R. and W. S. and their Heirs, *to the Uſes* following, viz. *Bl. Acre to A. himſelf for* 99 *Years, if he ſo long live*, and after the Expiration to the Uſe *of the ſaid M. for a Jointure*, and after her Death to the Uſe *of the Heirs Male of the Body of the ſaid A.* Remainder *to the right Heirs of A.* And as to *Wh. Acre, to* the Uſe of A. *for* 99 *Years, if* &c. and after to the Truſtees and their Executors for 200 Years in Truſt *to raiſe Portions for his Children by M.* Remainder *to the Heirs Male of the Body of A.* Remainder *to his right Heirs.* The Marriage took Effect, and after *A. died, leaving B. his Son by his firſt Wife, and H. and J. Daughters, by M. his 2d Wife. M. enter'd into Bl. Acre, B. enter'd into Wh. Acre, and cauſed Part of the Rents to be paid to the Truſtees towards raiſing Portions purſuant to the Settlement*, and granted Leaſes &c. and *died without Iſſue in the Life of M.* Afterwards *M. died.* The Maſter of the Rolls was of Opinion, that the Limitation of Wh. Acre was void; and as to what had been urg'd that an Uſe aroſe by Operation and Conſtruction of Law, he ſaid that to talk of raiſing an Uſe by Implication was a Myſtery in Law which he did not underſtand; and would have decreed Wh. Acre to the Siſters of B. But upon the Importunity of the Defendant's Counſel, a Caſe was ſtated and ſent to the Judges of C. B. who certified, November 26. 1712. That *as to Bl. Acre* nothing but a Reverſion expectant on M.'s Eſtate for Life deſcended to B. So that by her enjoying the Land, and ſurviving B. *there was no Poſſeſſio Fratris*, to exclude H. and J. the Siſters by the 2d Venter, from inheriting as Heirs to A. their Father. But *as to Wh. Acre*, they held *the Limitation to the Heirs Male of the Body of A. void, no Freehold being limited to any Perſon precedent to that Eſtate, and* that *no Eſtate of Freehold could reſult* to A. for his Life *by Implication, becauſe another Eſtate*, viz. *for* 99 *Years, if* &c. *was expreſsly limited to him*, which would be inconſiſtent with a Freehold in him by Implication, and that a Freehold either expreſs or implied, was neceſſary to ſupport ſuch Limitation; and conſequently the Freehold and Inheritance in Fee-ſimple of Wh. Acre, deſcended to B. expectant only on a Term for Years, to the Truſtees of which there was ſuch a Poſſeſſio Fratris as intitles E. and F. the Plaintiffs Aunts, and Heirs of the whole Blood to B. the Son, to that Land. MS. Rep. Mich. 8 & 11 Ann. Rawley v. Holland. See Tit. Remainder (C. 3)

(G) Uſes at Common Law. *In what Manner* and Nature *Ceſty que Uſe ſhould have* it, *and* how he might *diſpoſe thereof.*

Jenk. 212. pl. 50.—Gilb. Law of Uſes &c. 56. cites S. C. ſays that the Uſes were in him; and therefore it is Equity he ſhould diſpoſe of it when, and as, he pleaſes, to bar himſelf and his Heirs.

1. D. 3 & 4 Ph. & M. 136. **Baſſet's Caſe. A Man** ſuffer'd a Recovery 16 H. 7. **without Conſideration,** and 20 H. 7. declared the Uſes **of the precedent Recovery, and good; for before the Statute** of 27. (**as this was**) **an Uſe being but a thing in Confidence, might be directed and altered according to the Intention of the Parties. Agreed 9 Rep. 10. Downman's Caſe.**

But where a Stranger has Intereſt by the Uſe, or if it be to the *Intent to retake Eſtate Tail*, there he cannot *change the Uſe* after. Br. Feoffments al Uſes, pl. 36. cites 5 E. 4. 8.——Cary's Rep. 15. cites S. C.

2. If a Man *infeoffs others to the Uſe of him and his Heirs, or* generally, *without expreſſing any Uſe*, he may make a Will after, and alter the Uſe. Br. Feoffments al Uſes, pl. 36. cites 5 E. 4. 8.

S. P. So of a Leaſe generally; for the Statute gives nothing but that he may infeoff, grant, releaſe, or leaſe; Per Keble, Fiſher, and Jay, quod Brian and the Juſtices conceſſerunt; and that where Ceſty que Uſe leaſes for Years, the *Feoffee ſhall have* * Action of *Waſte, and* ſhall *be received in Default of Tenant for Life*, where the Leaſe is for Life, *and* ſhall *join in Aid*, and ſhall *enter for Forfeiture.* Br. Feoffments al Uſes, pl. 26. cites 8 H. 7. 8.

3. If *Ceſty que Uſe makes a Leaſe for Life*, yet the Reverſion remains in the Feoffees, and not in the Leſſor. Br. Feoffments al Uſes, pl. 23. cites 5 H. 7. 5. Per Cur. except Davers.

* S. P. Per Cur. except Davers. Br. Feoffments al Uſes, pl. 23. cites 5 H. 7. 5. notwithſtanding that there be Privity.

4. If Ceſty que Uſe *enters, and a long Time after makes a Feoffment*, yet this ſhall not purge the Tort, but the Feoffee ſhall have *Aſſiſe*; Per Cur. quod Brian and others conceſſerunt clearly. Brooke ſays Quære how this Entry is to be intended; for Ceſty que Uſe always occupied the Land at the Will and Sufferance of his Feoffees; therefore quære what Act will make him Diſſeiſor. Br. Feoffments al Uſes, pl. 23. cites 5 H. 7. 5.

But *if* the Reſervation be *by Deed*, the *Ceſty que Uſe ſhall have the Rent.* Br. Feoffments to Uſes, pl. 26. cites 8 H. 7. 8.——S. P. Gilb. Law of Uſes &c. 26. 27. For being by Deed, the Feoffees are eſtopp'd by their own Act to deny the Tenure of Ceſty que Uſe; but where it is without Deed, the rendring Rent to a Man is an Acknowledgment of the holding Lands from him, but here the Lands are not held of Ceſty que Uſe, but of the Feoffees who had the Reverſion.

5. If Ceſty que Uſe *makes a Leaſe rendring Rent*, the Reſervation is void, unleſs it be by Deed; Per Brian. Br. Feoffments al Uſes, pl. 23. cites 5 H. 7. 5.

In ſuch Caſe the Ceſty que Uſe between the Statute of R. 3. and 27 H. 8. tho' he had but an Uſe when the Feoffment was made, yet now he ſhall be ſeiſed of the whole Eſtate in the Land. Co. Litt. 202. a.——Gilb. Law of Uſes 32. cites S. C. For the whole Eſtate is deveſted out of the Feoffees by the Feoffment; and they cannot enter for the Condition broken, becauſe they are no Parties to it.

6. If Ceſty que Uſe makes a *Feoffment in Fee upon Condition, and enters for the Condition broken*, he ſhall retain; for the Feoffees cannot enter; for by the Feoffment the Fee and the Right was out of them. Br. Feoffments al Uſes, pl. 23. cites 5 H. 7. 5.

7. The

7. The Feoffees of Ceſty que Uſe *during the Nonage of the Heir*, in whom the Uſe is, may *grant all ordinary Offices* as Steward, Bailiff, Receiver &c. without the Heirs Aſſent, *but not Fees for* Term of *Life without his Aſſent* at his full Age, and may defend the Land of the Heir with the Profits; Per Huſſey and Brian Ch. Juſtices. And per Keeble, they may do this for the Profit of the Heir without his Aſſent. Br. Feoffment to Uſes, pl. 27. cites 8 H. 7. 11. in Chancery.

G. Law of Uſes, 14. cites S. C. and ſays that during the Minority the Law ſuppoſes a tacit Conſent when it is for his Benefit; but ſettling Fees without his Aſſent when he comes to full Age may be to his Prejudice. And that [after full Age, as it ſeems] he may grant ſuch Offices; for he is the Inſtrument to convey the Profits to Ceſty que Uſe, and now it may be in his Power to appoint all Means in Order thereunto, but this it ſeems muſt be by the Conſent of Ceſty que Uſe; for this Appointment is wholly to convey the Profits to him.

8. If Ceſty que Uſe makes *a Deed of Feoffment and Letter of Attorney to deliver Seiſin*, and the Attorney makes the Livery, this is a good Feoffment by ſome; but Brian, and all the others ſaid it *was Diſſeiſin*: For as ſoon as Ceſty que Uſe had ſold the Land the Uſe was out of him, and then he is not Ceſty que Uſe, and therefore cannot make a Feoffment. And ſo ſee that the Caſe is intended for the Sale of the Land. And afterwards all the Juſtices ſaid that Ceſty que Uſe *himſelf may make Livery of Seiſin*, *but not his Attorney*; for the Statute is taken ſtrictly, Brooke ſays, Quære inde; for at this Day, the Law is taken otherwiſe. Br. Feoffments al Uſes, pl. 28. cites 9 H. 7. 26.

S. C. cited G. Law of Uſes, cites 27. and leaves it a Quære.

9. Where *Feoffees* to an Uſe *make a Leaſe* or ſuch like, and *Ceſty que Uſe enters and makes Feoffment over*, this does not diſprove the firſt Eſtate, and therefore ſhall not avoid Meſne Acts, as Leaſe, Dower, Statute Merchant, or ſuch like made by the firſt Feoffees; Per all the Juſtices except Brudenell, who was contra. But Brooke ſays it ſeems that thoſe Caſes are againſt him. Br. Feoffment al Uſes, pl. 10. cites 14 H. 8. 4.

(G. 2) Ceſty que Uſe. *His Power.*

1. CEſty que Uſe cannot *give a Tree*, and yet he may *grant Eſtovers in Fee*, and may grant 10 *Trees per Annum in Fee or for Life*; for this is Inheritance or Franktenement. But Brooke ſays it ſeems that the Giſt of the Tree ſhall be good; for the Stat. of 1 R. 3. is that all Giſts, Feoffments &c. by Ceſty que Uſe ſhall be good; and ſo is 11 H. 7. 2. that Sale of Trees or Wood by Ceſty que Uſe ſhall be good by the Statute of R. 3. Br. Feoffments al Uſes, pl. 64. cites 10 H. 7. 29.

Ceſty que Uſe may *give or grant the Graſs or Corn* to any other, *but* Ceſty que Uſe himſelf cannot take them; for then Treſpaſs lies. Br. Feoffments al Uſes, pl. 13. cites 15 H. 7. 2. by all the Juſtices of C. B.

2. Ceſty que Uſe cannot juſtify the *taking of Beaſts in the Land Damage Feaſant*, but the Feoffees ſhall make this Juſtification, and ſhall have Action of the Treſpaſs done in the Soil, but thoſe who have Intereſt in the Land as Commoner or Tenant at Will ſhall juſtify in their own Names, by all the Juſtices of C. B. Br. Feoffments al Uſes, pl. 13. cites 15 H. 7. 2.

S. P. that he could not juſtify before the Statute, becauſe at Common Law he had no Eſtate; but he may juſtify ſince the Statute. G. Law of Uſes &c. 81.

3. Ceſty que Uſe of Lands in Fee-Fimple may by the Statute make a *Leaſe* or *Bargain* of the Land as well as he may ſell the Trees growing on

on the Land; and his Sale good. Kelw. 41. b. Paſch. 17 H. 7.— Ibid. 42. b.

G. Law of Uſes &c. 34. cites S. C. and ſays he ſhall *not avow* becauſe the legal Eſtate of the Reverſion is ſtill in the Feoffees ſince he has put the Eſtate out of them but for a Term; but the equitable Eſtate is in him, and he may diſpoſe of it and the Rent paſſes, but the Feoffees ſhall puniſh for *Waſte* done, and *enter for a Forfeiture* &c.

4. If *Ceſty que Uſe leaſes for Years rendring Rent*, and makes his *Will that his Executors ſhall have the Profit of his Lands for* 20 *Years*, he ſhall have this Rent for it is Parcel of the Reverſion, and annex'd thereto, and Ceſty que Uſe ſhall have Action of Debt but not Avowry; Per Fitzherbert and Shelly. And per Fitzherbert, if he leaſes by Parol rendring Rent this is good, and he ſhall have the Rent; for ſo is the Intent of the Statute. Br. Feoffments al Uſes, pl. 6. cites 27 H. 8. 13.

5. If *Ceſty que Uſe in Tail had ſuffer'd a Recovery before the Statute of Uſes* made 27 H. 8. *and died*, the Feoffees could not have enter'd, but ſhould have had Writ of Entry ad terminum qui præteriit or Writ of Right, and falſify it. Br. Entry Changeable, pl. 123. cites 31 H. 8.

Bendl. 12. pl. 10. Paſch. 25 H. 8. adjudg'd, and that it was within the Statute of 1 R. 3.

6. Ceſty que Uſe may make *Letter of Attorney to make Livery*, which proves that he makes not the Feoffment as Servant but as Owner of the Land. Arg. Godb 314. in Caſe of **Sheffield v. Radcliff** cites **Biſhop of London v. Kellet** in Bendl. R. and in D. 283. and 9 Rep. 75.

7. Ceſty que Uſe may *deviſe*, that after his Deceaſe his Feoffees ſhould ſtand ſeiſed of the Manor to the Uſe of any Perſon. See Cro. E. 28. pl. 12. Paſch. 26 Eliz. in the Star Chamber, in Caſe of Mantell v. Mantell.

8. Ceſty que Uſe ſhall take *Advantage of Conditions* which are knit to the Eſtate, as for Payment of Rent, but not concerning *collateral* things; And ſuch Expoſition of the Statute 32 H. 8. hath been made before. Arg. 3 Le. 225. Paſch. 31 Eliz. B. R. in Caſe of Scott v. Scott.

Mod. 223. pl. 12. S. C. accordingly by the Name of Boſcawen and Herle v. Cooke—See tit. Diſtreſs.

9. Ceſty que Uſe of a *Rent Charge executed* by the Statute may *diſtrein* for Rent Arrear; for by the executing the Eſtate ſuch Power is tranſferr'd the Ceſty que Uſe as incident; but a Covenant for Payment of the ſame is not transferr'd to him, as the Power of diſtraining is. 2 Mod. 138. Mich. 28 Car. 2. C. B. Cook v. Herle.

(G. 3) Ceſty que Uſe. His Power *as to Feoffees.*

1. A Feoffee of Truſt is bound to *plead all Pleas, and ſhall maintain Actions for the Land as Ceſty que Uſe ſhall deviſe and require at the Coſts of Ceſty que Uſe*; Per the Juſtices. Br. Feoffments al Uſes, pl. 38. cites 7 E. 4. 29.

2. If I *give my Goods to J. S. to my Uſe* the Donee is bound to maintain a Writ of *Treſpaſs* for the taking of them *but not Appeal of Robbery*; Per Littleton. And per Choke 'tis true; for he *ſhall not be compell'd to ſwear*, and the Appellant ſhall ſwear that his Appeal is true. Br. Feoffments al Uſes, pl. 38. cites 7 E. 4. 29.

(G. 4) *Con-*

(G. 4) *Conſideration.* *Neceſſary* in what Caſes to raiſe an Uſe.

1. IF a Man makes *a Feoffment without Conſideration*, the Feoffee ſhall be ſeiſed to the Uſe of the Feoffor, or to the Uſe to which the Feoffor was ſeiſed; Per Fitzherbert J. Br. Feoffments al Uſes, pl. 10. cites 14 H. 8. 4.

2. It is ſaid that if a *Man* be *ſeiſed of Lands* in Fee, and *grants a Rent* iſſuing out of the ſame Lands to a Stranger, without any Conſideration &c. the Grantee ſhall be ſeiſed of this Rent to his own Uſe; for the Law cannot intend ſuch a Grant to be made to the Uſe of the Grantor. Perk. S. 531. cites Mich. 14 H. 8. 5.

3. Ld. Bacon, in his Reading on the Statute of Uſes, 310, 311. ſays, He would have one Caſe ſhewn, by Men learned in the Law, where there is *a Deed*, and yet there needs a Conſideration; That as for Parol, the Law adjudges it too light to give Action without Conſideration; but a Deed *ever imports a Conſideration, becauſe of the Deliberation and Ceremony in the Confection of it*; and that therefore, in the 8 Eliz. it is ſolemnly argued, that a Deed ſhould raiſe an Uſe without any Conſideration. In the **Queen's Caſe**, a falſe Conſideration, if it be of Record, will hurt the Patent, but want of Conſideration never does; and yet they ſay that an Uſe is but a nimble and light Thing; and now, contrarywiſe, it ſeems to be weightier than any thing elſe; for you cannot weigh it up to raiſe it, neither by Deed nor Deed inroll'd, without the Weight of a Conſideration. But (he ſays) you ſhall never find a Reaſon for this, to the World's End, in the Law; but it is a Reaſon of Chancery, and it is this, That no Court of Conſcience will inforce *Donum Gratuitum*, tho' the Intent appears never ſo clearly, where it is *not executed, or ſufficiently paſs'd by the Law*: But if Money had been paid, and ſo a Perſon damnified, or that it was for the Eſtabliſhment of his Houſe, then it is a good Matter in Chancery.

4. If one, without any Conſideration, *enfeoffs* another by Deed, *Habend' to the Feoffee and his Heirs, to his own Uſe*, and the *Feoffee ſuffers a Feoffor to occupy* the Land ſeveral Years, yet the Right is in the Feoffee; becauſe *expreſs Uſe* is contain'd in the Deed, which is ſufficient without other Conſideration. The ſame Law is when a Feoffment is made to the Uſe of a Stranger and his Heirs. And. 37. pl. 95. Anon.

5. Uſe declared on an *Eſtate executed*, needs no Conſideration. Mo. 102. pl. 247. Mich. 16 & 17 Eliz. per Cur. in Calthrop's Caſe.

When an Uſe *ariſes* upon a Conſideration, the *Conſideration muſt* be *preſently executed.* Arg. Cart. 140. in Caſe of Garniſh v. Wentworth.——If I covenant to ſtand ſeiſed to the Uſe of J. S. and his Heirs, in *Conſideration that he ſhall be my Counſellor*, it is good, and the Land paſſes preſently, tho' it is not executed. Arg. Cart. 142. ſays this Caſe was put by Popham in B. R. in one Pepplewell's Caſe.

6. A *Fine*, without any Conſideration, doth carry the Uſes; per Cur. Le. 138. pl. 188. Hill. 30 Eliz. C. B. Stephens's Caſe. See (O. 7) pl. 5. S. C.

7. In the Statute of 27 *H.* 8. 10. all the Conveyances are mention'd, and not one Word of a Conſideration in the whole Statute; but that is left to the Judgment of the Law; for at *Common Law*, that which paſs'd by *Tranſmutation* does ſo ſince, and what before the Statute could not paſs without valuable Conſideration, will not now. Arg. Cart. 138. in Caſe of Garniſh v. Wentworth, cites Pl. C. 301. Sharington's Caſe.

8. To raiſe Uſes *by way of Covenant or Bargain and Sale*, there muſt be a Conſideration. *But in Caſe of Tranſmutation of Poſſeſſion*, they may ariſe Jenk. 247. pl. 36.

without any Conſideration at all. Arg. Cart. 143. in Caſe of Garniſh v. Wentworth.

See (K)

(H) Uſes. Conſideration. What ſhall be ſaid a *good* Conſideration *to raiſe an Uſe.* Againſt the Law. [*Or otherwiſe.*]

1. IF A. bargains and ſells to B. in Conſideration of the Loan of 100l. by B. to him for a Year, this is a good Conſideration to raiſe an Uſe; for it is not unlawful, by any Statute, to take 10l. for the Loan of 100l. For the Contract is good for this between the Parties themſelves, and ſhall bind him, and only a Pain is limited upon him who takes it, ſcilicet, That the King ſhall recover ſo much from him. (But if Uſury be * againſt the Common Law, it ſeems no Uſe can ariſe.) Vide for this 26 E. 3. 71. Contra Hill. 37 El. B. between *Nowell and Hudſon.*

* See Tit. Uſury.

7 Rep. (40) 39. Mich. 5 Jac. S. C. adjudged accordingly, and affirm'd in Error.— 9 Rep. 24. b. 25. a. S. C. cited accordingly per Cur. in H. Harpur's Caſe.— Jenk. 289. pl. 25. cites S. C. accordingly.

2. In an Indenture between A. and his Wife of one Part, and B. their Son of another Part, and C. their Son of the 3d Part, the ſaid A. in Conſideration of Natural Affection and Paternal Love which he has to his ſaid Sons, and for their better Advancement, and to the Intent that the Lands ſhould continue in his Name and Blood, covenants to ſtand ſeiſed to the Uſe of himſelf for Life, the Remainder to his ſaid Wife for Life, the Remainder to his ſaid Sons. Tho' here another Conſideration is expreſs'd, yet inaſmuch as his Wife is named his Wife in the Deed, this ſhall be a ſufficient Conſideration to raiſe an Uſe to her. Adjudged 7 Rep. 40. *Bedell's Caſe*, Trin. 3 Ja. B. R. Adjudged between *Bedell and Hall.* It ſeems this was the ſame Caſe, but there the Feme is not ſaid to be Party to the Indenture.

3. If a Man, having Iſſue 3 Sons, covenants, in Conſideration of Natural Affection to the eldeſt Son, to ſtand ſeiſed of certain Land to the Uſe * of himſelf for Life, and after to his eldeſt Son and the Heirs Males of his Body; and for Default of ſuch Iſſue, to the Uſe of his 2d Son and the Heirs Males of his Body; and for Default of ſuch Iſſue, to the Uſe of the 3d Son &c. This is good Conſideration to raiſe the Uſe to his younger Sons; for tho' the Conſideration of Natural Affection be limited only to the Eldeſt, yet this is equal to all the Sons; and therefore the Law will ſupply it without Expreſſion; for if nothing had been expreſs'd, it had been good Conſideration by Implication of Law. Mich. 43 & 44 Eliz. B. R. between *Bond and Edmonds:* Per Curiam.

* Fol. 783.

* Cro. C. 529. pl. 7. Hill. 14 Car. B. R. S. C. by the Name of Smith v. Riſley, adjudg'd accordingly.— Jo. 418. pl. 6. S. C. by Name of German v. Riſley,

4. If [A.] by Indenture made between him of the one Part, and B. his Brother, (naming him ſo in the Deed) and C. and D. (who are Strangers to him) in Conſideration of Love and Affection which he bears towards his Wife and Children, and for their Maintenance and Stay of Living, and to the Intent to ſettle his Land in his Name and Blood, covenants with the ſaid B. C. and D. to ſtand ſeiſed to the Uſe of himſelf for Life, and after to his Wife for Life, and after to the ſaid B. C. and D. and their Heirs, upon Truſt, that they ſhould make ſuch Uſes as he himſelf ſhall appoint, and after to raiſe Portions for his Children, and after to G. his 2d Son in Tail &c. Though no Uſe can ariſe by this Indenture to C. and D. who are Strangers to the

the Conſideration of Blood, and ſo this is void as to them, yet the Uſe ſhall ariſe for all to B. who is his Brother, and ſo named in the Deed, which is within the Conſideration. Trin. 14 Car. This was a Special Verdict between *Fox and Wilcocks*, and argued at Bar; but it abated by Death. And after, upon a new Special Verdict between *Smith and Busbie*, it was adjudged per Curiam, That Uſe ſhall well ariſe to B. to perform the Truſts ſpecified in the Indenture. Intratur. [Trin. 14 Car. Rot. 1502.] This concerns one * Ritley of Gray's-Inn.

adjudg'd accordingly.—S. C. cited MS. Rep. Mich. 4 Geo. 2. in the Caſe of Nugent v. Hancock, which ſee pl. 13.

5. Conſideration of ancient Acquaintance, or of being Chamber-Fellows, or entire Friends, ſhall not raiſe any Uſe. Trin. 3 Jac. B. R. Agreed per Curiam between *Ward and Tuddingham*.

S. P. Gilb. Law of Uſes &c. 48. For the Obligation that a Man has to his own Family is ſuppoſed, by all Governments, to be ſuperior to all Obligations of mere Gratitude; and therefore the Chancery will not preſume that it is the Party's Intent to diſpoſe of Lands out of the Family, where any Ceremony is abſent that is neceſſary in Law to the making ſuch a Contract.

6. So Conſideration of great Familiarity, or long Acquaintance with him, or that they were Scholars together in their Youth, ſhall not raiſe an Uſe. Pl. C. 503. *Sherington*.

7. If A. in Conſideration that B. was bound in a Recognizance for him, * bargains and ſells Land to the other, this is not good. 37 Eliz. b. Adjudged between *Ward and Lumbard*, cites Tr. 41 Eliz. B. R.

* After Recital of the being bound &c. A. for *diverſe Conſiderations*, bargain'd and ſold to B. and his Heirs. The Deed was *inroll'd* within the 6 Months, but no Money paid. This cannot be good. But if there had been *apt Words*, he might thereby have raiſed an Uſe *by way of Covenant*; for in every Bargain and Sale muſt be a *Quid pro Quo*. But here A. has nothing; but being bound had been a good Conſideration to raiſe an Uſe by way of Covenant. Cro. E. 394 pl. 19. Paſch. 37 Eliz. C. B. Ward v. Lambert.—G. Law of Uſes, 253. cites S. C. and ſays the Words here are not apt to make a Covenant to ſtand ſeiſed, ſo the Deed had not any Operation.——But a *Covenant to ſtand ſeiſed* would be good; becauſe Chancery will oblige a ſpecifick Performance upon any Agreement, where a Conſideration was perform'd on one ſide; and where the Chancery would raiſe an Uſe, the Statute executes it. G. Law of Uſes, 112. cites S. C.——Ibid. 51. accordingly, That it had been good by Covenant to ſtand ſeiſed, had there been apt Words.

8. The Conſideration of a *Surname* will not raiſe an Uſe, as was reſolved in Sir Chriſtopher Hatton's Caſe, who had a Siſter's Son call'd Newport, and in Conſideration of his *changing* his Name to Hatton, he covenants by Deed to raiſe an Uſe to him. This Conſideration was adjudged not ſufficient to raiſe an Uſe. Jenk. 81. pl. 50.

S. C. cited Arg. Cart. 140 in Caſe of Garniſh v. Wentworth, *alias*, Parker.

9. If before the Statute of 27 H. 8. one had *infeoff'd his Servant*, he ſhould be ſeiſed to the Uſe of the Feoffor, but if he *expreſſes the Conſideration to be for Service*, he ſhould be ſeiſed to his own Uſe; Per Popham Ch. J. Mo. 684. pl. 943. Mich. 43 & 44 Eliz. in Caſe of Ward v. Sudman.

10. *W. and M. his Wife purchas'd* Lands, *to them and the Heirs of W.* They by Indenture *bargain'd and ſold* the Land *to O. P. Q. and R. and their Heirs, upon Truſt to ſell the ſame to pay his Debts and Legacies, and for the Maintenance and Marriage of E. his Daughter.* W. alſo *covenanted, that he and his Wife*, before Pentecoſt then following, *ſhould by Fine* with Proclamations *grant the ſaid Lands to the Bargainees and their Heirs, upon the ſaid Truſt.* In the Deed W. *recites, that* the ſaid *O. is near allied to him, that P. as* [is] *his Uncle, Q. is his Uncle in Law, and R. is his Brother in Law*; and *that he and his Heirs, for the natural Love and Kindred between him and them, ſhould immediately after his Deceaſe ſtand ſeiſed to the Uſe of the ſaid Kinſmen and their Heirs, of all* ſuch Parts of the ſaid Lands *as before the Deceaſe of the ſaid W. ſhould not be executed by Fine, or other Execution of Eſtate, according to the Purport of the ſame Deed*, upon the Truſt and Confidence aforeſaid: And in that Deed W. and M. made a Letter of Attorney to make Livery and Seiſin; but *no Livery was made, nor* any *Fine levied, nor* was *the Deed inroll'd*: Of all the Parties to the

the Deed P. only was of Blood to the ſaid W. Reſolv'd that the Uſe did not enure to them which were not of Blood, but of Alliance. But * how much of the ſaid laſt did veſt and execute in the ſaid P. who was of Blood, the ſaid Lords the Judges reſted doubtful, and would be further adviſed. Ley 57. 58. Trin. 15 Jac. Bulkley's Caſe.

* The Uſe ſhall ariſe for all to P. See pl. 4.

11. A. *covenanted to ſtand ſeiſed* to ſeveral Uſes, and afterwards *to C. for* 99 *Years, if he ſo long live, Remainder to two Strangers for the Life of C. to preſerve contingent Remainders*, Remainder over. It was agreed by all, that the Remainder to the two Strangers was void, they not being of the Blood; ſo that they cannot enter for, or take Benefit of, a Forfeiture committed by C. 2 Lev. 52. 54. Trin. 24 Car. 2. B. R. Whaley v. Tankard.

Vent 241. S. C. but S. P. does not appear. —— Raym. 219. S. C. but S. P. does not appear.

12. A *Father in Law* cannot covenant, becauſe not of the Blood. Arg. 2 Show. 12. in the Caſe of Coltman v. Senhouſe.

13. A. by voluntary Deed *covenants with B. and C.* (*Strangers*) *to ſtand ſeiſed to* the Uſe of *himſelf for Life*, Remainder *to the Uſe of B. and C. during the Life of E. the Daughter of A.* [his Heir at Law] upon Truſt to apply the Profits &c. for the Benefit of E. *and after her Death to* B. and C. and their Heirs *during the Life of the eldeſt Son of E.* upon Truſt, *to raiſe Portions for younger Children, and then to convey to the eldeſt Son* &c. with Remainders over &c. It was objected, That the Plaintiff, who claim'd as the eldeſt Son of E. can have no Benefit under this Settlement, for that the Truſtees being Strangers to the Conſideration of Blood, no Uſe thereby ariſes to them, according to the **Lord Pagett's Caſe**, and Lord Chancellor was of the ſame Opinion. Then it was objected for the Plaintiff that there may be a *Difference where the Eſtate, Truſt, or Uſe* in the Truſtees, *is limited for the Benefit of the Blood* and Family *of the Covenantor, and where for collateral* or other *Purpoſes*, as was the Lord Pagett's Caſe, the Truſt Term there being for the Payment of Debts &c. but here the Truſt is for the Benefit of the Blood of the Covenantor, ſcil. his Grandſon &c. Sed non allocatur. Bill diſmiſs'd. MS. Rep. Mich. 4 Geo. 2. Nugent v. Hancock.

(H. 2) Uſes. Conſideration good. Where the Conſideration is *mixt*.

1. IF an Uſe be declar'd on a Covenant to ſtand ſeiſed on Conſideration of *Marriage and Money*, no Uſe will ariſe without Marriage, tho' the Money is paid. Mo. 102. pl. 247. Mich. 16 & 17 Eliz. Per Cur. in Calthrop's Caſe.

A Deed to a Son was in Conſideration of natural Love and Affection,

2. In Conſideration of *natural Affection to my Son, and of* 100 *l. paid by my Son*, I covenant to ſtand ſeiſed. Lord Ch. J. Bridgman (who put this Caſe) ſaid he thought the principal Conſideration will carry it. Cart. 144. Mich. 18 Car. 2. C. B. in Caſe of Garniſh v. Wentworth.

and of the Sum of 5 l. to be paid annually to the Father. Tho' *Money is Part of the Conſideration* mention'd, yet this will work as a Covenant to ſtand ſeiſed; but then it ought to be pleaded as a Covenant to ſtand ſeiſed according to the legal Conſtruction of ſuch a Deed where there is no Execution at Law; Per Pollexfen Ch. J. And tho' Judgment was given contrary to this Opinion, yet that Judgment was revers'd on the very Point of Law. 2 Vent. 266. Hill. 2 & 3. W. & M. in C. B. Lade v. Parker. ——— 2 Vent. 149. 260. S. C. ——— 3 Lev. 291. Baker v. Lade, S. C. accordingly. ——— 4 Mod. 149. Barker v. Lade, Mich. 4 W. & M. the S. C. in B. R accordingly. ——— Skin 315. Baker v. Lane, S. C. accordingly. ——— Carth. 253. S. C. in B. R. accordingly. ——— Comb. 190. B. R. S. C. accordingly.

3. A.

3. A. in *Conſideration of Blood covenants to* ſtand ſeiſed *to the Uſe of B. his Kinſman*, and the Heirs of his Body, and in Default of ſuch Iſſue, then to the Uſe of *J. S. a Stranger, in Conſideration of* 100 *l.* B. died without Iſſue. The Deed was not inroll'd. The Queſtion was if the Uſe can ariſe *partly by Covenant* to ſtand ſeiſed, *and partly by Bargain and Sale*, or whether it muſt ariſe *wholly one Way* or wholly the other, and not by Fractions. Bridgman Ch. J. ſaid in this Caſe that there was a *mixt Conſideration*, and there needed no *Inrolment*. See Cart. 144. Mich. 18 Car. 2. C. B. Garniſh v. Wentworth. The Caſe was not adjudged.

(I) Uſes. Conſideration. *To whom* the Conſideration may raiſe an Uſe. Not to a *Stranger*.

1. **If a Man, in Conſideration of** natural Love **which he bears** towards B. his Brother, **covenants to ſtand ſeiſed** to the Uſe of B. and A. his Wife, **for their Lives, this ſhall raiſe a good Eſtate to A.** for he * **gives the Eſtate to A. in Conſideration of the Marriage between her and his Brother; and this ſhall be taken for the Jointure of A. For the Love which he bears towards his Brother extends in Right of his Brother** to his Wife. **Pl. C.** 307. ‡ **Sher. & Pled.**

See (K) pl. 2. S. C.

* Fol. 784.

‡ Sharrington and Pledall v. Strotton.

2. **If a Man, in Conſideration that** B. ſhall marry his Daughter, **covenants to ſtand ſeiſed** to the Uſe of B. and his Daughter, **in Tail or** &c. **this ſhall raiſe a good Eſtate to them both. Pl. C.** 307. **Sharington and Pledall v. Strotton.**

3. **If a Man, in Conſideration of** natural Love and Affection to his Son, **covenants to ſtand ſeiſed to the** Uſe of the Wife of his Son **for Life, this ſhall raiſe a good Eſtate to the Wife; for the Love to the Son extends to his Wife. Contra Trin. 5 Jac. B. R. between Bould and Winſton.**

The Uſe was to the Son for Life, and after to the Uſe of ſuch a *Feme as he ſhould afterwards marry*; and reſolv'd that the Conſideration extends to the Wife that ſhould be. Cro. J. 168. pl. 8. S. C. —— See (L) pl. 1.

4. **If a Man, in Conſideration of a** Marriage **to be had** between B. his Son, and A. **covenants to ſtand ſeiſed to the** Uſe of B. and A. **this is a good Conſideration to raiſe an Uſe to A. Mich. 37 & 38 Eliz. B. R. Admitted between Corbin and Corbin.**

Mo. 544. pl. 722. S. C. but not exactly S. P. — This is no Conſideration to raiſe an Uſe; for the Conſideration is only the Marriage of his Son with a Stranger, the which, as to changing the Poſſeſſion, is not any Benefit to the Father, but he is, in a manner, a Stranger to this perſonal and peculiar Conſideration; but if the Conſideration had been for the eſtabliſhing the Land in his Name and Blood, it had been good; for this touches the Father meerly. Yelv. 51. Mich. 2 Jac. B. R. Freſhwater v. Rois. —— Mo. 683. pl. 940. Trin. 44 Eliz. Freſhwater v. Rois, ſeems to be S. C. however different in Time; but this Point does not appear. —— Brownl. 193. Mich. 2 Jac. S. C. and S. P. but ſeems only copied from Yelv. 51.

5. **If a Man, in Conſideration that** B. ſhall marry his Daughter, **covenants to ſtand ſeiſed to the** Uſe of B. and his Daughter, **the** Remainder to C. **this is a void Remainder to C. becauſe he is a** Stranger **to the Conſideration. Pl. C.** 307. **b. Sher. & Pled.**

6. **In Conſideration of** certain Money given by B. **a Man may covenant to ſtand ſeiſed to the** Uſe of A. for Life, **the** Remainder to C. in

If A. *bargains and*

ſells his Land *to B.* in Conſideration of 100 *l. paid by J. S.* tho' in this Caſe the Conſideration ariſeth from a Stranger, yet it will paſs the Uſe to the Bargainee; C. in Fee; **for here it is apparent that the Monies were given for both Eſtates; and tho' A. and C. are** Strangers **to the Gift of the Money, yet they are privy enough, inaſmuch as the Monies are given for them.**

Per Hobart Ch. J. Winch. 61. Hill 20 Jac. C. B. in Caſe of Buckley v Simmons.

But if, in Conſideration of 100 l. paid *by B. A. bargains and ſells to B. to the Uſe of J. S.* a Stranger, the Uſe limited and the Truſt are void. Arg. 2 And. 136. in Corbet's Caſe, cites 4 & P. & M.

7. So **in Conſideration of certain** Monies given by B. **a Man may covenant to ſtand ſeiſed to the** Uſe of B. for Life, **the** Remainder to C. in Fee, or with diverſe meſne Remainders; **for the Monies are given for all the Eſtates. Pl. C. 307. b.** *Sher. and Pled.*

1 Rep. 154. is that Ld. Paget was attainted of Treaſon, and that the Term to J. S. was adjudged void, for want of Conſideration,

8. **If a Man, in Conſideration of the** Diſcharge of his Funerals, Payment of his Debts and Legacies out of the Profits of his Land, **covenants to ſtand ſeiſed to the Uſe of** himſelf for his Life, **the** Remainder **after his Death to the** Uſe of J. S. for 20 Years, **and dies,** not making J. S. his Executor, **(but dies Inteſtate, viz. Attaint of Treaſon) the Remainder for Years is void, and no Uſe ſhall ariſe thereof to J. S. becauſe he is a Stranger to the Conſideration. Adjudged 1 Rep. 154.** *Lord Paget's Caſe.*

becauſe the Conſideration being Payment of Debts, he was a Stranger to it.——Mo. 193. pl. 343. Trin. 26 Eliz. S. C. accordingly.——Le. 194. pl. 279. S. C. argued.——And. 259. pl. 267. and pag. 263. pl. 270. S. C. accordingly.——Jenk. 247. pl. 37.——S. C. cited Arg. Mo. 310, 311. in Englefield's Caſe.——S. C. cited Mo. 519, 520. in **Lord Buckhurſt's** Caſe; but ſays that if J. S. had paid the Debts with his own Money, the Conſideration had been good.——S. C. cited 2 Mod. 250. in Caſe of **Barker v. Keat,** That it was adjudged a void Uſe, becauſe there was no Conſideration on the Covenantee's Part to raiſe the Money appointed to be paid, it being to be raiſed out of the Profits of my Lord's own Eſtate.—G. Law of Uſes, 112, 113. cites S. C. and ſays the Conſideration does not ariſe from any Equivalent; but it had been otherwiſe, if the Debts were to be paid out of the proper Lands of J. S. —Sid. 262. pl. 12. Trin. 17 Car. 2. B. R. in Caſe of **Jennet v. Cowley,** ſays a Diverſity was taken on Ld Paget's Caſe, viz. That a Covenant to ſtand ſeiſed to the Uſe of *the Executors of his Son,* is void; *but* if it be *to the Uſe of himſelf, or his Son and his Executors for Years,* it is good; becauſe all veſts in the Son, but not in the other Caſe.

S. C. cited by Hobart Ch. J. Hob. 151. in Caſe of **Colt and Glover v. the Biſhop of Litchfield,** &c. That tho' he made him his Executor after, yet the Limitation is void.

9. **But otherwiſe it had been, if the Covenantor** had made J. S. his Executor; **for then he had been enough** privy **to the Conſideration. 1 Rep. 154. Lord Paget's Caſe.**

10. A *Feme* may *enfeoff a married Man, Cauſa Matrimonii prælocuti,* becauſe of the *common Poſſibility.* 10 Rep. 50. b. in **Lampet's Caſe,** cites 4 H. 6. 16 & 17.

Ow. 33. in the Caſe of **Winter v. Loveday,** cites it as Trin. 28 H. 8. the Caſe of Whaydon v. Aſhford.

11. A Mortgagor intreated a Stranger to redeem the Land at the Day, and by Indenture *Mortgagor covenanted, that after the Redemption the Stranger ſhould have the Land to him and his Heirs*; and that he, *in Conſideration of* 100 l. *would ſtand ſeiſed* to the Uſe of him and his Heirs. The Stranger redeems the Land at the Day, the Mortgagor enters, and the Deed is inroll'd within the 6 Months; yet Ruled that nothing paſs'd, becauſe he had not any Eſtate or Intereſt therein at that Time, to contract for it. Cro. E. 402. pl. 10. in the Caſe of Yelverton v. Yelverton, ſays it was cited as a Caſe in the 20 Eliz. but neither the Name, nor in what Court, was mention'd.

12. Feoffment in Fee, on Condition that if the Feoffor do ſuch a Thing he ſhall *re-enter,* and *retain* the Land to the *Uſe of a Stranger,* the Uſe is void, and the Feoffor ſhall hold the Land to his own Uſe; Per Mead J. Le. 269. pl. 372. in Caſe of Ferrand v. Ramſey.

(K) Uſes. Conſideration. What ſhall be a good Conſideration to raiſe an Uſe.

Fol. 785.

(See this Title before) [at (H)]

1. A Man may covenant to ſtand ſeiſed to the Uſe of A. his Wife, in Conſideration that ſhe is his Wife, and this ſhall raiſe a good Eſtate to the Wife; for this is a good Conſideration in Law. Adjudged 7 Rep. 40. *Bedell's Caſe*. Adjudged Trin. 3 Jac. B. R. between Bedell and Hall. S. C. cited 11 Rep. 24. b. 25. a. in Harpur's Caſe. ——— If the Perſon be ſuch a one as has an obvious Conſideration of his Side, a Uſe ſhall preſently riſe to him; As if a Man covenants to ſtand ſeiſed to the Uſe of his Wife or Brother, or any of his Kindred, this is ſufficient to raiſe a Uſe to them, without any Mention of a particular expreſs Conſideration; for the Love and Affection between them is obvious, which being a Conſideration in itſelf ſufficient to raiſe a Uſe, it ſhall be preſum'd that it was to the Intent the Uſe was limited; nay, if there be a Conſideration to ſome certain Perſon, and afterwards a Uſe is limited to another Perſon, that does not come under the Conſideration expreſs'd, yet if he be a Perſon on whoſe Side there is a manifeſt Preſumption of another Conſideration, he ſhall have the Uſe limited to him by that Conſideration, tho' he could not take by Virtue of the firſt. Thus, if a Man covenants, in Conſideration of natural Love and Affection that he bears to his eldeſt Son, to ſtand ſeiſed to the Uſe of him, and then to the Uſe of any other of his Kindred, as Brother, Couſin &c. this ſhall give a Uſe to them, tho' they do not come within the Conſideration that is expreſs'd to the eldeſt Son; for there is an obvious and apparent Conſideration to raiſe an Uſe to them. Gilb. Law of Uſes and Truſts 251. 252.

2. A Man may covenant to ſtand ſeiſed to the Uſe of A. the Wife of his Brother, in Conſideration that ſhe is the Wife of his Brother, and this ſhall raiſe a good Eſtate to her; for the Love which he bears towards his Brother, extends in his Right to his Wife. Pl. C. 307. Sher and Pled.

3. Fraternal Love, and Continuance of his Land in ſuch of his Blood, is good Conſideration to raiſe an Uſe by way of Covenant; for this is a Conſideration of Blood, and the Brother is one of the next Degrees after his Parents and Children, and they who are next in Blood are next in Love by Intendment of the Law. Pl. C. 307. Sher. and Pled. [v. Strotton.]

4. If a Man covenants, in Conſideration of Blood, and of the Marriage of his Baſtard-Daughter, to ſtand ſeiſed to the Uſe of the Baſtard-Daughter, this is not a good Conſideration to raiſe an Uſe, becauſe in the Law ſhe is not his Daughter, but Filia Populi. Mich. 43 & 44 Eliz. B. R. per Curiam, between Frampton and Gerard. Mo. 735. pl. 1020. Framp-ton's Caſe, S. C. ſays the Judges were divided in Opinion, viz. Popham and Fenner with the Heir general, and Gawdy and Yelverton e contra, whereupon it was adjourn'd for Difficulty into the Exchequer Chamber, and that it was argued there. [But ſays not what became of it.] ——— And. 75. 79. pl. 145. S. C. by Name of Gerard v. Worſeley, adjudged. ——— D. 374. pl. 16 & 17. Hill. 23 Eliz. Worſeley's Caſe, S. C. that all the Juſtices, except Periam, held, that the Uſe cannot be carried to the Baſtard without expreſs Conſideration. ——— S. C. cited 2 And. 81. and 136. *Sp. acc. Co. Litt. 123. a.*

S. P. Gilb. Law of Uſes &c. 207. But if a Man covenants by Indenture, in Conſideration of natural Love and Affection, Blood, and Marriage of his Baſtard Daughter, *to levy a Fine*, and that the Conuſee ſhall ſtand ſeiſed *to the Uſe of the Baſtard* Daughter; tho' this be not a ſufficient Conſideration to raiſe an Uſe upon a Covenant, yet it is expreſſive of the Intent of the Party, and therefore ſhall ſerve as a ſufficient Declaration of a Uſe upon the Fine, where there needs no Conſideration.

5. A Man, in Conſideration of his Care and Love which he bears to J. S. call'd, named, and reputed, one of his Sons, (where he was his Baſtard-Son) covenants to ſtand ſeiſed to the Uſe of the ſaid J. S. this is no good Conſideration to raiſe any Uſe. This was *Sir James Perrot's Caſe*, adjudged in the Exchequer, in a Writ of Intruſion upon the Conveyance of Sir John Perrot, by which a Remainder Mo. 368. pl. 506 Mich. 36 & 37 Eliz. S. C. but S. P. not adjudg'd. ——— D. 374 a. b. pl. 16. 17.

Hill. 23 Eliz. Sir Robert Worſeley's Caſe, S. P. **mainder was limited to him, and he loſt the Land for the ſaid Cauſe.** And all the Juſtices, præter Periam held, that the Uſe cannot be carried to a Baſtard without expreſs Conſideration, inaſmuch as the Conſideration in Law is not good and lawful; for he is not de Sanguine Patris, but a meer Stranger in the Eye of the Law.——And. 79. pl. 145. S. C. accordingly.——Gilb. Law of Uſes &c. ſays that Conſideration of natural Love in ſuch Caſe is not good; for ſince that Copulation is unlawful, the Iſſue ought not to have from the Government the Privilege of a lawful Son.——But a Baſtard is a Perſon *capable of taking by a Feoffment*, tho' not by a Covenant to ſtand ſeiſed, in Conſideration of natural Affection; Per Manwood. Le. 197. pl. 279. Mich. 31 & 32 Eliz. in Cam. Scacc. in Lord Pagett's Caſe.——Gilb. Law of Uſes &c. 206. If a Baſtard has got a Name by Reputation to be ſuch a one's Son, yet it is not a Conſideration ſufficient to raiſe a Uſe to him; for ſtill in Law he is look'd upon as Nullius Filius, therefore the Law can never ſupport that as a good Uſe to him, as the Son of ſuch a one, in reſpect of the natural Affection that a Father bears to his Sons, when by another Maxim the Law ſuppoſes and ſays he is Nullius Filius; and ſo no Body can have any natural Affection for him.

6. **Conſideration of** Affection to the Heirs Males of the Covenantor, which he ſhould beget of the Body of A. his late Wife, **is good Conſideration to raiſe an Uſe, by way of Covenant, to the ſaid Heirs of his Body; for every one is bound in Nature to provide for his Children.** Pl. C. 304. *Sher. and Pled.*

S. C. cited G. Law of Uſes &c. 208. 209. ſays the Conſideration of preſerving the Lands to the Heirs Male of his Body, by the Creation of an Eſtate Tail, and ſo having the Force of the Statute De Donis to preſerve the Inheritance for the Iſſue, being a good Conſideration to raiſe an Uſe, that Eſtate, which the Owner of the Land had, is chang'd and qualified into an Eſtate Tail. Accordingly my Lord Coke ſays, that if a Man makes a Feoffment in Fee to the Uſe of one for Life, the Remainder to the Uſe of the Heirs Male of his own Body, this is an Eſtate Tail in him; yet here the Uſes were not out of him; ſo that a Man may modify a Fee that continues in him, but he cannot take a Fee as de novo, when he has the old one in him. In the Caſe of **Pybus and Mitford**, it was held that if a Man covenanted to ſtand ſeiſed to the Uſe of his Heirs Male begotten on the Body of his 2d Wife, he had thereby an Eſtate Tail.—Lord Bacon, on the Statute of Uſes 352. ſays, If one covenants to ſtand ſeiſed to the Uſe of himſelf in Tail, and to the Uſe of his Wife in Fee, the Eſtate Tail is executed in him, becauſe Eſtate Tail cannot be re-occupied out of a Fee-ſimple, it being a new Eſtate, and not like a particular Eſtate for Life or Years, which are but Portions of the abſolute Fee.

7. **For** Advancement of his Heirs Males, **a Man may covenant to ſtand ſeiſed to the** Uſe of himſelf and the Heirs Males of his Body, **and this ſhall raiſe a good Eſtate Tail; for tho' all the Eſtate Tail is in himſelf, yet this is for the Benefit of the Heir Male, tho' it is** in Futuro, and not in Præſenti; **for none can know who ſhall be his Heir, but** ſolus Deus facit Hæredes. 7 **Rep.** 13. **b.** [14. **a**] *Engleſield's Caſe.*

* In the Original 'tis (Meſme.) † Quære Whether (Poient) as in the Original ſhould not be (Doient.)

8. **A Conſideration of** the Continuing of his Land in his * Name, **is a good Conſideration to raiſe an Uſe by way of Covenant; for by this the** Females ſhall be excluded; **for the Males are more worthy, and for ſeveral Reaſons † may [ought to] be preferr'd before the Females.** Pl. C. 306. *Sher. and Pled.*

And. 140. pl. 191. S. C. accordingly. —— S. C. 2 Rep. 15. accordingly.— 9. W. *covenanted to ſtand ſeiſed to the Uſe of himſelf in Tail*, Remainder *to R. in Tail*, Remainder *to the Queen in Fee.* Adjudged that no Uſe is raiſed to the Queen in Remainder for want of a Conſideration. Mo. 195. pl. 344. in Trin. 27 Eliz. Wiſeman v. Barnard.

And if the Uſe had been limited to the Queen *in Conſideration that ſhe was the Head of the Commonwealth, and had the Care and Charge as well to preſerve the Peace of the Realm, as to repel foreign Hoſtility*, yet had no Uſe been raiſed to her, for this is to be done Ex Officio.——G. Law of Uſes &c. 224, 225. cites S. C. and adds that there is no particular Conſideration to intitle her to the Profits of thoſe Lands; neither has ſhe any more Reaſon to have them now than before; for Ex Officio ſhe takes Care of the Commonwealth, and to that End ſhe has a ſufficient Revenue.

So of a *Brother*; Per 10. If a Man *covenants to ſtand ſeiſed* to the Uſe of his *Wife*, *Son*, or *Couſin*, it is good to raiſe an Uſe without any expreſs Words

Words of Conſideration. 7 Rep. 39. b. (40. b.) in Bedell's Caſe. Cur. For the Word Brother, implies a ſufficient Conſideration. Roll. Rep. 68. Trin. 12 Jac. B. R. in Caſe of Worrall v. Harper. —— 11 Rep. 24. b. Harpur's Caſe S. C. accordingly.

11. Conſideration of *Marriage to be had*, will raiſe an Uſe, becauſe the preſent Eſtate is to the Baron, and what is limited to the Feme, is only a Remainder; Per Twiſden J. Sid. 83. Trin. 14 Car. 2. B. R. in Caſe of Stephens v. Brittridge.

12. There are no Conſiderations, now at this Day, to raiſe Uſes upon *Covenants to ſtand ſeiſed*, but *natural Love* and Affection, which is for Advancement of Blood, or Conſideration of *Marriage*, which is joining of Blood and Marriage together. Other Conſiderations, as *Money* for Land, *or Land for Land*, tho' the Words are (Stand ſeiſed to Uſes) yet they are Bargains and Sales, and without *Inrolment* raiſe no Uſe. Arg. Cart. 139. in Caſe of Garniſh v. Wentworth, cites Le. 201. at the End of the Lord Paget's Caſe, and Coke's Inſtitute on the Statute of Inrolments, p. 672. and Pl. C. 303.

13. If a *Leaſe and Releaſe* be pleaded to A. and his Heirs, and no Conſideration appears, nor ſaid to whoſe Uſe, it ſhall be intended to the Uſe of *Releſſee and his Heirs*. 2 Salk. 678. pl. 5. Mich. 1 Ann. B. R. Shortridge v. Lamplugh. In this Caſe the Leaſe was pleaded in Conſideration of 5 l. but no Conſideration was pleaded for the Releaſe; per Powell J. the *Merger of Eſtate* is a good Conſideration. Ibid. —— S. C. and S. P. accordingly per Powell J. But by him and Holt Ch. J. if there were a particular Uſe limited on the Releaſe, the reſt would reſult back. 7 Mod. 77. in S. C.

(L) Uſes. Conſideration. In what Caſes they ſhall be raiſed *to a Stranger to the Conſideration for a collateral Reſpect.* Fol. 786.

1. **If a Man covenants, in Conſideration of** natural Love and Affection to his Son, **to ſtand ſeiſed to the** Uſe of his Son for Life, the Remainder to ſuch Wife as the Son ſhall have after, **for Life, the** Remainder to the firſt Son of the Son and Wife **begotten &c. Tho' the Wife be a Stranger to the Conſideration (admitting it) yet the Eſtate limited to her is well rais'd for the ſubſequent Eſtate, which is within the Conſideration. Agreed Cr. 5 Jac. B. R. between Bould and Winſton.** Noy 122. Bolls v. Sir R. Winton, S. C. held accordingly: —Reſolved by the 2 Ch. Juſtices and Ch. Baron, That the Wife ſhall take well enough, and that ſhe is within the Conſideration; for it is for the Advancement of his Poſterity, and without a Wife the Son cannot have Poſterity. And the Eſtate of the Son ſhall ſupport the Uſe to the Wife, and when the Contingent happens, the *Eſtate of the Son ſhall be changed according to the Limitation*; that is, to the Son and the Woman &c. 13 Rep. 48. Trin. 7 Jac. in the Court of Wards. Anon. —— And ſo it was reſolved in B. R. per tot. Cur. in the Reign of Qu. Eliz. for both Points in Sheffield's Caſe. Ibid. 49. —— Baron makes Feoffment in Fee to the Uſe of himſelf, and ſuch *Wife as ſhall be* in Fee. He marries, and levies a Fine of all, and dies, and the Wife brought a *Cui in Vita* of a Moiety. D. 274. b. pl. 42. Marg. cites it as in the Time of Q. Eliz. in C. B. Read's Caſe.

M. ſeiſed of Lands in Queſtion, levied a Fine thereof to the Uſe of himſelf and of ſuch Feme as he ſhould afterwards marry, and after their Deceaſe to the Uſe of J. the Daughter of M. and the Heirs of her Body, and afterwards married the now Tenant, and died. Adjudged per 3 J. againſt Dyer Ch. J. that ſuch Limitation is good. Mo. 96. pl. 240. Hill. 14 Eliz. Mutton's Caſe. —— D. 274. b. pl. 42. Paſch. 10 Eliz. S. C. and Dyer makes a Quære; but ſays, that by the Opinion of Wray and Mead, Serjeants, and Plowden and Onſlow, Solicitor, the Eſtate is raiſed to the Wife; and that they ſubſcrib'd their Names to their Opinion. —— And. 42. pl. 106. Mich. 10 Eliz. ſays it was held, that the Wife took nothing, becauſe the Land was veſted in the Conuſor by the Statute 27 H. 8. with the Remainder over. And yet it appears that the Intent was, that ſuch Feme ſhould take Eſtate; and alſo that this cannot be

jointly with her Baron, becauſe at the Time there was not any ſuch Perſon who was his Wife; in which Caſe, when for apparent Cauſe it cannot take Effect, according to the Words, then it ſhall be taken according to the Intent. And the Reporter ſays Nota; for many Things may be ſaid of the one Part, and and of the other.——2 Le. 223. pl. 283. S. C. argued for the Plaintiff; but nothing appears as ſaid by the Court.——Dal. 91. pl. 14. 15 Eliz. S. C. argued; but ſays it was for Land in Wales, and the Parties agreed to bring Action in Salop, and thereby to know the Opinion of the Juſtices of C. B. which being declared to the Court by one of the Parties, they would hear no further Argument, nor give Judgment.——Mo. 376, 377. in Perrot's Caſes, cites S. C. as held, that the Limitation to the Wife that ſhould be, was good enough.——S. C. cited Mo. 517. in Lord Buckhurſt's Caſe, and ſays that the Parties not being ſatisfied with the Opinions in D. 274. b. ſupra, ſued in C. B. where the Caſe was adjudg'd with the ſaid Reſolution, as appears by Writ of Entry brought there, Mich. 13 & 14 Eliz.—3 Lev. 371. Arg. cites D. 274. b.

(M) Uſes. Conſideration. *To what Uſe* the Conſideration ſhall be ſaid to go.

See (O) pl. 11. S.C.

1. IF a Man ſeiſed of the Manor of K. and of other Land, bargains and ſells the Manor of K. to B. in Fee, in Conſideration of 200l. and covenants with B. in the ſame Deed, that when he is diſpoſed to ſell the other Land, that he ſhall have the firſt Offer; and that if he go about to alien or convey the Land to any other, that then he covenants to ſtand ſeiſed thereof to the Uſe of B. in Fee; and after he endeavours to alien the Land without any Offer of it to B. the ſaid Conſideration of 200 l. ſhall be ſufficient to raiſe the Uſe thereof to B. according to the Covenant, being all in one Deed. M. 40 & 41 El. B. R. between Parſons and Wills.

(N) Uſes. Conſideration. Where the Conſideration ſhall be ſaid *too general* to raiſe an Uſe. [*Averment.*]

* S. P. For no Uſe ſhall be raiſed upon ſuch general Conſideration, becauſe it appears not to the Court that the Bargainor has Quid pro Quo, and the Court ought to adjudge if the Conſideration be ſufficient or not, and this cannot be where it is alleg'd in ſuch Generalty. 1 Rep. 176. a. Reſolved. Mildmay's Caſe.

1. IF a Man bargains and ſells Land for diverſe good Cauſes and Conſiderations, and does not expreſs in certain the Conſiderations, * no Uſe ſhall ariſe by it. Tr. 41 El. B. R. adjudged † between *Fiſher and Smith.* 1 Rep. 176. b. 177. ‡ *Mildmay's* Caſe. Reſolved. But upon Averment that this was in Conſideration of Money, or other valuable Conſideration given, this ſhall paſs; for this Averment ſtands with the Deed.

2. If a Man in Conſideration of a certain Sum of Money, bargains and ſells; this is a good Conſideration to raiſe an Uſe without Averment of any Sum in certain; for the Quantity of the Sum is not material. Held Tr. 41 Eliz. B. R.

† Mo. 569. pl. 777. S. C. That if it was for Money, it muſt be averr'd; but if it be expreſs'd in the Deed to be for *a competent Sum of Money*, it is ſufficient, without *ſhewing the Certainty* of the Sum; and none of the Parties ſhall ſay that no Money was paid; for againſt this expreſs Averment in the Deed no Averment nor Evidence ſhall be admitted to ſay that no Money was paid; and Judgment accordingly.

‡ Jenk. 247. S. P. and cites S. C.

3. An

3. An Uſe cannot be raiſed by any Covenant or Proviſo, or by Bargain and Sale *upon a general Conſideration.* Reſolv'd 1 Rep. 175. b. 176. a. Hill. 26 Eliz. Mildmay's Caſe.

4. If I by Deed *covenant with J. S. for diverſe good Conſiderations, that I and my Heirs ſhall ſtand ſeiſed to the Uſe of J. S. and his Heirs,* no Uſe will ariſe thereby without a ſpecial *Averment.* 1 Rep. 176. a. by the Reporter in Mildmay's Caſe.

But if J. S. be of my Blood, and in Truth *the Covenant was made for*

Advancement of his Blood, he may *aver* that the Covenant was in Conſideration thereof; for in both thoſe Caſes the *Perſon who ſhall take the Uſe is certain.* 1 Rep. 176. a. by the Reporter in Mildmay's Caſe.

5. There is a Difference where the *Conſideration is general* and the Bargain or *Covenant* is *with a Perſon certain,* there Averment, according to the Truth of the Caſe, may be taken; but when the Conſideration is general and the *Perſon incertain,* there no *Averment* can avail. 1 Rep. 176. b. Reſolv'd 26 Eliz. in Mildmay's Caſe.

G. Law of Uſes &c. 218. 219. cites S. C. and ſays the Averment by the parti-

cular Perſon is only the reducing the general Conſideration to ſome Certainty, and making out that in particular in Favour of the Perſon who was before included in the general Words, which is very reaſonable in caſe a good Conſideration were Bona fide paid him; but in caſe where the Perſon is uncertain, the Intent of the Covenantor was void ab initio; for it appearing that he deſigned no Body in particular for the Benefit of the Uſe he would raiſe, no Perſon in certain could aver any particular Conſideration why he ſhould have the Uſe, becauſe it plainly appears by the Deed he did not deſign him for the Uſe any more than any other Perſon; and the Law will not give a Uſe to any Body contrary to the Intent of the Party mentioned in the Settlement.

6. And *therefore* if A. for diverſe good Conſiderations, covenant with B. that *A. will ſtand ſeiſed* to the *Uſe of ſuch a one as B. ſhall name*; now, tho' B. names the Son or Couſin of A. yet no Uſe ſhall be rais'd by it; for by the *Generality* and Uncertainty this was void in initio, and cannot be made good after, and no *Averment* can make it good, or reduce it to any Certainty; for A.'s Intent was as general as the Words. 1 Rep. 176. b. in Mildmay's Caſe.

G. Law of Uſes &c. 219. cites S. C. For there is no particular Conſideration expreſs'd, and the Nominee

of B. cannot aver any, becauſe it appears that A. knew not who the Nominee would be, and therefore could have no Reſpect for any particular Perſon to make him raiſe a Uſe. If B. had paid Money Quære whether he might not have averr'd it, and ſo made good the Uſe to the Nominee.

7. *But* if A. covenants with B. that in Conſideration of *paternal Love,* or for Advancement of my Blood, he will *ſtand ſeiſed* to the *Uſe of ſuch of my Sons,* or of ſuch of my Couſins *as B. ſhall name*; on Nomination made the Uſe ſhall be rais'd; for the Conſideration is particular and certain, and the Perſon by Matter ex poſt Facto may be made certain. 1 Rep. 176. b. Reſolv'd Hill. 26 Eliz. in Mildmay's Caſe.

G. Law of Uſes &c. 219. cites S. C. For A. had a Deſign, for very good Reaſons, to

advance ſome of his Family, and he only left it to B.'s Judgment who ſhould be the Perſon.

8. If one *infeoffs his Son and Heir apparent,* and *no Uſe is expreſs'd, nor Conſideration,* it was ſaid it ſhould be to the uſe of the Son, and that ſo the Law has been taken; and that ſo it is in Caſe of a *Covenant to ſtand ſeiſed to the Uſe of the Son.* But the Court ſaid there was a *Difference* betwixt the Caſes; for in Caſe of a Feoffment they ſeem'd of Opinion that the Deed ſhould have no Operation, but that in the other Caſe it might be otherwiſe upon Conſtruction of the reſulting of the Uſe to the Father. 4 Le. 106. pl. 218. 26 Eliz. Hodge's Caſe.

In both Caſes the Conſideration is implied, Per Williams and Yelverton J. but Popham thought that no Conſi-

deration implied would raiſe an Uſe. Mo. 683 684. pl. 943. Mich. 43 & 44 Eliz. in Caſe of Ward v. Sudman.

9. A. *Tenant in Tail, Remainder to B. in Fee*; *B* by Deed inroll'd, for and *in Conſideration that the Lands ſhould remain in his Family, Name, and Blood, and for other good Conſiderations, covenanted to ſtand ſeiſed* &c. *to the*

Mo. 195. pl. 344. Muſgrave v. Barnard,

the Uſe of himſelf and the Heirs Males of his Body, and after to the Uſe of diverſe Brothers in Tail; and *for Default thereof to the Uſe of the Queen, her Heirs and Succeſſors*. Afterwards the Tenant in Tail in Poſſeſſion ſuffered a common Recovery with Voucher. Reſolv'd that the Iſſue in Tail were barr'd, becauſe the Conſideration that his Land ſhould continue in his Name and Blood, was not a ſufficient Conſideration to raiſe an Uſe to the Queen, tho' the Limitation to her was for the Preſervation of the Eſtate Tail againſt Diſcontinuances and Bars; and the Words (viz.) for other good Conſiderations, are too general to raiſe an Uſe, without a ſpecial Averment that ſome valuable or other good Conſideration was given. 2 Rep. 15, a. Trin. 27 Eliz. C. B. Wiſeman's Caſe.

S. C. and S. P. as to no Uſe ariſing to the Queen; but nothing appears as to the other Point. —— And. 140. pl. 191. S. C. and S. P. as to the Uſe to the Queen; but I do not obſerve the other Point there.

10. In Aſſiſe the Caſe was, the Father of the Demandant ſeiſed in Fee covenanted by Indenture, in *Conſideration of Advancement of* the Demandant, being *his Son, to ſtand ſeiſed to the Uſe of himſelf and his Wife* (being the Tenant in the Aſſiſe) *for their Lives, and after to the Uſe of the Demandant*, without expreſs Mention of any Advancement of the Wife. The Father died, the Wife entred; the Son brought Aſſiſe. Adjudg'd that he ſhall be barr'd. So that it appears the Juſtices thought the Uſe well rais'd to the Feme, without expreſſing her Advancement, or Averment thereof in pleading, becauſe it was Matter apparent. Arg. Mo. 504. in Lord **Buckhurſt's** Caſe, cites 30 Eliz. before the Juſtices of Aſſiſe in the County of Hertford, Burgoine v. Burgoine.

11. A. in *Conſideration of Service, and for diverſe other Conſiderations gave* Land *to J. S. his Servant, and M. his Couſin* in Tail. The Queſtion was, If this be a Jointure forfeitable by Alienation of M. the Feme? The Court varied in Opinion in Reſpect that no Conſideration was expreſſed, but Service and the Conſanguinity is Conſideration implied. Mo. 683. pl. 943. Mich. 43 & 44 Eliz. Ward v. Sudman.

Yelv. 101. Paſch. 5 Jac. B. R. **Ward** v. **Matthew** S. C. held that it was not a Jointure within the Statute. ——Cro. J. 173. pl. 15. S. C. accordingly. And Ibid. 175. ſays that the *naming one of the Grantees Couſin* in the Deed is not material, where it does not appear to be any Conſideration of the Deed, but is by way of Addition to her Name; yet in Regard 'tis *found by Verdict* that in Fact ſhe was his Couſin, and that a Marriage was intended between her and the other Grantee at the Time of the Gift, which after took Effect, it ſhall be intended as well the Cauſe of the Gift as the Service of the Baron, which was mention'd as another Part of the Conſideration.

12. A *Different Conſideration from what is expreſſed* in the Deed is not to be averr'd, and tho' the Conſideration of Blood is a good Conſideration, yet that is not to be regarded, if *Money or the Grant of Annuity* be expreſſed in the Deed. And where the *Grant is to two, and only one is of Kin*, the Conſideration of Blood cannot be the Inducement to the Conveyance. And it would be dangerous and liable to Perjury intended by the Statute of Frauds to be prevented to ſuffer Parol Evidence to prove Blood or Kindred to be the Conſideration of the Conveyance; Per Maſter of the Rolls. 2 Wms's Rep. 204, 205. Mich. 1723. Clarkſon v. Hanway & al'.

(O) Uſes.

FH
MVSEVM
BRITANNICVM

(O) Uſes. Bargain and Sale. In what Caſes an Uſe ſhall *ariſe*. *By way of Uſe.*

1. IF a Feme in Conſideration of Marriage to be had between her and one F. within 20 Days after, by her Deed inroll'd, gives, grants and confirms * Land to the ſaid F. and his Heirs, to the uſe of F. and his Heirs with Clauſe of Warranty againſt all People, but never makes Livery and Seiſin of the Land, nor is any Letter of Attorney in the Deed, and after the Marriage is had within the 20 Days. In this Caſe an Uſe ſhall ariſe to F. by Force of this Deed; for it does not appear that it was the Intent of the Party to paſs this by Way of Feoffment, notwithſtanding the Word Dedi, and the Warranty; for if it be admitted that a Man cannot vouch by Force of a Warranty created with an Uſe, yet he may rebut by it, and ſo the Warranty of Effect. M. 40 & 41 El. B. R. per Curiam between Tebbe and Poppletwell. S. C. cited 2 Vent. 318, * Fol. 787. 319. in Caſe of Samon v. Jones. — Raym. 47, 48. S.C. cited Arg. that Clench and Fenner held that an Uſe did not ariſe to the Baron becauſe it is only a Feoffment, Cauſa Matrimonii prælocuti; but that Popham held e contra.

2. But otherwiſe it had been if a Letter of Attorney to make Livery of Seiſin had been in the ſame Deed. Agreed. Ibid.

3. If the Father makes a Deed of Feoffment to his Son, and a Letter of Attorney to make Livery and no Livery is made, yet no Uſe ſhall ariſe to the Son; for then he ſhould be in by the Statute in other Degree than was intended. Co. Litt. 49. G. Law of Uſes and Truſts 49. cites S. C. accordingly; for the Court of Equity muſt follow the Intent of the Parties, and they have expreſſed their Intent not to part with the Eſtate until the Ceremony be perform'd.

4. If the Lord of a Manor by Deed grants, Bargains, releaſes and enfeoffs to a Copyholder the Land to the Uſe of the Copyholder and another in Fee, and after makes Livery accordingly, this ſhall paſs by the Livery and not as a Releaſe or Confirmation, tho' this might have operated as a Releaſe or Confirmation by way of Enlargement to the ſaid Uſe, preſently upon the Delivery of the Deed; for the Operation ſhall ſtay till the Livery. M. 7 Ja. Reſolved per Curiam in the Court of Wards, Sam's Caſe. 13 Rep. 54. pl. 23. S. C. — Ley. 11. S. C. that the Livery being made Secundum Formam Chartæ, it ſhould enure by way of Feoffment.

5. If a Man in Conſideration of natural Affection and of Money gives, grants, bargains, ſells, enfeoffs and confirms to B. in Fee by Deed indented with a Letter of Attorney in the Deed to make Livery, and the Deed is after enroll'd within ſix Months, this ſhall paſs as a Bargain and Sale notwithſtanding the Letter of Attorney in the Deed; for the Feoffor has given to the Feoffee Election to execute the Eſtate the one Way or the other, and that Way which firſt executes the Eſtate ſhall ſtand. Mich. 10 Car. ſaid per Berkley J. that the Ld. Keeper held ſo in Chancery the ſame Term. 3 Le. 16. pl. 39 M. 13 El. B. R. Anon. S. P. and there it was clearly agreed by the Court, that the Words, *Give for Money*, *Grant* for Money, *Confirm* for Money, *Agree* for Money, *Covenant* for Money, if the Deed be duly inroll'd, that the Lands paſs both by the Statute of Uſes and by the Statute of Inrollments, as well as upon the Words of Bargain and Sale.

6. If a Man ſeiſed in Fee of Land, for Money grants, demiſes, bargains and ſells it to another for Years, the Leſſee may elect to have it as a Demiſe at Common Law, or as a Bargain and Sale; for the Leſſor having Poph. 95. S. C. accordingly. —

2 And. 202. pl. 19. S. C. accordingly. — A. ſeiſed in Fee leaſed

having the Power to paſs it the one Way or the other, hath given expreſs Election to the Leſſee to have it the one Way or the other. Reſolved. 2 Rep. 35. b. Sir Rowland Heyward's Caſe.

to B. for three Lives, and afterwards by Indenture, in Conſideration of 50 l. paid by P. the ſaid A. did *demiſe, grant, ſet, and to Farm let* to P. Habend. from the Day of the Date for 99 Years rendring 40 s. Rent. Adjudg'd that this Demiſe and Grant, upon Conſideration of 50 l. amounts to a Bargain and Sale for the 99 Years; for when a Franktenement or Inheritance ſhall paſs by Deed indented and inroll'd, the preciſe Words of Bargain and Sale are not neceſſary, but Words tantamount are ſufficient; as if a Covenant be in Conſideration of Money to ſtand ſeiſed to the Uſe of his Son in Fee, if the Deed be inroll'd, is good. 8 Rep. 93. b. 94. a. Hill. 7 Jac. Fox's Caſe.——2 Brownl. 291. S. C. by the Name of Smallman v. Powis.

Jo. 206. pl. 2. S. C. by the Name of Darrell v. Gunter is that a Leaſe was made to A. for 20 Years rendring Rent, A. enter'd. Afterwards the Leſſor for Money paid by B. demiſed,

7. If a Man ſeiſed of Land in Fee and with Intent to convey to B. in Fee, for Money demiſes, grants, bargains and ſells it to A. for Years, and after releaſes in Fee to A. to the Uſe of B. in Fee. This Releaſe is before any Agreement of A. to have it as a Bargain and Sale, and if A. after elects to have it as a Leaſe at Common Law, yet he ſhall deveſt the Eſtate out of B. thereby; for Prima facie, by the Intent of the *Leſſor, A. being only named as a Conveyance for the Settlement of the Land to B. was poſſeſſed as a Bargainee, and when the Releaſe has ſettled the Eſtate in B. A. cannot by his Election make it void. P. 5 Car. B. R. between *Gorton* Leſſee of *Sir John Dorrel*, and per Curiam præter Jones, who ſeemed e contra, upon Evidence at Bar.

granted, and to Farm let to B. the ſame Land for 4 Years from the Date of the ſaid Indenture, and afterwards infeoffed by Deed the 2d Leſſee before that he had elected to take the Leaſe by way of Bargain and Sale or otherwiſe, and before any Rent paid to him, and neither upon the Deed of Feoffment nor after, did he declare what Way he took the Leaſe, nor had he any Attornment from the firſt Leſſee; And therefore Jones J. was of Opinion that B. had Election to take it by Demiſe at Common Law, or by Way of Bargain and Sale, executed by the 27 H. 8. according to Hayward's and Fox's Caſe; but till Election he ſhall take it as a Leaſe at Common Law, and if there was no Attornment, it is as a future Intereſt; but if he had received the Rent of the firſt Leſſee, this had been an Election in Law to take it by Way of Bargain and Sale.

* 'Tis (Deviſor) in the Original.

S. C. cited 2 Inſt. 725. and ſays * Fol. 788. that this Judgment was afterwards allow'd and ratified by Act of Parliament Anno 4 Car. —— S. C. cited G. Law of Uſes &c. 84, 85. and ſays that a Bargain and Sale to them is good tho' the Truſt be void when limited to other Perſons.

8. If an Indenture be made by A. of the one Part, and B. C. D. and others, Governors of the Hoſpital of S. (which is their Name of Incorporation) of the other Part, and by this Indenture, in Conſideration * of 5 s. given to A. by the ſaid Governors, A. bargains and ſells Land in Fee to the Governors and their Succeſſors, rendring 12 l. Rent per Annum to A. and his Heirs. Tho' it be admitted that the Conſideration be given by the Governors or any of them as private Perſons, yet 'tis a good Conſideration to paſs the Land to them in their politick Capacity; but the Indenture imports that they pay this as Governors, and by ſuch Name by the Indenture they are acquitted, Alſo there is a Rent of 12 d. reſerved to A. and his Heirs, which is a good Conſideration. Reſolved and adjudged. 10 Rep. 34. Sutton Hoſpital's Caſe.

S. P. Gilb. Law of Uſes &c. 199, 200. For Uſes cannot be deſtroy'd nor alter'd without a Tranſmutation of the Poſſeſſion

9. A *Feoffee to the Uſe of A. and his Heirs before the Statute of* 27 H. 8. for Money *bargain'd and ſold* the Land *to C. and his Heirs, who had Notice of the former Uſe*; yet no Uſe paſſed by this Bargain and Sale; for there cannot be two Uſes in Eſſe of one and the ſame Land; and ſeeing there was *no Tranſmutation of Poſſeſſion by the Tertenant*, the former Uſe could neither be extinct nor alter'd. And if there could be two Uſes of one and the ſame Land, then could not the ſaid Statute execute either of them for the Uncertainty; but if A. *diſſeiſed one to the Uſe of B.* and *A.* had *bargain'd and ſold the Land for Money to C.*—C. had an Uſe; and here

here were two Uſes of one Land, but of ſeveral Natures, the one, viz. Upon the Bargain and Sale to be executed by the Statute, and the other not. But ſince Littleton wrote all Uſes are transferr'd by Act of Parliament into Poſſeſſion. Co. Litt. 271. b. 272. a.

by which the Privity of Eſtate or the Truſt and Confidence is alter'd and gone. The ſame Law of Covenants to ſtand ſeiſed.

10. If the *Feoffees give a different Eſtate than what was in Uſe*, as if the Feoffment was to them for Life, and they give a Fee, no Uſe can ariſe out of this new Eſtate; as if one *Diſſeiſee* feoffee to Uſe, the Diſſeiſor ſhan't be ſeiſed to the Uſe tho' he had Notice. And. 314. in Caſe of Dillan v. Freine, alias, Chudleigh's Caſe.

11. A. Tenant in Tail, *in Conſideration of* 100 *l. bargains and ſells Bl. Acre*, by Indenture inroll'd, to B. And by the ſame Deed, *in Conſideration of the ſaid* 100 *l. and of Rent to be granted afterwards by B. covenants* that if he ſells any Part of his other Lands, which he has in Fee, that B. ſhall have the firſt Offer for the Purchaſe of them; and if he attempts to ſell without ſuch Offer to B. then *that A. and his Heirs will ſtand ſeiſed for the ſame Conſiderations* to the Uſe of B. and his Heirs of all which he ſhall attempt to alien without ſuch Notice. B. dies, leaving M. his Heir. A. without Notice, ſells other Land to J. S. who had Notice of the Covenant. The Rent was not granted; yet the Juſtices agreed that the Conſideration was good enough tho' *but one of the two Things be perform'd*, that is, the Payment of the Money. And 2dly, the Rent ſhould have been granted in convenient Time, which not being done, is no Part of the Conſideration. 3dly, They doubted if the Heir of B. ſhould take Benefit of the Contingent Uſe. Mo. 547. pl. 732. Mich. 37 Eliz. Mills v. Parſons.

Poph. 199. in the Caſe of Browne v. Stroud, Noy Arg. cited this Caſe of Mills v. Parſons, that it was reſolved that the Covenant was not perform'd; for the Grant of the Rent (which in the Conſideration was mention'd to be made payable at Michaelmas and Lady-Day) ought to be before Michaelmas, for otherwiſe A. could not have the Benefit intended.

12. The Father by Indenture, *in Conſideration of Love* which he bare *to his Son*, and for natural Affection unto him, *bargain'd and ſold, gave, granted and confirm'd* certain Land unto him and his Heirs; this Deed was *inroll'd*. The Queſtion was, Whether this Land ſhould paſs? And it was held it ſhould not, unleſs Money had been paid, or Eſtate were executed; for the *Uſe ſhall not paſs*; but becauſe the *Son was then in Poſſeſſion*, it was held to enure by way of *Confirmation*. Cro. J. 127. pl. 17. Trin. 4 Jac. B. R. Osborn & al' v. Churchman.

13. Covenant by Indenture that in Conſideration of 20 l. *to me paid by my ſon* I will ſtand ſeiſed to the Uſe of him and his Heirs. The *Indenture muſt be inroll'd* according to the Statute or elſe nothing paſſes; becauſe the *expreſs valuable Conſideration* tolls the tacit implied Conſideration of Blood, and no other Conſideration can be averr'd than is contain'd in the Deed; becauſe the Subſtance of the Agreement is by Aſſent of the Parties referr'd to the Deed. 11 Rep. 24. b. Trin. 12 Jac. B. R. H. Harpur's Caſe.

S. P. 7 Rep. 39. b. Mich. 5 Jac. B. R. at the End of Bedel's Caſe. —— S. C. cited 8 Rep. 94. a. Hill. 7 Jac. in Fox's Caſe. ——

S. P. by Twiſden J. *But* that *in Conſideration of* 20 *l. and Affection*, is good without Inrollment, becauſe both Conſiderations are expreſſed. 1 Lev. 56. Hill. 13 & 14 Car. 2. B. R. in Caſe of Forſter v. Forſter.

14. A. *with his own Money*, bought Lands of 100 l. and took the Conveyance by Indenture in theſe Words, grant, *bargain, ſell*, alien, *enfeoff*, &c. *to the Uſe of A. for Life*, Remainder as to *one 3d to his Wife for Life*, Remainder to *B. and his Heirs*, and there was a *Letter of Attorney to make Livery*. The *Deed was inroll'd* in Chancery, and 2 Months after *Livery was made*, and indorſed on the Deed. A. afterwards, by Leaſe and Releaſe,

leaſe, convey'd one Moiety of the Lands to B. and the other Moiety to C. (who were his Grandchildren) and their Heirs. C. had no other Proviſion, as all other Grandchildren had, and B. made no Objection to this Conveyance in the Life of A. which had he done, A. would probably have made other Proviſion for C. It was inſiſted for B. that A. intended to take the Eſtate by Feoffment, and that inrolling it firſt was only for ſafe Cuſtody; and that tho' *Uſes, upon a Uſe by Bargain and Sale*, would not ariſe in Law, yet in Equity they were good by way of Truſt. 'Twas urged for C. among the Counſel, in private Diſcourſe among themſelves, That A. having, by the Indenture, an Election to take either by Feoffment (which had he done, he could not otherwiſe have diſpoſed of it) or by Bargain and Sale (by which he might diſpoſe of it as he pleaſed) and having choſe to take by Inrollment, and diſpoſed the ſame by Act executed in his Life, it is plain he intended to take it ſo as to diſpoſe of it, and ſo no Reaſon in Equity to make other Operation of the Conveyance than the Law made. Counſel differ'd; but the Parties agreed, and no Argument was made. Ch. Caſes, 114. Mich. 20 Car. 2. Aſh v. Gallen.

(O. 2) *How* they may be *raiſed*. Where *without Deed*.

Cro. E. 344. pl 16. S. C. in B. R. Gawdy ſaid, He was clear of Opinion, that an Uſe ſhould not ariſe by Parol; but Popham

1. A Man cannot raiſe an Uſe by Parol in Nature of a Covenant, without any Feoffment, for natural Affection, becauſe it would be miſchievous if upon every Word, without any Ceremony of the Law, an Uſe ſhall ariſe without a ſettled Reſolution manifeſted by a Deed. M. 37 El. in the Caſe between *Callard and Callard*. Per Curiam adjudg'd, and there ſaid that 1 Ma. per Curiam accordingly and that Wray ſaid, that when he was Serjeant the Opinion of all the Juſtices was ſo. Contra 37 & 38 El. B. R. between * *Corbin and Corbin*.

ſaid they were clear of a contrary Opinion. And Popham ſaid, that 7 E. 6. it was adjudged that an Uſe may riſe by Parol, and that he could ſhew the Record of it. Fenner would ſay nothing as to this Point. ——Mo. 687. pl. 950. S. C. ſays that in B. R. Popham Ch. J. held ſtrongly, that the Conſideration of the Blood raiſed an Uſe without Writing, and ſo the Party had Poſſeſſion by the 27 H. 8. But Gawdy, Fenner, and Clench e contra. And in the Exchequer all the Juſtices agreed, that an Uſe could not ariſe upon Natural Affection without Deed.——2 And. 64. pl. 46. S. C. by Name of Tallard v. Tallard.——Poph. 47. Collard v. Collard, S. C. in B. R. with the Reaſons of the Judges there; but that Judgment given there was reverſed in the Exchequer.

Raym. 47. Arg. in the Caſe of Foſter v. Foſter, ſays, that the Judgment in Collard's Caſe was reverſed upon the Miſtake that an Uſe might be raiſed by Parol.——Sid. 82. pl. 9. in the S.C. of Foſter v. Foſter, ſays the Court was of Opinion, according to the Caſe of Callard, that no Uſe will ariſe without Deed.——G. Law of Uſes and Truſts, 270, 271. ſays, it ſeems at Common Law an Uſe might have been raiſed by Word upon a Conveyance that paſs'd the Poſſeſſion, by ſome ſolemn Act, as a Feoffment; but where there was no ſuch Act, there it ſeems a Deed declaratory of the Uſes was neceſſary; for as a Feoffment, which paſs'd the Eſtate, might be made at Common Law by Parol, ſo by the ſame Reaſon might the Uſes of the Eſtate be declared by Parol: But where a Deed was requiſite to the Paſſing of the Eſtate itſelf, it ſeems it was requiſite for the Declaration of the Uſes, as upon a Grant of a Rent, or the like. So it ſeems a Man could not covenant to ſtand ſeiſed to a Uſe without a Deed, there being no ſolemn Act; but yet a Bargain and Sale by Parol has raiſed a Uſe without, and it has been held to do ſo ſince the Statute. In Cities exempted out of the Statute it has been held, that if a Fine be levied of a Rent no Uſe can be limited of it without Deed; but now by 29 Car. 2. c. 3. all Declarations of Truſt, other than ſuch as ariſe by Implication of Law, are to be in Writing, and ſign'd by the Party, who is by Law enabled to declare ſuch Truſt, or elſe it muſt be by his laſt Will in Writing.—— And Ibid. 48. ſays the Intent of the Party muſt be declared by Deed, and the Chancery muſt follow that Intent; for it would be miſchievous that any Words of Kindneſs, that expreſs a future Deſign of parting with an Eſtate, ſhould be conſtrued as a preſent Settlement.

* See (I) pl. 4. S. C.

2. Mich.

2. Mich. 13 Car. B. R. in *Fox and Wilcock's* Caſe, per Curiam accordingly clearly, this being collaterally held, per Maſter Holborne in his Argument. Tr. 15 Car. B. R. Agreed per Curiam in * *Pierce and Patfield.* * See (O. 4) pl. 2. S. C.

3. If a Man levies a Fine of a Rent, he cannot limit the Uſe to a Stranger without Deed. Mich. 12 Ja. B. R. per Curiam, between *Parvis and Yeaton.* Roll Rep. 72, 73. pl. 15. S. C. & S. P. accordingly.——

S. P. Gilb. Law of Uſes &c. 56, 57. For the Uſe and Poſſeſſion of that which has its Nature and Being by a ſolemn Agreement by Deed, cannot paſs without ſuch Agreement; for otherwiſe there would be a greater Evidence that the Uſe continued with the Party, than that it was diſpoſed of.

4. There are ſeveral Ways in the Law for declaring of Uſes, whether upon Tranſmutation of Poſſeſſion or without it. If an Uſe be declared to be *on Tranſmutation of Poſſeſſion*, as in a Fine or Feoffment, there needs no *Agreement* whatſoever; it is ſufficient for the Party on the Tranſmutation to *declare, that the Uſe ſhall be to ſuch Party, and of ſuch an Eſtate*; *But* if an Uſe ariſe *without Tranſmutation of* Poſſeſſion, the Uſe then does not ariſe by virtue of any Declaration or Appointment, but there muſt *be ſome precedent Obligation* to oblige the Party to declare the Uſe, which muſt be *founded on ſome Conſideration*; for an Uſe, having *its Foundation generally on Grounds of Equity*, could not be relieved in Chancery without Tranſmutation of Poſſeſſion, or an Agreement founded on a Conſideration. And therefore if *Bargain and Sale* were made of a Man's Lands *on the Payment of Money*, the Uſe would have raiſed without Deed by Parol; *but* if the Uſe was *in Conſideration of Blood*, then it could not ariſe by Parol Agreement without a Deed, becauſe that Agreement was not an obliging Agreement; it wanted a Conſideration; and therefore to make it an obliging Agreement there was a Neceſſity of a Deed; but where there was a Tranſmutation of Poſſeſſion there needed no Deed, but only the bare Appointment of the Party. 12 Mod. 161, 162. Hill. 9 W. 3. Per Holt Ch. J. in delivering the Opinion of the Court in the Caſe of Jones v. Morley. 2 Salk. 677. S. C. That where a Conveyance to Uſes enures by way of *Tranſmutation of Poſſeſſion*, the Uſes may be declar'd *without Deed.* —*As* by *Fine* or *Feoffment.* Show. Parl. Caſes, 145. S. C.—— Comb. 429. S. C.—— *But* where the Conveyance is by way of *Covenant to ſtand ſeiſed*, there muſt

be a valuable Conſideration, or a binding Agreement by Deed. 2 Salk. 677. Jones v. Morley.

5. On a *Fine ſur Conuſance de droit tantum*, Uſes may be raiſed without a Deed; for Affectio tua imponit nomen operi tuo; and therefore where-ever there is an Act that alters the Poſſeſſion, the Party's own Words may declare the Intent of the Act; and this being according to the Policy of the Common Law, has not been alter'd by any Statute. Gilb. Law of Uſes &c. 57.

(O. 3) How they may be raiſed. *Upon what Conveyance.*

1. If the Lord releaſes to a Copyholder in Fee, to have to him in Fee to the Uſe of another, this is a good Uſe; for upon ſuch Releaſe a Rent may be reſerved. M. 7 Ja. in the Court of Wards. Reſolved per the 3 Judges and the Court in *Sammes's Caſe.* 13 Rep. 55. pl 23. S. C. and P. accordingly.—— S. P. Gilb. Law of Uſes

&c. 53. For ſince the Seiſin and Uſe is in the Lord, he may transfer the Seiſin of the legal Eſtate by paſſing the Uſe to another, or not, as he pleaſes. Quære if the Law is not the ſame of the Releaſes that enure by way of Enlargement, and tranſmitting of an Eſtate; but otherwiſe of Releaſes that enure by way of tranſmitting a Right and Extinguiſhment; for in theſe Caſes the Releaſor has not the Uſe and Poſſeſſion of any Eſtate; for that is in the Diſſeiſor.—— Ibid. 231. ſays it is a good Uſe; for the Releaſe

leaſe enures by way of Enlargement of his Eſtate, and by this Releaſe the Copyhold Eſtate is extinct and gone, as it ſeems.

S. P. Gilb. Law of Uſes &c. 53, 54. For Husband and Wife, in all Matters of Property, by the Rules of Law, are as one Perſon; and no Man can covenant with himſelf.

2. If the Baron covenants with his Wife to ſtand ſeiſed to the Uſe of the Wife, this is void; becauſe he cannot covenant with his Wife. Co. Litt. 112.

3. An Uſe cannot be out of a *Releaſe by Diſſeiſee*; for ſuch Releaſe to ſuch Purpoſe ſhall not enure as an Entry and Feoffment. Le. 148. pl. 205. in Caſe of Read v. Naſh, Arg. cites 10 E. 4. 5.

If one, ſince the 27 H. 8. by Deed indented and inroll'd, or before by Deed, for 200 l. had bargain'd and ſold his Land to another in Fee, to the Uſe of the Bargainor for Life &c. or in Fee, or to the Uſe of a Stranger, this Uſe is utterly void; for the Bargain for Money implies in it a Uſe, and the Limitation of other Uſe is merely contrary; for by this means the Uſe in Fee, which is in the Bargainee in Fee only, ſhall be taken away, if the Law were otherwiſe. By the Juſtices in Banco. Mich. 4 & 5 Ph. & M. And. 37. pl. 96. Anon. ſeems to be S. C.——Bendl. 61. pl. 108. Anon. ſeems to be S. C. accordingly.——S. C. cited And. 313. in Caſe of Dillon v. Freine.——S. C. cited 2 And. 81. in Caſe of Lord Cromwell v. Andrews.——And Ibid. 136. in Corbet's Caſe, and ſays that it is void, becauſe there is a Repugnancy in it, and the one cannot ſtand with the other.——If a Man bargains and ſells Land for Money, and limits an Uſe upon it, it is void; Per Browne J. Mo. 46. in pl. 138. Mich. 5 Eliz. Anon.——A Man cannot bargain and ſell Land to another Uſe than that of the Bargainee. Arg. Le. 148. in Caſe of Read v. Naſh.

4. M. for 400 *l. paid by A. her Son and Heir apparent, by Indenture inroll'd* 4 E. 6. *bargain'd, ſold &c. to the ſaid A. all her Manors* &c. *to have* &c. *to the ſaid A. and his Heirs for ever, to the Uſe of the ſaid M. during her Life*, without Impeachment of Waſte; and immediately after her Deceaſe *to the Uſe of the ſaid A. and his Heirs of his Body lawfully begotten*; and for Default of ſuch Iſſue *to the Uſe of the Heirs of the ſaid M. for ever.* It ſeem'd to all the Juſtices of C. B. and to Saunders Ch. J. that the Limitation is void &c. For tho' the Statute of Inrolments had not been made, but only the Statute of Uſes of 27 H. 8. yet even then the Caſe above could not be, becauſe there cannot be a Uſe upon a Uſe &c. D. 155. a. b. pl. 20. Mich. 4 & 5 P. & M. Tyrrell's Caſe.

5. *No Uſe is imply'd* on a *Fine* any more than on a Feoffment; ſo that a Limitation of Uſes by a Deed to the Heirs of the Baron, where the Render on the Fine was to the Heirs of the Feme, is a good Limitation. Mo. 45, 46. pl. 138. Mich. 5 Eliz. Anon.

An Uſe cannot be on Eſtate, (as on a Surrender) which paſſes by way of *Extinguiſhment.* Palm. 359. in the Caſe of Waker v. Snow.

6. By *Releaſe* and *Extinguiſhment*, no Uſe can be limited by the Party, nor reſerved by the Law. Arg. Mo. 384. in Perrot's Caſe.

But this is not by Force of the Statute of 27 H. 8. of Uſes, but by the Statute of 32 H. 8. of Wills. Sid. 26. Hill. 12 Car. 2. C. B. in Caſe of Hore v. Dix.—Lutw. 823. Trin. 12 W. 3. in Caſe of Broughton v. Langley, ſays it was agreed that a Deviſe may be to the Uſe of another.——S. P. Gilb. Law of Uſes, 281. but ſays, Quære if the Limitation of the Uſe be void, whether the Deviſee ſhall be ſeiſed to the Uſe of the Deviſor and his Heirs.

7. A *Deviſe* may be to an Uſe. Le. 254. Ellis Hartop's Caſe.

8. A *Fine by Tenant for Life* to him in *Reverſion in Fee* was declared to the Uſe of Conuſee and his Heirs, on Condition to pay to Conuſor 40 l. per Ann. for his Life; and for Default to the Uſe of the Conuſor for Life; this is no Surrender, becauſe a Fine implies a Gift in Fee-ſimple, and the Parties are eſtopp'd to ſay the contrary; but if it were a *Surrender*, yet it may well be to an Uſe; for it is a Conveyance charg'd with this Limitation of an Uſe. Cro. E. 688. pl. 23. Trin. 41 Eliz. C. B. Smith v. Warren.

9. An

9. An Uſe cannot ariſe by *Bargain and Sale by itſelf.* Cro. E. 744. pl. 21. Hill. 42 Eliz. B. R. in Caſe of Southcot v. Manory.

10. Upon a *Releaſe which creates an Eſtate*, an Uſe may be limited; *but* upon a *Releaſe or Confirmation* which *enures by* way of *Mitter le Droit*, an Uſe cannot be limited. 13 Rep. 35. in Sammes's Caſe.

A Releaſe or Confirmation, which enures by way of *enlarging an Eſtate*, may as well be to an Uſe as a Feoffment. Ley's Rep. 13. reſolv'd Trin. 7 Jac. Sammes's Caſe.

11. If a Man makes a *Feoffment in Fee to the Uſe of his Will*, here ariſes an Uſe and Truſt for himſelf, becauſe he hath not put it out of him. Arg. 1 Mod. 17. pl. 46. Mich. 21 Car. 2. B. R. in Caſe of Smith v. Wheeler.

(O. 4) *By what Words* Uſes may be raiſed.

1. IF A. ſeiſed in Fee of Land, covenants with B. in Conſideration of a Marriage to be had between A. S. the Daughter of B. and J. D. the Son of A. that the ſaid Land ſhall, from and immediately after the Death of A. remain and be unto the ſaid J. D. and A. S. and to the Heirs of the ſaid J. D. to the only Uſe of the ſaid J. D. and A. S. and to the Heirs of the ſaid J. D. In this Caſe, tho' the Marriage takes Effect, yet no Uſe ſhall ariſe by this Covenant, becauſe he does not covenant to ſtand ſeiſed to the ſaid Uſe, but only that it ſhall remain &c. Mich. 18 Ja. B. Rot. 2120. between *Buckler* Plaintiff, and *Symons and Pearſe* Defendants, in a Quare *Impedit adjudged. I did not hear this adjudged, but the Record exemplified was ſhewn to me, and it was ſaid that this was ſo reſolv'd by all the Court, and that the Judgment was given for this Cauſe.

S. C Win. 35. 36. 37. Trin. 20 Jac. C. B. adjornatur. but Ibid. 59. 61. Judgment was given for the Plaintiff.— 3 Nelſ. Abr. 491. pl. 25. cites S. C. but ſays it * Fol. 789.

was not reſolv'd.——S. C. cited Per Cur. 2 Lev. 78. in Caſe of Pybus v. Mitford. ——Vent. 374. S. C.——S. C. cited Sid. 26. in Caſe of Hore v. Dix, that it would not raiſe an Uſe, becauſe *Et Res & Modus habendi* are to be conſidered; and tho' there was *Res*, yet there was *not Modus habendi*; and ſo was the Caſe of Pitfield v. Pierce, 16 Car. B. R. and Bridgman Ch. J. ſaid that theſe two Reſolutions were founded upon 21 H. 7. 18.——Vent. 141. Trin. 23 Car. 2. B. R. in Caſe of Croſſing v. Scudamore, the Court ſaid that this Caſe was adjudg'd upon the abſurd Contrivance of the Conveyance.——S. P. Gilb. Law of Uſes &c. 60. ſays the Uſes do not ariſe by this Covenant, becauſe here the Seiſin of the Father is not appropriated to the ſeveral Uſes, but only a Remainder limited after the Father's Death, which cannot be without a particular Eſtate, nor that without a particular Contract; and no Man can contract with himſelf.

A. ſeiſed of Land in Poſſeſſion and in Uſe, covenanted on the Marriage of his Son with the Daughter of J. S. *that the Son, immediately after his Deceaſe, ſhall have in Poſſeſſion or in Uſe all his Lands, according to the ſame Courſe of Inheritance as they then ſtood in; and that all Perſons now ſeis'd, or hereafter to be ſeis'd, ſhall be ſeis'd to the ſame Uſe* and Intent. It was held that the Fee-ſimple of the Uſe was not out of the Father, nor is it chang'd, and that, as it is, it is only a Covenant; but perhaps it might be otherwiſe had the Words been, *That immediately after his Deceaſe the Land ſhould enure and remain to the Son.* Quære inde. D. 55. a. pl. 3. Paſch. 34 & 35 H. 8. Lord Burgh's Caſe.—— But if the Word *Deſcend* had been join'd, it would be otherwiſe; for there is Election how he is to have it. D. 55. Marg. cites it as ſo held by Manwood and Chute in the Exchequer, 21 Eliz. and alſo cites 2 H. 7. 16.

So where the Father, in Conſideration of marrying of his Son, covenants &c. that *he &c. has not made, nor ſhall make any Grant &c. of the ſaid Lands, but that all the ſaid Lands &c. ſhall deſcend, remain, and come in Poſſeſſion and Uſe to the ſaid Son, and the Heirs Male of his Body &c.* no Uſe is created or alter'd by thoſe Words. And. 25. pl. 55. Trin. 4 Eliz. Anon.——Bendl. 121. pl. 153. S. C. Anon.——3 Le. 6. pl. 18. S. C.

So where a Man covenanted in Conſideration of marrying his Daughter, that *he will ſuffer* 20 *l. per Ann. to deſcend, come, and remain to his* Daughter and her Baron, and the Heirs of their Bodies, (The Eſtate of the Covenantor was 300 l. per Annum) It was agreed by the Juſtices, that this is only Covenant, and no Uſe ariſes for want of Certainty, and thoſe Words Deſcend, Come, *and* Remain, cannot create Uſe but to the Heir apparent; but if it were in the Diſjunctive (*Or*) the Word *Remainder* would create an Uſe in the Remainder to a Stranger. Mo. 123. pl. 267. Paſch. 25 Eliz Anon.

So

So where A. *Tenant in Tail*, in Conſideration of a Marriage of B. the Tenant (his eldeſt Son) *covenanted that the Land, after his Death, ſhould deſcend, remain*, or ſhall be *to the Son and his Heirs.* Reſolv'd that by this no Eſtate was alter'd in A. but he remain'd Tenant in Tail as before. 1ſt. Becauſe it is only a Covenant and Executory, for which an Action of Covenant lies, if he performs it not; for it is not that he will ſtand ſeiſed to the Uſe of himſelf for Life, and after to the Uſe of the Son, but only that it ſhall deſcend, remain, or be to the Son after his Death, which may be his permitting it to deſcend and be to the Son, without any Alteration of the Eſtate. 2dly. If it were an expreſs Covenant that he would ſtand ſeiſed to the Uſe of himſelf for Life, and after to his Son, this had been void to alter the Uſe to the Son; for he being Tenant in Tail, and reſerving to himſelf an Eſtate for his own Life, he thereby reſerv'd all that he might lawfully diſpoſe, and then by the Covenant he can diſpoſe of no more than he can lawfully do; and ſo the Limitation after his Death is meerly void, and the Eſtate remain'd in him as before; for both which Cauſes, but principally for the firſt, Judgment was given for the Demandant. Cro. E. 279. 280. pl. 8. Paſch. 34 Eliz. B. R. Blithman v. Blithman.——And. 291. pl. 299. S C. that notwithſtanding the Conſiderations were ſufficient to raiſe an Uſe, yet A. being Tenant in Tail, cannot, as this Caſe is, raiſe an Uſe to commence after his Death, eſpecially to his Son and Heir, who is inheritable to the Tail, and to whom it ſhall deſcend; and he ſhall enjoy the Land according to the Intention of the Covenant, tho' it raiſes no Uſe. ——S. C. cited 2 Rep. 52. a. in Cholmley's Caſe, that the Limitation of the Remainder is void.——S. C. cited Mo. 345. accordingly.

If I *covenant that my Son ſhall have my Land*, this was held good by Reaſon of the Word (*Covenant*) in 1 Rep. **Chudleigh's** Caſe, and was cited out of **Seymour's** Caſe in D. 96. But Hobart Ch. J. (in Win. 61. in Caſe of **Buckley v. Simmonds**) denied this; and now Bridgman Ch. J. agreed with Hobart's Opinion, that it wanted Conſideration. But per Bridgman, If I will that my Son ſhall have my Land *in Conſideration of Marriage*, tho' the *Word* (*Covenant*) *is wanting*, yet the Uſe is well rais'd. Sid. 26. pl. 7. Hill. 12 Car. 2. B. R. in Caſe of Hore v. Dix.

Mar. 50. pl. 78. S.C. but ſtates it that A. by Deed, in Conſideration of Marriage, did give and grant to C. his 2d Son, and his Heirs after his Death, and that no Livery was made, & Roll Ch. J. conceiv'd that no Eſtate was rais'd to C. by this Conveyance; and as to an Objection that it ſhould enure by way of Covenant, he agreed that if the Meaning of A. might appear that he intended to paſs the Eſtate by way of raiſing an Uſe, it might do ſo, otherwiſe not; and that it does not ſo appear here, but that by the Word (Give) he intended Tranſmutation of the Poſſeſſion; and Judgment was given accordingly. And Jones J. ſaid, When a Man makes a doubtful Conveyance it ſhall be intended a Conveyance at Common Law.——S. C. cited Arg. 2 Show. 12. 14. in Caſe of Colton v. Senhouſe.

2. **If A. ſeiſed in Fee of certain Land, has Iſſue B. his eldeſt, and C. his youngeſt Sons,** and in Conſideration of the Marriage of B. **with E. ſeals and delivers a** Deed-poll, **which was to this Effect, Be it known that I A.** do give and grant by theſe Preſents unto my Son B. **the ſaid Land &c.** after my Deceaſe, to have **and to hold the ſame** unto the ſaid B. and the Heirs of his Body **begotten; and** for Default **of ſuch Heirs, I do give the ſame Land** after B.'s Death unto C. in Tail; Provided, **and it is nevertheleſs** agreed **upon between the ſaid Parties, that he the ſaid** B. ſhall **well and truly** pay, **or cauſe to be paid** unto the ſaid A. during **the Time of** his natural Life 8 l. at two Feaſts &c. and alſo diſcharge the Lord's Rent, with all other Duties whatſoever; **In Witneſs whereof,** to this my Deed of Gift I have hereunto ſet my Hand 2 **May, 16 Jac. This was in Effect all the Words of the Deed, and this Eſtate was** not executed by Livery or Inrolment; **but the Queſtion was if it ſhould paſs by way of Covenant; but this** ſhall not paſs by way of Covenant to ſtand ſeiſed, **becauſe it does not appear that A. intended to ouſt himſelf of the Land during his Life; for he grants this to B. after his Death before the Habendum; ſo that he does not intend to make himſelf only Tenant for Life, and it would be inconvenient to make a ſtrain'd Conſtruction to paſs Eſtates by** general Words, without the uſual Ceremonies of the Law. **Tr. 15 Car. B. R. adjudged per Curiam, upon a ſpecial Verdict between** *Pitfield and Pierce.* **Intratur Hill. 11 Car. Rot. 439. Mich. 15 Car. this was mov'd again, ſcil. that this does not alter the Eſtate of the Father, but that he ſhould be ſeiſed in Fee thereof during his Life, and his eldeſt Son ſhould have it by Way of Contingent Uſe after his Death. But the Court ſaid that this was harder to maintain than the other; and therefore they gave Judgment as before, becauſe the** Intent is to convey at Common Law. But if it appears by a Deed, that it is the Intent **of him who was ſeiſed of the Land, that this ſhall** paſs an Eſtate according to the Rules of Law, this ſhall ſo paſs, tho' there are not formal Words of Covenant &c. **Agreed per Curiam in the ſaid Caſe of Pitfield.**

Where the *Intent* appears, that one ſhall have Eſtate, but the *Conveyance is defective*, this ſhall be ſupplied by way of Uſe to anſwer the Intent. 2 Lev. 226. Arg. cites 2 Roll 789. Tibb v. Popplethwaite, and [2 Lev. 9.] Croſſing v. Scudamore, and [2 Lev. 75.] Pybus v. Mitford. And Judgment accordingly Trin. 30 Car. 2. B. R. Coltman v. Senhouſe.

3. **If a Man ſeiſed in Fee** ſuffers a Common Recovery, **and this is** expreſs'd to be upon Truſt and Confidence that the Recoverors will execute back to him an Eſtate Tail, the Remainder in Fee to his Son; **but there was** no Condition **expreſs'd**, nor **any** Covenant **to compel them to execute it, and therefore the** Law will ſupply **it, and will execute it without any ſuch Act. M. 37 & 38 Eliz. B. R. in *Fulmerſton's* Caſe, and ſaid by Sir Edward Coke Attorney General, that it was ſo agreed in the Caſe of Seniori Puero. 16 El.** S. P. Gilb. Law of Uſes &c. 60. ſays, the Court of Chancery would formerly have forc'd him to it, and conſequently the Statute will ariſe *till* it riſes, as it will now execute it in him.——When there is *Agreement for further Aſſurance*, no Uſe *Execution* of ſuch future Conveyance, tho' a Recovery be had in order thereto. D. 162. pl. 48. Trin. 4 & 5 P. & M. Lady Wingfield v. Littleton.——But where there is *a preſent Execution*, was agreed in a manner, that if I covenant in Conſideration of Marriage, or for a Sum of Money to me paid, that the Party ſhall have the Manor of D. by expreſs Words, this ſhall change an Uſe immediately, becauſe there is no Eſtate to be made &c. And it was agreed that if Ceſty que Uſe *wills that his Feoffees ſhall make Eſtate in Fee*, or in Tail *to J. S.* and dies, the Uſe changes before the Eſtate executed. D. 96. pl. 41. Hill. 1 M. Bainton's Caſe.

4. A Man can * [not] commence an Uſe *without Bargain, Livery* of Seiſin, *or Recompence*; for it can *not* be *by a naked Grant or Covenant without Recompence*, where the Grantor himſelf is ſeiſed of the Land in Poſſeſſion. Br. Feoffments al Uſes, pl. 46. cites Dr. & Stud. lib. 2. fo. 100. *Dr. & Stud. 205. 207.—*But* if a Man makes a Feoffment in Fee to the Uſe of the Feoffee and his Heirs without Recompence, yet the Feoffee is ſeiſed to his own Uſe. Br. Feoffments al Uſes, pl. 46. cites Dr. & Stud. lib. 2. fo. 100.——*But* if a Man makes a *Feoffment to his Uſe*, ſo that the Uſe be *in Eſſe*, he may *grant to the Feoffee to be ſeiſed to his own Uſe without Recompence*, and well; for there a Uſe was in Eſſe before. Br. Feoffments al Uſes, pl. 46. cites Dr. & Stud. lib. 2. fo. 100.——*Contra where* a Man *ſeiſed in Fee to his own Uſe, grants to another that he will be ſeiſed to his Uſe without Bargain or Recompence.* Note a Diverſity; and the ſame it ſeems of Conſideration. Br. Feoffments al Uſes, pl. 46. cites Dr. & Stud. lib. 2. fo. 100.

5. If a Man makes a *Feoffment* in Fee to the Uſe of himſelf for Life, and that after his Deceaſe *J. N. ſhall take the Profits*, this *makes a Uſe* in J. N. *Contrary if he had ſaid that* after his Death his *Feoffees ſhould take the Profits and deliver them to J. N.* this makes no Uſe in J. N. for he has them only by the Hands of the Feoffees. Br. Feoffments al Uſes, pl. 52. cites 36 H. 8.

6. If a Man covenants upon Conſideration to be ſeiſed to the Uſe of *himſelf for Life*, and after to the Uſe of his Son; but he ſays further, that *his Meaning is that his Wife ſhall have it for her Life*; Per Periam J. This is not a void Clauſe, but good to the Wife. Ow. 85. Hill. 33 & 34 Eliz. C. B. in Caſe of Carter v. Kungſted.

7. A. makes a Deed, and by the Word *Dedi* conveys Land to B. without any Words of Bargain and Sale, and that for a Sum of *Money*; if the Deed be Debito Modo *inroll'd*, the Uſe ſhall paſs as well as if the Words of Bargain and Sale had been in the Deed, becauſe that a Sum of Money was paid for the Land. 4 Le. 110, pl. 224. 19 Eliz. B. R. Grey v. Edwards.

8. A. in Conſideration of *Love*, and for ſettling the Land in his Name and Blood to his eldeſt Son, *covenants to convey before Eaſter, in Truſt* for himſelf for Life, Remainder to B. his eldeſt Son in Tail &c. A. alſo *covenants to ſtand ſeiſed from and after Eaſter, of ſo much of the ſaid Lands as ſhould not be ſufficiently conveyed, to the ſaid ſeveral Uſes*, Intents and Purpoſes. No Aſſurances was made before Eaſter. It was reſolv'd that the Uſes and Eſtate raiſed by this Covenant, being in Conſideration of Love to his Son &c. (no Eſtate at all being executed before Eaſter) the Covenant extended to all. Tho' it was objected, that the Words being

That of ſo much of the ſaid Lands &c.) the Intent was that he would ſtand ſeiſed when Part was executed and ſufficiently conveyed; but when no Part was executed, it was not his Intent that *all ſhould be rais'd by Covenant.* Sed non allocatur; for the Conſideration being ſufficient, the Covenant well extends to all, there being nothing conveyed by Eſtate executed. Cro. J. 180. pl. 10. Trin. 5 Jac. B. R. Croſs v. Fauſtenditch alias Shoreditch.

9. Bridgman Ch. J. took a *Difference* between *Covenants obligatory* and Covenants *declaratory*; for Covenants declaratory ſerve to limit and direct Uſes, but Covenants obligatory (as for Enjoyment free of Incumbrances) ſhall never be conſtrued to raiſe a Uſe, inaſmuch as they *have another Effect.* Sid. 27. pl. 7. Hill. 12 Car. 2. in Caſe of Hore v. Dix.

Sid. 102. pl. 8. Hill. 14 & 15 Car. 2. B. R. Goodiar v. Clarke, adjudg'd by all the Court, præter Mallet J.

10. Settlement *to Baron for Life, Remainder to his Son in Tail,* and *if he die without Iſſue Male,* Remainder *to his Daughter for* 500 *Years, to raiſe* 1500 l. for *Portions, Remainder over.* The Son dies without Iſſue, a Siſter living. Whether Baron leaving a Son, and that Son dying without Iſſue, the Baron ſhall be now ſaid to die without Iſſue Male within the Intent of the Settlement, ſo as the Term ſhall ariſe to the Daughter; Judgment for the Daughter. Lev. 35. Trin. 13 Car. 2. B.R. Goodin v. Clark.

Twiſden ſaid that *Covenant,* in Conſideration *of* 20 *l. to ſtand ſeiſed to the Uſe of my Son,* is not good without Inrolment; but in Conſideration of 20 *l. and Affection,* is good without Inrolment, becauſe both Conſiderations are expreſs. Ut ſupra 56.——Sid. 82. S. C.——Raym. 43. S. C.——; Rep. 39. b. Bedel's Caſe, S. P.

11. In Articles of Agreement, the Mother *bargains and ſells, demiſes and grants to her Son* the Tenements in Queſtion *for* 20 *l.* to have &c. to him and his Heirs for ever, *ſhe to have it during her Life,* and alſo *ſhe to have his Barn* during her Life for her 3d Part &c. No Uſe ariſes, but the Deed *reſts all in Agreement.* 1 Lev. 55. Hill. 13 & 14 Car. 2. B.R. Foſter v. Foſter.

12. A. *covenants,* upon Marriage of his Son, *to levy a Fine to his Son, and that the Son ſhall ſtand ſeiſed* to ſuch Uſes. *No Fine* is levied; no Uſes can ariſe. But had it been *added, that for Default* of Fine, or other Execution of Conveyance, *the Father ſhall ſtand ſeiſed* to the Uſes, it had been well. 3 Lev. 306. Trin. 3 W. & M. in C. B. Barrington v. Crane.

13. It is not *neceſſary* in declaring an Uſe, *if* there be a *Tranſmutation of Poſſeſſion,* to uſe the *very Word* Uſe. *Any Expreſſion whereby the Mind of the Party may be known,* that ſuch a one ſhall have the Land, is ſufficient; Per Holt Ch. J. in delivering the Opinion of the Court. 12 Mod. 162. Hill. 9 W. 3. in Caſe of Jones v. Morley.

See (D) (F) **(O. 5) *To whoſe Uſe* it ſhall be *without any Limitation.***

1 Com. Dig. Rec. (B. 2. Uſes D. 2.

Godb. 180. pl. 253. Trin. 8 Jac. C. B. Bury v. Taylor,

1. **If a Man ſuffers a** common Recovery, **or levies a** Fine **of Land, and** limits no Uſe, **this ſhall be to the Uſe * of him who ſuffers the Recovery or levies the Fine.**

S. P. agreed per tot. Cur.——S. P. and S. C. cited Gilb. Law of Uſes &c. 61. 64. ſays, that the Uſe reſults to the Tenant in Tail, and he becomes ſeiſed in Fee by Virtue of the Recovery, becauſe the Recoveror is Tenant in Fee-Simple, and when no Uſes are declared of that Recovery; and where no Conſideration appears from the Recoveror, the Recovery can be to no other Purpoſe than to dock the Entail.

A. To-

A. *Tenant for Life ſurrenders to Remainder-Man in Tail*, tho' by this Surrender the Eſtate for Life is extinguiſh'd; yet if the *Intent was only to enable him to ſuffer a Recovery*, to bar Remainders depending upon the Eſtate for Life, and the Eſtate Tail of the Remainder-Man, the Recovery ſhall be to the Uſe of A. for Life, if no other Uſes may be ſhewn. Held per Cur. Palm. 359. Paſch. 18 Jac. B. R. Waker v. Snow.

* Tho' the Limitation of the Feoffment, by which J. S. was made Tenant to the Præcipe, was to J. S. and his Heirs; for otherwiſe he could not be Tenant to the Præcipe to ſuffer it. Palm. 359. Waker v. Snow.

2. If two join in a Common Recovery where one has nothing in the Land, and no Uſe is limited upon it, this ſhall be to the Uſe of him only who had the Intereſt in the Land, and no Uſe ſhall ariſe to the Stranger. P. 10 Ja. in the Exchequer among the Reports of *B. Becket*'s Caſe. Per Curiam.

If *A. be ſeiſed in Fee* of an Acre of Land, and *A. and B. levy a Fine thereof to J. S. without Conſideration*, the Uſe implied ſhall be to A. only and his Heirs; for an Uſe is only a Truſt and Confidence, and a Thing in Equity and Conſcience ſhall be, by Operation of Law, his who in Truth was Owner of the Land, without having Regard to Eſtoppels or Concluſions; And ſo it was adjudg'd in the principal Caſe, where Baron and Feme ſeiſed in Jure Uxoris, levied a Fine without declaring any Uſe, the Law will reveſt the Uſe in the Feme only; becauſe the Eſtate of the Land paſſed from her only, and the Baron's joining with her was only for Conformity. 2 Rep. 58. b. Trin. 27 Eliz. in Beckwith's Caſe, alias, Colgate v. Blithe.

3. If a Man *ſells his Land or the Uſe of it for Money*, and does *not ſay to the Vendee and his Heirs*, yet the Vendee hall have it to him and his Heirs. Br. Feoffments to Uſes, pl. 4. cites 27 H. 8. 8. and ſays that fol. 5. in the ſame Year is agreeable thereto.

Gilb. Law of Uſes 17, 18. cites S. C. For there wanted not the Word (Heirs) to create an Inheritance in an Uſe; for it is Equity that a Perſon who gave a Conſideration for a Fee, ſhould have it; and that it is not ſetting up any other Rules of Property oppoſite to the Rules of Law in particular Caſes, where they ſhould happen to ſhelter Diſhoneſty and Oppreſſion; But now ſince the Statute, no Inheritance can be raiſed without the Word, Heirs, becauſe now the Uſes are transferr'd into Poſſeſſion, and muſt be govern'd by the Rules of Poſſeſſions at Common Law, as to the Words that create new Eſtates.

4. If a *Feoffment* be made *to A. to enfeoff B. to the Uſe of C.* and *A. infeoffs B. without limiting of any Uſe*, yet it ſhall be to the Uſe of C. Noy. 19. per Popham Ch. J. in Caſe of Yelverton v. Yelverton.

5. If one *ſeiſed of Land of the Part of his Mother makes Feoffment in Fee without Conſideration*, he ſhall be ſeiſed as he was before, [viz.] of the Part of the Mother. 2 Rep. 58. a. Sic dictum fuit in Beckwith's Caſe.

6. If *two Jointenants* are, the *one for Life and the other in Fee*, and they levy a Fine without declaring any Uſe, the Uſe ſhall be to them of the ſame Eſtate as they had before in the Land. 2 Rep. 58. a. Sic dictum fuit, in Beckwith's Caſe.

7. If *A. Tenant for Life and B. in Reverſion or Remainder* levy a Fine generally, the Uſe ſhall be to A. for Life, the Reverſion or Remainder to B. in Fee; for each grants that which he lawfully may, and each ſhall have the Uſe which the Law veſts in them according to the Eſtate which they convey over. 2 Rep. 58. a. Sic dictum fuit in Beckwith's Caſe.

(O 6) Uſes. *Conſideration, Averment.* [*And of what Things the Uſe ſhall ariſe.*]

1. A Conſideration which ſtands with the Deed **and not repugnant to it, may be averr'd. Reſolved.** 7 **Rep.** 40. **Bedel's Caſe.**

As where A. by Indenture between him and J. S. *in Conſideration of* 70 *l. paid by J. S. bargain'd and ſold to J. S. for* 30 *Years*, Remainder *to A. for Life*, Remainder *to B.* the eldeſt Son of A. *for Life*, Remainder *to C.* the Son of B. *and one M. Daughter of the ſaid J. S. in Tail* &c. Afterwards *a Recovery was had to the ſame Uſes. C. and M. inter-married.* And it was found and *averr'd, that the ſaid Indenture was made, and the Recovery had, as well in Conſideration of the Marriage between C. and M. to be had, for a Jointure, as for the ſaid Sum of* 70 *l.* Adjudg'd that tho' a particular Conſideration was mention'd, yet another Conſideration, which ſtands with the Deed, may be averr'd, and that this was not contrary. 8 Rep. 176. a. cited by the Reporter as in D. 346. Paſch. 3 & 4 Ph. & M. Villers v. Beaumont. ——Bendl. 39. pl. 72. S. C. ſays it was adjudg'd that this Indenture and Recovery countervail'd in Law, as if an immediate Gift of the ſame Manor &c. had been made by the ſaid A. to the ſaid C. and M. in Special Tail.——Bendl. in Kelw. 208. pl. 6. S. C. adjudg'd. ——S. C. cited as adjudg'd. 7 Rep. 40. in Bedel's Caſe.

Where the Deed of the Anceſtor expreſsly mention'd the Feoffment to be for Money paid, and an Acquittance was made accordingly, the Heir ſhall not aver the Conſideration falſe, tho' in Truth no Money was paid. D. 169. pl. 21. Trin. 1 Eliz. Wilks's Caſe.

2. **If a Man** bargains and ſells **in Conſideration** of the Loan of 100*l.* for a Year, **and for** other good Conſideration, **admitting that the Loan of** 100 **l. is no good Conſideration to raiſe an Uſe, yet another Conſideration may be averr'd for which the Bargain and Sale was made. H.** 37 **El. B. per Curiam between Nowell and Hudſton.**

If pro quadam Pecuniæ ſumma be not in the Indenture of Bargain and Sale, yet the Payment thereof is averrable; Periam J. Le. 170. pl. 287. Mich. 30 and 31 Eliz. C. B. in Caſe of Smith v. Lane.——If Land be bargain'd and ſold by Deed, indented and inroll'd, without expreſs Conſideration of Money, the Bargainee in pleading ſhall not be compell'd to aver Payment of Money, becauſe it is apparently imply'd. Arg. Mo. 504. cites it as adjudg'd Trin. 8 Eliz. B. R. Stanley v. Bracebridge, and Paſch. 27 Eliz. B. R. Palmer v. Prince, and alſo cites the Caſe of Smith v. Lane.

3. **If a Man** bargains and ſells **to J. S. to the Uſe of J. S. and his Heirs,** without Mention of any particular or general Conſideration, **and without the general Words** (for diverſe good Conſiderations) **yet a Conſideration may be averr'd. Hill.** 37 **Eliz. per Beamont, in the Caſe of** *Nowel v. Hudſton*, **and there ſaid per Serjeant Harris, that this was adjudged in Lambert's Caſe.**

2 Roll. Rep. 76. S. C. but not S. P. — Ibid 91. S. C. and S. P. accordingly.

4. **If the Father by Deed in Conſideration of** natural Affection to his Son makes Feoffment in Fee **to the Son, without expreſſing of any other Conſideration, and without any general Words of** (for **diverſe other good Conſiderations) yet it may be averr'd that this Conveyance** was alſo in Conſideration of Payment of Debts of the Father by the Grandfather, and of the Conveyance from the Grandfather of certain Land upon the Father, **for this ſtands with the Deed. Tr.** 17 **Ja. B. R. Reſolved per Curiam upon Evidence at the Bar between Atwell and Harris.**

Mo. 342. pl. 464. S. C. accordingly. —— Noy. 19. S. C. accordingly. — Cro. E. 401. pl. 10. S. C. accordingly. —S. C. cited Gibb. 236, 237.

5. **If a Man** covenants to ſtand ſeiſed of all his Land of which he is now ſeiſed, and of all other Land, which he ſhall after purchaſe, **to the Uſe of A. his Son, and his Heirs, and** after he purchaſes other Land to the Uſe of him and his Heirs, **the ſaid Uſe cannot raiſe any Covenant of this Land newly purchaſed to the ſaid A. becauſe this is to be raiſed only by the ſaid Covenant, at the making of which he had not this Land to charge or diſpoſe. H.** 37 **El. B. R. Adjudged. Yelverton's Caſe.**

by Trevor Ch. J. in C. B. in Caſe of **Arthur v. Bockenham**, and ſaid it was grounded on very good

good Reaſons, becauſe he cannot raiſe a Uſe of that which is not his own. For if a Man that has no Right to the Land can raiſe an Uſe of the Land, then *two at the ſame Time might raiſe Uſes*; for no Doubt the Owner may raiſe what Uſes he pleaſes.——11 Mod. 153. in S. C. accordingly.

Upon the Purchaſe of the Land to the Uſe of himſelf and his Heirs, the Fee is in the Father; for if a Man binds Lands, you muſt ſuppoſe him to have a Power to oblige them; for no Man can do that which he hath no Power to do; but he that hath no Intereſt hath no Power to oblige them; and therefore ſuch a Covenant in Equity, before the Statute, could not oblige him to a ſpecifick Performance; for that were in Equity to bind the Land, which is abſurd; and ſince the Covenant is void in Equity, there can be no Execution by the Statute; for the Rules of Law are equally ſtrict in avoiding this Repugnancy; for in Law every Diſpoſal ſuppoſes a precedent Property, and by Conſequence every Covenant to ſtand ſeiſed preſuppoſes a precedent Seiſin. G. Law of Uſes and Truſts, 116, 117.

No Uſe ſhall ariſe upon it; for a Covenant to ſtand ſeiſed, is a Covenant that affects an Alteration of the Land itſelf, which no Man has Power over but the Owner; and it is not now in the Nature of a Contract to do any Thing but that which reaches the Lands themſelves. Gilb. Law of Uſes &c. 274.

6. So **it would be if he had** purchaſed **the Land** generally to him and his Heirs **afterwards without expreſſing of any Uſe, for this ſhall be to his own Uſe. M. 37 El. B. R. Adjudged Yelverton's Caſe.**

7. **If a Man for a Conſideration covenants to ſtand ſeiſed** of the Manor of D. which he ſhall purchaſe hereafter **to the Uſe of another, and his Heirs, and** after he purchaſes it, **yet the Uſe ſhall not ariſe, becauſe he had not this to charge at the Time of the Limitation of the Uſe.** Upon every Feoffment or Purchaſe the Feoffor or Donor, from whom the Land paſſes, is to limit the Uſes to the Feoffee or Purchaſor, and conſequently before the Purchaſe one cannot limit how the Uſe ſhall be, viz. that it ſhall be to his youngeſt Son, where the Feoffor has limited it to the Uſe of him and his Heirs; for this would be to limit an Uſe out of a Uſe, which the Law will not ſuffer. Cro. E. 402. in Caſe of Yelverton v. Yelverton.——Noy. 19. S. C. accordingly.

8. **If a Man** covenants to ſtand ſeiſed of the Manor of D. **to the Uſe of another,** and after he purchaſes it, **no Uſe ſhall ariſe clearly; becauſe he intended to paſs the Uſe preſently, and he had not the Land at this Time. M. 37 El. B. R. Agreed. Yelverton's Caſe.** Cro. E. 401, 402. That a Man can no more limit a Uſe out of Land which he has not, than he can charge or let or grant a Thing which he has not. —— S. C. cited per Trevor Ch. J. Gibb. 236. in Caſe of Arthur v. Bockenham.

9. **If** 2 Jointenants in Fee **are, and** one covenants that after the Death of his Companion he will ſtand ſeiſed of the Moiety of his ſaid Companion to certain Uſes. **Tho' the Covenantor ſurvives, yet no Uſe ſhall ariſe, becauſe at the Time of the Covenant he could not grant or charge it. Adjudged.** *Barton's Caſe*, **cited M. 3. Ja. B. R.** Mo. 395 pl. 514. S. C. but S. P does not appear.—— Goldsb. 187. pl. 130. S. C. but S. P. does not appear.——Poph. 96. pl 2. Herbin v. Chard & al' S. C. but S. P. does not appear.—— Noy 157. Farbin v. Loby, S. C. but S. P. does not appear.——S. C. and S. P. cited Mo. 776. pl. 1074. in Caſe of Whitlock v. Hartwell.

10. **If** I covenant to purchaſe certain Land before Michaelmas, and after, before Eaſter, to levy a Fine of it to B. and that it ſhall be to the Uſe of A. and his Heirs. **If this be done accordingly, the Uſe ſhall well ariſe; for there the Uſe is not raiſed merely by the Indenture, but the Indenture is only * an Evidence that his Intent is, That the Conveyance, which he ſhall make after his Purchaſe, ſhall be to ſuch Uſes; and Uſes which ſhall be raiſed by Fine or Feoffment, may be directed by ſuch Intent precedent, and yet ſuch Intent is countermandable. Mich. 37 Eliz. per Curiam.** *Yelverton's Caſe.* Cro. E. 401. pl. 10. S. C. and S. P. accordingly.—— * Fol. 791. Noy 19. S. C. and S. P. by Popham Ch. J. accordingly, that with an *Averment* it ſhall be taken to be to the Uſe mentioned in the firſt Covenant; *but if another Uſe had been expreſs'd in the Fine*, that ſhould have controll'd the firſt Declaration of the Uſe.——S. P. and the Uſe ariſes on the Fine, and not on the Deed; per Trevor Ch. J. in delivering the Opinion of the Court. Gibb. 237. in Caſe of Arthur v. Bockenham.——The Fine by Relation raiſes the Uſe; per Trevor Ch. J. 11 Mod. 154 S. C.—G. Law of Uſes &c. 117. cites S. C. For a Man may declare the Intent of a future Act, which he had no Power to do at the Time of the Declaration; for to declare the Intent

Intent of a future Act doth not ſuppoſe an immediate Power of doing it; but the Doing any Act itſelf, which the Law allows to be good and effectual, preſuppoſes the Power of doing.

11. Tho' an *Eſtate convey'd to the Wife for Life* be *not mention'd to be for a Jointure*, yet it may be averr'd to be ſo. Jenk. 208. pl. 40.

Where there is an *expreſs* Conſideration it ſhall ſilence all imply'd Conſiderations. Arg. Cart. 146. cites 7 Rep. Bedel's, and 11 Rep. 24. b. Harpur's Caſe

12. Where one *Uſe is expreſs'd, another Uſe cannot be averr'd or implied*; for it would be very miſchievous, and go in Deſtruction of that which is directly contain'd in the Deed. And it was agreed, that if *one for* 1000*l. paid, infeoffs others, to them and their Heirs, to the Uſe of the Feoffees, the Feoffees ſhall have Uſe for Life, and ſo Eſtate for Life in Poſſeſſion*; and againſt this Deed it cannot be averr'd that nothing was paid, or that it was to other Uſe than is expreſs'd; for if it ſhould, the Conſequence would be that every Deed might be defeated. And. 313. in Caſe of Dillon v. Frain.

——S. P. 2 And. 81. in Caſe of **Lord Cromwell v. Andrew**; and if it is in a Record or a Deed, it cannot be *denied*, tho' it be *really falſe*; and cites D. 169. 21. Wilk's Caſe.——And ſee 2 And. 82. 136. 199. & 201.

If there be a Conſideration *of Money* expreſs'd in the Deed, no Averment or Evidence can be admitted againſt it; for the Affirmative is proved by the Deed, and it is impoſſible in Law or Equity the Negative ſhould ever be proved. G. Law of Uſes &c. 51.

But Poph. 105. in Kelſie's Caſe, ſays it ſeem'd to the Juſtices, that an Uſe *may be averr'd without Deed*, upon a Fine ſur Render.

13. *A Fine with Render may be to the Uſe expreſs'd in Writing*, not to the Uſe imply'd or declar'd by Parol. Agreed by the Juſtices. Mo. 106. pl. 249. Mich. 17 & 18 Eliz. in Andrews's Caſe.

——A *Fine ſur Grant and Render*, unleſs in ſpecial Caſes, cannot be *averr'd by Parol* to be to other Uſe or Intent than is expreſs'd in the Fine, Feoffment, or other Conveyance; but there is *Diverſity* between a Uſe and a Conſideration; for *when a Fine, Feoffment, or other Conveyance imports expreſs Conſideration*, a Man may aver by Parol other Conſideration which ſtands with the expreſs Conſideration; but the Parties cannot aver any other Uſe than is contain'd in the ſame Conveyance, nor ſhall any Averment be againſt the Conſideration expreſs'd. But yet, in ſome Caſes, a Fine upon Grant and Render may be ruled and directed in Part by Averment by Parol; and this is when the original Bargain and Contract, between the Parties, is by Indenture or other Deed; As where the Indenture is That a Fine ſhall be levied of certain Lands, by the Name of a certain Number of Acres, to diverſe Perſons; and that they ſhall grant and render the Land again in Fee-ſimple to certain Uſes, but there is a Variance either as to the Number of Acres in the Fine, or the Fine is levied to only one of the Parties who grants and renders; ſo that a Variance is between the Covenant and Fine, yet it may be averr'd to be to the Uſes in the Indenture. Reſolved. 2 Rep. 76. Hill. 43 Eliz. C. B. Lord Cromwell's Caſe.—S. P. Gilb. Law of Uſes &c. 57. For in this Fine there is a Uſe implied, becauſe there is a Conſideration, (viz.) *pro finali Concordia* &c. and where-ever a Uſe is either expreſs'd or implied, there can be no verbal Averment to the contrary; for there is a greater Sign that the Minds of the Parties are alter'd from the verbal Agreement, than that they continue the ſame when they leave no ſolemn Teſtimony that there was ſuch a one.——If an Eſtate in Fee be granted, and render'd back to one in Tail, he ſhall have it to his own Uſe; and ſo if the Conuſee keeps the Fee, he ſhall have it to his own Uſe: But by Deed the Uſe of a Fine ſur Grant and Render may be directed, and if there be a Deed to lead the Uſes of ſuch a Fine, tho' there be ſome Variance between the Deed and the Fine, yet it ſhall be ſaid to be to the Uſes of the Deed, if there are no other Uſes, and that That was the Intent. Ibid. 268.

14. If I bargain and ſell, or covenant with J. S. for *diverſe good Conſiderations*, that I and my Heirs will ſtand ſeiſed to the Uſe of him and his Heirs, no Uſe will ariſe hereby without a ſpecial Averment. *But if J. S. be of my Blood, and in Truth the Covenant was made for Advancement of his Blood*, he may aver that the Covenant was made in Conſideration thereof; for the Perſon that ſhall take the Uſe is certain, and ſuch Averment as ſtands with the Deed may be taken, tho' it be not expreſly compriz'd therein. 1 Rep. 176. a. in a Nota of the Reporter in Mildmay's Caſe.

15. *Tho' an Uſe cannot be declared of a Rent to a Stranger without Deed*, as was agreed by the Court, *yet* they held clearly that *it may* well *be averr'd* that the Uſe was to the Stranger, *without ſhewing the Deed*, or making mention of it. Roll Rep. 72, 73. pl. 15. Mich. 12 Jac. B. R. Parvis v. Yeaton.

(O. 7) What ſhall be a *good Limitation* of an Uſe. *Upon a Fine, Feoffment, or Recovery.*

1. IF a Man levies a Fine of certain Land, and covenants by Indenture, in Conſideration of Blood, and of Marriage of his Baſtard-Daughter, that the Conuſee ſhould ſtand ſeiſed to the Uſe of the Daughter, tho' this is not a good Conſideration to raiſe an Uſe by way of Covenant, yet it is ſufficient upon a Fine; for the Will of the Party is ſufficient for this without Conſideration. Contra M. 43 & 44 Eliz. B. R. per Curiam, between *Frampton and Gerard.*

2 If A. in Conſideration of 100l. by B. makes Feoffment in Fee to B. to the Uſe of B. and C. the Son of B. this ſhall raiſe the Uſe to C. well enough, tho' all the Conſideration was given by B. Tr. 7 Jac. in the Exchequer. *Samme's Caſe.* 13 Rep. 54. pl. 23. S. C. that the Uſe limited to B. and C. and their Heirs, is good; but it ſays nothing of the Conſideration of 100 l. paid by B.——Ley. 11. S. C. & S. P. of the Conſideration-Money being paid by B. Reſolved that B. (who was the Father of C. and is ſince dead, living C.) did take by the Livery, and that the ſaid C. took nothing thereby; but that the ſaid C. by the Limitation of the Uſe in the Habendum, did take together with the ſaid B. as Jointenants of the Uſe, which being executed by the Statute of 27 H. 8. of Uſes, did make them Jointenants, and jointly ſeiſed of the Intereſt and Poſſeſſion; and that therefore the ſaid C. upon the Death of the ſaid Father, ſhould be ſaid to have the whole Land compriz'd in the ſaid Conveyance, Per jus accreſcendi, and not to take any Part thereof by Deſcent from his Father; which was decreed accordingly.

An Uſe ſhall ariſe to all, on a Bargain and Sale, by *Payment of one of the Bargainees.* Clayt. 145. pl. 263. Harley v. Thompſon.

3. If A. ſeiſed in Fee of 25 Boyleries at Wyche, covenants to levy a Fine of all his Boyleries, and that for 24 of them it ſhall be to the Uſe of C. in Tail &c. and that for the other it ſhall be to the Uſe of himſelf in Fee, with Power of Revocation; and after A. levies a Fine of 24 Boyleries only. Quære whether the Eſtate paſſing by the Fine ſhall be directed by this Covenant or not. P. 8 Ja. in the Exchequer-Chamber. *Sir Tho. Overbury's Caſe.* Quære. Lane 55. Trin. 7 Jac. S. C & S. P. and it was moved for a Doubt, what Boylerie ſhould be intended; and it was adjourn'd.—— G. Law of Uſes &c. 277. S. P. and leaves it a Quære whether the Uſe of the 24 are not directed by the precedent Conveyance.

4. Feoffment in Fee *on Condition* that *if Feoffor do ſo*, he ſhall *re-enter* and *retain* the Land *to the Uſe of a Stranger.* The Uſe is void, and Feoffor ſhall hold it to his own Uſe; per Mead. Le. 269. pl. 362. 20 Eliz. C. B. in Caſe of Ferrand v. Ramſey.

5. A. and B. *covenanted with J. S. that C. Son of B. ſhould marry M. the Daughter of J. S.* if ſhe would aſſent, the ſaid *J. S. covenanted that M. ſhould marry C.* if he would aſſent; *Pro quo quidem Maritagio ſic tunc poſtea habendo*, the ſaid *A. covenanted to make, or cauſe to be made, an Eſtate to the ſaid C. and M. and to the Heirs of their 2 Bodies, for the Jointure of the ſaid M.* Afterwards a Fine was levied, in which C. and M. were Plaintiffs, and A. and B. Deforceants. And in Ejectment it was found by Verdict, that the ſaid Fine *fuit ad Uſus & Intentiones in Indentura prædict a ſpecificat'* by Force whereof the ſaid C. and M. were ſeiſed, and that C. died, and M. intermarried with L. Whereupon it was moved by Gaudy Serj. That inaſmuch as the *Marriage took no Effect* between *C. and M.* the Uſes cannot be in them, but the Fine ſhall be to the Uſe of the Conuſor; which was oppoſed by Walmſley Serj. who ſaid that it was not like *a Covenant in Conſideration of Marriage to ſtand ſeiſed of ſuch a Manor*; for there if the Conſiderations fail, the Uſes fail alſo; for Le. 138. pl. 188. Hill. 30 Eliz C. B. S. C. by Name of Stephens's Caſe, accordingly.—— Cro. E 121. pl. 14. Stephens v. Lawton, S. C. but S. P. does not appear.

for the Conſideration only is the ſole and entire Cauſe that makes the Uſes to ariſe: But in this Caſe the Conſideration is not material, but the Fine is effectual without Conſideration of Money paid. The Court being full, they all agreed to the Difference put by Walmſley, and Judgment was given for the Plaintiff accordingly. Ow. 40, 41. Mich. 29 Eliz. Stephens v. Layton.

There is no Letter in Roll to this Diviſion, nor in any from Letter (O.)

(P) What ſhall be a *good Contingent Uſe.*

1. IF a Man makes Feoffment in Fee, and after declares by Indenture that it ſhall be to the Uſes following, ſcilicet, after Marriage had between him and Anne Woodlet, it ſhall be to the Uſe of himſelf and the ſaid Anne, and to his own Heirs; this ſhall raiſe an Eſtate for * Life in Anne, after Marriage between them; for before the Marriage this was to the Uſe of himſelf in Fee, ſubject to the ſaid Contingency. M. 37 & 38. B. R. Adjudged between *Woodlet and Drury.*

* S. C. and S. P. accordingly, if there be no Act in the mean time to deſtroy that future Uſe, according to the Limitation of the Uſe; and adjudged accordingly. Cro. E. 439. pl. 54.——D. 340. b. Marg. pl 50. cites S. C. by the Name of Woodlife v. Bra.——S. C. cited Pollex. 95. in Caſe of Carpenter v. Smith.

The Surrender was to his Child, then an Infant, in Ventre ſa mere. He died. The Child was born, and died within 2 Months after.

2. If a Man ſurrenders a Copyhold in Fee to the Uſe of J. S. and his Heirs, who is an Infant, and if J. S. dies before the Age of 21, or Marriage, then he ſurrenders it to the Uſe of J. D. in Fee; this is a good Remainder to J. D. upon the Contingent; for a Fee may be limited upon a Fee upon a Collateral Contingent. M. 13 Ja. B. R. Dubitatur, between *Simpſon and Southwood.*

Adjudged that the Limitation is void, and that the Defendant, who claim'd from the Heir at Common Law, had good Title. Cro. J. 376. pl. 2. S. C.——Godb. 264. pl. 364. Simpſon's Caſe, S. C. adjudged for the Defendant.——2 Bulſt. 272. S. C. and adjudg'd for the Defendant.——Roll Rep. 109. pl. 52. S. C. adjornatur. Ibid. 137. pl. 22. S. C. adjornatur. Ibid. 253. pl. 21. Mich. 13 Jac. B. R. S. C. ſays Judgment was given for the Plaintiff.——G. Treat. of Tenures, 244, 245, 246. cites S. C. and ſays this Surrender was held to be void to J. S. becauſe the Contingency did not happen in the Life of the Surrenderor; and a Man cannot ſurrender to take Effect after his Death. 'Twas not reſolved abſolutely, that a Fee may be limited upon a Fee. See Roll Rep. 109. 138. 253. to explain theſe Matters. This Caſe, as reported by Rolls, (as 'tis ſaid in Lex. Cuſt. 120) is an Authority that ſuch future Uſe is good. This is the ſame Caſe as is reported by Crook, but directly contrary; and as it ſeems, not grounded upon ſo good Reaſon as the Reſolution in Crook: For, as before has been ſhewn, Surrenders are not conſtrued ſo favourably as Wills, (though Coke ſays they ſhould be taken according to the Intent of the Surrenderor) neither is there the ſame Reaſon; for a Man may as well order a Surrender in his Life-time, according to the Rules of Law, as he may any Deed to paſs away a Freehold Eſtate; ſo that the Intention of the Party has not ſo ſtrong an Operation in a Surrender as in a Will; and therefore that Reaſon will not ſupport a Fee upon a Fee in that Caſe, as it doth in a Will. And then 'tis not at all like a Uſe or Truſt, in which a Fee may be limited upon a Fee, becauſe there the legal Eſtate was not by any Limitation extended further than one entire Fee-ſimple, which would be to extend an Eſtate further than its original Creation warranted. But a Uſe, after a Uſe in Fee, was but only to give an equitable Right to ſomebody to have the Profits, as long as the Eſtate in Fee laſted; which is highly reaſonable, that a Man that has a legal Eſtate ſhould diſpoſe of the Profits of that Eſtate as long as it ſhould laſt; for ſo long had he a Right to the Profits himſelf, which Right he may transfer to others, and there is no Harm done to any body; but to extend the legal Eſtate would be to keep the Lord of the Eſcheat eternally out; and it is only allow'd in a Will, becauſe of the want of Counſel to adviſe with, how to do it. But a Uſe in a Surrender is not like this Uſe; for he that hath a Uſe by a Surrender is to be admitted to the legal Eſtate, and is not ſeiſed to Uſe; and therefore if a Fee might be limited upon a Fee in ſuch Caſes, the legal Eſtate would be extended further than its original Creation warranted, and a great Eſtate be made out of a little one; ſo that it ſeems that a Fee upon a Fee in Copyholds is not good.

And Ibid. 246. cites Cro. E. 361. Mich. 36 & 37 Eliz. C. B. Paulter v. Cornhill, where a Surrender was to the Uſe of one in Fee, upon Condition that he pay 100l. to a Stranger; and if he fail'd, it ſhould be to the Uſe of the Stranger in Fee. It was moved whether this were a good Limitation to add Fee upon Fee. The Court directed the Matter to be found Specially; and it does not appear what be-

came

came of it afterwards. But Beamond J. conceived the Limitation to be good enough, and compared it to a Uſe upon a Feoffment: But Ld. Ch. B. Gilbert ſays, that for the Reaſon before, it ſeems, it cannot be compared to the Caſe of a Feoffment to Uſes.

3. **If a Man makes a** Feoffment to the Uſe of himſelf for Years, **and after to the Uſe of** A. in Tail, **Remainder** to his own right Heirs, **and after A. dies without Iſſue, living the Feoffor, the Remainder to the right Heirs is void, inaſmuch as it cannot reſt in Contingency, there not being any Franktenement to ſupport it.** *The Earl of Bedford's Caſe*, **adjudged in the Court of Wards, cited M. 37 & 38 El. B. R.** See Tit. Remainder (I) pl. 4. S. C.—For here is no Tenant to the Præcipe; and the not having a perpetual Tenant to the Præcipe, was an Inconvenience the Statute expreſsly deſign'd to redreſs; and conſequently to this Rule the Statute has ſubmitted all Uſes. G. Law of Uſes &c. 76.

Husband and Wife, ſeiſed *in Jure Uxoris*, levied a Fine with Proclamations, and by Deed declared the Uſes, viz. That the Cognizees ſhould ſtand ſeiſed *to the Uſe of the Heirs of the Body of the Husband on the Body of the Wife*; and for want of ſuch Iſſue, to the right Heirs of the Husband. Both died, no Iſſue then living. It was reſolved, that the Limitation is void for want of a particular Eſtate; and the preſent Diſpoſition of the Freehold is a Foundation to ſupport the contingent Uſes; for otherwiſe the whole Inheritance muſt be in *Abeyance*, which cannot be. Carth. 262 Hill. 4 W. & M. in B. R. Davis v. Speed.——4 Mod. 153. S. C. accordingly.——Skin. 351. pl. 20. Paſch. 5 W. 3. B. R. S. C. accordingly.——12 Mod. 38. S. C. accordingly.——Show. Parl. Caſes, 104. S. C. and Judgment affirm'd in Parliament.——5 Mod. 143. Davis v. Speed, is a D. P.

4. A. *covenanted to make a Feoffment within a Year to the Uſe of himſelf for Life*, the Remainder *to H. his younger Son, and the Heirs Males of his Body*, Remainder *over*; *and if* he did *not* make the Feoffment, *he covenanted to ſtand ſeiſed to thoſe Uſes, for the Continuance of the Land in his Name and Blood*; *Proviſo if H. or any Heir Male make a Feoffment, or levy a Fine, his Eſtate to ceaſe* as if he were dead, *and then the Feoffees to ſtand ſeiſed to the Uſe of ſuch Perſon to whom the Land ſhould remain.* No Feoffment was made within the Year; A. died, H. the Son levied a Fine to the Defendant. Reſolv'd that the Feoffees and their Heirs could not ſtand ſeiſed to the Uſe of the Perſon next in Deſcent or Remainder, becauſe no Feoffment was ever made, and the Perſons appointed to ſtand ſeiſed are no other than the Feoffees, their Heirs and Aſſigns. Mo. 592. pl. 799. Trin. 35 Eliz. C. B. Cholmley v. Humble. And. 346. 347. pl. 321. S. C. and P. accordingly.

5. A *Remainder* may well enough ariſe *by a Uſe to a Perſon not in Eſſe*, but not where it is *by way of Poſſeſſion*. Mo. 430. pl. 602. Hill. 38 Eliz. agreed in the Caſe of Blodwell v. Edwards.

6. A. covenants to ſtand ſeiſed to the Uſe of *himſelf for Life*, and after to the Uſe of his *Daughters that ſhould be unmarried at his Death*, until every of them ſucceſſively ſhall or may levy 500 l. Remainder to his eldeſt Son &c. It was mov'd if ſuch a *Contingent Uſe* might be rais'd out of a Covenant, tho' out of an Eſtate executed by Feoffment, it might well be rais'd. Anderſon doubted thereof, but the other Juſtices held that it might well be *rais'd*, becauſe it ariſes out of the Poſſeſſion of the Covenantor. Adjornatur. Cro. E. 800. pl. 53. Mich. 42 & 43 Eliz. C. B. Blackburn, alias, Bradford v. Laſſels. Noy 33. S. C. but nothing is ſpoke there as to this Point.

7. Uſe to *A. and his Heirs, provided that if he give a mortal Blow* to any Perſon, that *the Uſe ſhall ceaſe* to him, and ſhall be to another. *This is fraudulent* to prevent an Eſcheat, *and void*; Per Walmſley J. Mo. 633. pl. 868. Paſch. 43 Eliz. C. B. in Caſe of Mildmay v. Mildmay.

Fol. 792.

See Tit. Powers.

(Q) Uſes. Revocation by Proviſo. *What* Uſes and Eſtates *may be Revok'd.*

This Proviſo being coupled with a Uſe, is allowed to be good, and not repugnant to the Statute of Uſes; but in Caſe of a Feoffment, or other Conveyance, whereby the Feoffee or Grantee &c. is in by the Common Law, ſuch a Proviſo were meerly repugnant and void. Co. Litt. 237. a.

1. USES in Eſſe, and Contingency, **may be revok'd, a Proviſo being to revoke** every Clauſe and Article **contained in the Indenture.** 10 **Rep.** 86. **b.** *Loveis's* **Caſe.**

[Q. 2] [Revoked] *How.*

S. P. Co. Litt. 237. a. he may revoke Part at one Time and Part at another; and theſe Revocations are favourably interpreted, becauſe many Men's Inheritances depend on the ſame.

[1] 2. **Uſes by Proviſo may be revok'd** in Part, and remain good for the other Part. 10 **Rep.** 87. *Loveis's* **Caſe.**

2. Where a Conveyance to Uſes enures *by Way of Tranſmutation of Poſſeſſion*, the Uſes may be revok'd *without Deed.* 2 Salk. 677. Hill. 9 W. 3. B. R. Jones v. Morley.

See Tit. Remainder (M)

(R) Uſes. Conſideration. Contingent. *What* ſhall be ſaid a *Contingent Uſe*, and not a ſettled Uſe.

(S) *What Conſideration in one Capacity will raiſe an Uſe in another* Capacity.

Cro. C. 358. pl. 12. S. C. but nothing is ſaid there as to this Point.—See (S. 3) pl. 10. S. C.

1. **IF A.** ſeiſed in Fee of the Manors of D. and S. levies a Fine to B. of both **Manors in Fee, upon a** Purchaſe made by B. of the Manor of D. **and the Manor of** S. is intended for a Security for the Purchaſe of D. **and the Uſe is limited of the Manor of D. to B. and his Heirs, and of the Manor of S. to the Uſe of A. and his Heirs,** till Eviction made of the Manor of D. **by A. S. the Wife of A.** and after ſuch Eviction to the Uſe of B. his Heirs and Aſſigns, till **they ſhall be** ſatisfied **with the Profits of the Land for the Damages received by the Eviction. This is a contingent Uſe of the Manor of S. ſo that nothing veſts in B. till ſome Eviction happens. Hill. 9 Car. B. R. adjudged per Curiam between the** *Earl of Kent and Steward.* **Intratur Hill. 8 Car. Rot. 335.**

Jo. 345. pl. 4. S. C. but reports it that A. in Conſidera-

2. **If A.** covenants, in Conſideration of a Marriage to be had between him and B. **a Feme,** to make Aſſurance of certain Land to the Uſe of himſelf and the ſaid B. for Life, **and after makes** Feoffment and levies a Fine to the ſame Uſes. **Tho' the** Marriage never takes Effect, yet

yet the Uſe is well veſted in B. for tho' this was in Conſideration of a Marriage, yet this was not a contingent but a ſettled Uſe, when the Feoffment and Fine were perfected, and not like to an Uſe raiſed by way of Covenant to ſtand ſeiſed. Tr. 10 Car. B. R. adjudged per Curiam without Queſtion upon a Special Verdict between *Jones and Boyleſon.* Intratur Tr. 9 Car. B. R. Rot. 1510.

tion of the Love he had for W. Hill, and becauſe he was of his Name and Blood, and for the preſerving the Land in the Name of the Hills, and in Conſideration of a Marriage to

3. If A. ſeiſed of Land, in Conſideration of a Marriage to be had between him and B. covenants to ſtand ſeiſed to the Uſe of himſelf and B. for Life; this is a contingent Uſe; ſo that if the Marriage does not take Effect, the Uſe will not ariſe to B. Tr. 10 Car. B. R. Held per Curiam, in the ſaid Caſe of *Jones and Boyleſon.*

be had between R. Hill Son of the ſaid W. Hill, and B. the Daughter of J. S. covenanted to aſſure the Lands to the Uſe of A. for Life, Remainder to the Uſe of the ſaid R. Hill and B. and the Heirs of the ſaid R. Remainder to the ſaid W. Hill in Tail, with Remainder over. A Feoffment and Fine were made and levied to the ſaid Uſes, but B. married another Man, and R. married another Woman. A. died. Reſolved per Cur. and ſo adjudg'd, that R. and B. were Jointenants (notwithſtanding the Marriage did not take Effect) by Moieties, and not by Entireties. And the * ſame Difference was taken, that if the ſaid Conveyance had been by way of Covenant, in Conſideration of Marriage, there, if the Marriage had not taken Effect, the Feme ſhould take nothing; but when Feoffment and Fine were made and levied to this Uſe, it is otherwiſe.

* The ſame Difference was taken Ow. 40. Mich. 29 Eliz. in Caſe of **Stephens v. Layton**, and agreed to by the whole Court; which ſee at (O. 7) pl. 5.—Same Difference taken Arg. 2 Mod. 208. 209. in Caſe of **Sourhcot v. Stowel**, between a Feoffment and a Covenant to ſtand ſeiſed; for by the Feoffment the Eſtate is executed preſently; cites 1 Rep. 154. the Rector of Chedington's Caſe.——So if a Feoffment be to A. for Life, Remainder to B. in Fee, if A. refuſes B. ſhall enter preſently, becauſe the Feoffor parted with his whole Eſtate; but if this had been in the Caſe of a Covenant to ſtand ſeiſed, and A. had refuſed, the Covenantor ſhould have enjoy'd it again till after the Death of A. by way of ſpringing Uſe.

4. If A. ſeiſed of Land, in Conſideration of a Marriage to be had between B. his Son, and C. a Feme, who are Infra Annos Nubiles, covenants to ſtand ſeiſed to the Uſe of B. and C. and after the Marriage is had, and after * they are divorc'd, the Uſe limited to the Feme ſhall ceaſe. *Hanmer's* Caſe, cited per Jones J. in the ſaid Caſe of *Jones and Boyleſon.*

S. P. Gilb. Law of Uſes &c. 277. and * Fol. 793. cites S. C. accordingly;

and ſays it ſeems there is the ſame Reaſon the Uſe to his Son ſhould ceaſe, ſince the Conſideration ceas'd; the Marriage being the only Thing the Uſe was founded upon.

5. A. made a *Feoffment in Conſideration of a Marriage to be had with M.* to the Uſe of *A. for Life, Remainder to* the Uſe of *M. for, during, and until ſome Son,* which he ſhould beget of the Body of M. *ſhould attain the Age of* 21 *Years, and after he ſhould accompliſh that Age, then to the Uſe of M. during the Time that ſhe ſhould live ſole.* They afterwards marry, and *A. dies without Iſſue by M.* She enters and continues ſole. Adjudged without Argument, that the Eſtate to her in Remainder is good, tho' ſhe never had a Son. D. 300. pl. 39. Paſch. 13 Eliz. Anon.

Mo. 15. pl. 56. S. C. accordingly, by the Name of Cocket v. Sheldon.—And. 19. pl. 40. S. C. adjudged accordingly.—Bendl. 203. pl. 240. S. C. adjudg'd accordingly.

6. A. Tenant in Tail, conveyed the Land by Fine *to the Uſe of himſelf for Life,* Remainder *to his firſt Son, and the Heirs Male of his Body begotten* &c. and ſo to the 6th Son, *Remainder to the right Heir Male of the ſaid A. to be begotten after the ſaid 6th Son, and of his Heirs Male.* Reſolv'd that this is only contingent Eſtate, and not Eſtate Tail in A. becauſe it was limited to particular Perſons. Palm. 359. Mich. 20 Jac. B. R. Waker v. Snow.

(S. 2) Uſes.

(S. 2) Uſes. Revocation.

See (T) pl. 3 & 5. S. C.— Bridgm. 110. Webb and Jucks v. Worfield, S. C. and the Judgment given in C. B. affirm'd.

1. A Man covenants by Indenture, that a certain Fine ſhall be levied to the Uſe of the Conuſee and his Heirs, upon a Condition of Repayment of a certain Sum at a Day, and upon the whole Matter the Contract and Aſſurance will be Uſurious, accounting the Profits of the Land which the Conuſee ought to have in the mean Time by the Implication of Law, as well as the Uſe and Principal, upon the Performance of the Condition. The Conuſor, before the Fine ingroſs'd, may limit by other Indenture the ſame Uſes as before, adding to it a Covenant that the Conuſor ſhall have the Profits in the mean Time till the Condition perform'd, and ſo rectify the Uſury; and this Indenture ſhall not be any Revocation of the firſt Indenture, tho' this has not any Reference to the firſt Indenture, inaſmuch as this does not differ from the firſt in the Uſes, but only for the Profits; for both Deeds ſhall be taken but as one Indenture. Mich. 15 Ja. B. R. adjudged in Writ of Error, and the Judgment ſo given in Bank affirm'd, between *Webb and Worfield.*

(S. 3) Uſes contingent. *Revocation. Deſtruction.*

See tit. Remainder (S)

Noy 122. Bolls v. Winton, S.C. ſays that the Leaſe for Years does not hinder the raiſing of the contingent Uſe; but otherwiſe it had been if the Covenantor by the ſame Deed had rais'd a Power to himſelf to make Leaſes for Years. But in this Caſe the Leaſe (which was for 100 Years) takes Effect as a future Intereſt out of the Fee, that was in the Covenantor after the Eſtate determin'd; and at the worſt the Feme ſhall have the Reverſion and Rent during her Life; and Williams vouch'd Ralph Egerton's Caſe, where it was adjudged accordingly. And in this Caſe Judgment was given for the Feme, in an Ejectment brought by her.——Cro. J. 168. 169. pl. 8. S. C. reſolv'd that the Leaſe ſhall not bind the Eſtate of the Feme, becauſe there was a good Eſtate by the firſt Limitation, which, if it be not deſtroy'd, cannot be charg'd nor incumber'd after it is rais'd, becauſe it hath Relation to the firſt Covenant, and none hath Intereſt to charge it; and this Leaſe ſhall not deſtroy it, but may well be conſtrued to ariſe out of the Reverſion which Sir Henry Wynſton hath, and may lawfully charge; wherefore it was adjudged for the Plaintiff. Note, Williams cited Sir Peter Lee's Caſe in the Court of Wards, to be reſolv'd in this Point.

G. Law of Uſes &c. 138. cites S. C. that this will not prevent the riſing of the contingent Remainders, nor bind it; for the Covenantor has no Power to demiſe any thing but the Reverſion, and conſequently the Freehold remains unaltered to ſupport the contingent Remainder; but if the Covenantor in this Caſe had reſerv'd for himſelf a Power of making Leaſes, this Leaſe would have been good, and a Revocation of the former Uſes.

1. If a Man covenants for a good Conſideration to ſtand ſeiſed to the Uſe of his Son for Life, the Remainder to ſuch Feme as the Son afterwards ſhall take to Wife, for her Life, with Remainder over, and after the Covenantor makes Leaſe for Years of the Land, reſerving certain Rent; and after the Son takes a Wife, and dies. This Leaſe for Years is a Revocation and Deſtruction of the contingent Uſe for ſo much of the Time as the Leaſe is to continue; for the Eſtate of the Land is diſturb'd before the Contingent happen'd. But this is not any Revocation for more than the Leaſe; for the Feme ſhall have the Reverſion and the Rent reſerv'd upon the Leaſe. Tr. 5 Ja. B. R. agreed per Curiam between *Bould and Winſton.* *Dame Ruſſel's* Caſe, in the Court of Wards, which was adjudged between * *Wood and Reignolds.*

* See pl. 4. infra.

2. If a Man deviſes certain Rents out of certain Land to his youngeſt Sons, and deviſes further, Item, I will that if my Heir do pay

pay the ſaid Annuities to my ſaid Children, that then he ſhall have the ſaid Land, and if he do not, **that then** my Executors ſhall have the Land; **and** if my Executors fail of Payment **of the ſaid Annuities, that then** my ſaid Children ſhall have the Land to them and the Survivor of them, **and dies, and after** the Heir makes Feoffment of the Land, **and afterwards the Annuities are not paid. The ſaid Feoffment has not deſtroy'd the Contingent Remainders, but they ſhall ariſe to the younger Children well enough upon Non-Payment of the Annuities; for there is a** Difference between a Contingent Remainder **which depends a upon Limitation,** and Contingent Uſes. **For the** Feoffment **in this Caſe, does not give away the Limitations which are to** Perſons known certainly, **between whom there is a Privity, as in this Caſe, H. 42 Eliz. B. R. per Curiam adjudg'd, between Parker and Purſloe.**

3. **If A. makes** Feoffment **to the Uſe of his Wife for Life, the Remainder to the Uſe of Richard his Son for Life, the** Remainder to him who ſhall be eldeſt Iſſue Male of Richard at the Time of his Death, **in Tail, with diverſe Remainders over. A dies. The Wife makes** Leaſe for Years to Richard, who makes Feoffment to B. and after joins in a Fine to B. with him who has the next Remainder **after the future Uſe. This ſhall not deſtroy the Contingent Uſe, but it ſhall be** revived by the Entry of the Feme; **for her * Right of Eſtate is ſufficient to ſupport the Contingent Remainder. Contra. M. 40 & 41 El. B. R. between † Smith and Belly.**

Fol. 794. Mo. 545. pl. 726. by Name of **Bolls v. Smith** S.C. but ſtates it that after R. had enfeoffed the Stranger the Feoffee with

Wife dies, and he who had the next Remainder after the future Uſe, levies a Fine to Proclamation, B. dies, having a Son. Adjudg'd that the Feoffment of R. and the Fine of C. has prevented the future Uſe to ariſe in the Son of R. who ſhould be at the Time of his Death.———Cro. E. 630. pl. 25. **Smith v. Belay** S. C. And the whole Court was of Opinion that this future Uſe was deſtroy'd; but becauſe there was none of the other Side, they would adviſe.———Gilb. Law of Uſes &c. 127. cites S. C. that the Wife being alive at the Death of R. the Iſſue ſhall take; for the Feoffment of R. drowns his own Eſtate for Life, and a Forfeiture to the Wife and her Entry preſerves the Contingent Uſe, which now immediately depends upon her Eſtate, as if R.'s Eſtate were worn out by Efluxion of Time; and if it be the Reſidue of any of the ſame Eſtates that were created by the ſame Conveyance, it anſwers the Notion of a Remainder.

* *Right of Entry* is ſufficient, but then it muſt be preſent when the Contingency happens. 2 Salk. 577. pl. 2. Hill. 9 W. 3. B. C Thompſon v. Leech.———See pl. [12] infra.

† S. C. cited Arg Pollexf. 578. in Caſe of Harriſon v. Belſay.

4. **If a Man** covenants to ſtand ſeiſed **of certain Land to the Uſe of himſelf and his Heirs till Marriage, and after to the Uſe of himſelf** and his Wife, which ſhall be **for Life, and to the Heirs Males of his Body, the Remainder to his right Heirs, and** after, before the Marriage, he makes a Leaſe for Years, to commence at the End of a Leaſe which was then in Eſſe, **and then the Marriage was had. This is a Diſturbance and Revocation of the Contingent Uſe, as to the Leaſe for Years; for this is good; but** the Reſidue of the Eſtate will ariſe **well enough; for the Covenantor is ſeiſed to the ſame Uſe as he was before. Dubitatur. Tr. 42 El. B. R. between Reynolds and Wood.**

Cro. E. 764. pl. 3. **Wood v. Reignold,** S. C. Adjornatur. ——Ibid. 854. pl. 17. S. C. and Gawdy, Popham, and Clench, held that the Leaſe made (whereout the Uſe did ariſe) was

good, and ſhould bind the future Uſe; but that it ſhall not deſtroy the whole future Uſe, but ſhall ſtand for the Freehold, becauſe the Seiſin is not chang'd. And Popham ſaid, he had conferr'd with diverſe of the other Juſtices at Serjeant's-Inn, who agreed in this Opinion. But Fenner e contra, becauſe the Leaſe did not diſturb the Freehold, when the Uſe is executed this ſhall relate to the Limitation, and ſhall bind all mean Acts, and therefore ſhall not bind the Feme as to her Jointure; wherefore it was adjourn'd.———Gilb. Law of Uſes &c. 125, 126. ſays, that if before the Marriage he makes a Feoffment in Fee, Gift in Tail, or Leaſe for Life upon good Conſideration, without Notice of the Uſes, the Eſtates limited after the Marriage ſhall never ariſe; becauſe here is no Body ſeiſed to ſuch Uſes, and the ſame Law is of Feoffments to ſuch Contingent Uſes. But if in this Caſe he had made a Leaſe, for Years he would not have deſtroy'd the future Uſe, but only have bound it; becauſe there is a Seiſin, out of which the Uſe riſes; and at Common Law, if the Feoffees had made Leaſe upon good Conſideration, as in this Caſe, it would have bound the Lands, and conſequently Ceſty que Uſe muſt have the Profits of the Lands thus leaſed; and in this Caſe ſince the

Statute, the Covenantor has the ſame Power of obliging the Fee; and therefore thoſe to whom the Contingent Eſtates are limited, muſt take it under the Charge. Quære.

A. makes Leaſe for Life to his Brother B. with Livery, with theſe Words, that *if B. marry any Wife and ſhe overlive* him, then the Land ſhall remain to ſuch Wife for her Life; Proviſo if B. does not declare by Writing ſeal'd, or his laſt Will, that he wills that ſhe ſhall have it, that then it ſhall not remain to her. B. before Marriage infeoffs C. to whom A. levies Fine after the Feoffment, and bargains and ſells the Land, and ſuffers Recovery as Vouchee. B. marries, and declares that ſhe ſhall have the Remainder. After B. and his Wife levy Fine Come ceo, and with Warranty againſt them and the Heirs of B. to C. After B. makes other Declaration that his Wife ſhall have the Remainder. The Remainder (if ever it was good) was deſtroy'd by the *Feoffment*, becauſe the Franktenement was ſupplanted *before the Eſſence of the Remainder*, and alſo the *Poſſibility* of the Wife was included in the *Fine Come ceo* &c. and the *Warranty* is alſo a Bar. Mo. 554 pl. 750. a Caſe in Chancery referr'd to Walmſley and Kingſmill J. 7 May 41 Eliz. Powle v. Veere.

This ſhall not deſtroy the Eſtate of the Son born after; For there is the Rent of the

5. If A. gives Land to the Uſe of B. for Life, the Remainder to his eldeſt Son in Tail (he not having any Son at the Time) the Remainder to the right Heirs of B. and after B. leaſes for Years, and after a Son is born. The Son ſhall avoid this Leaſe after the Death of B. Dubitatur. H. 7 Jac. B.

ſame Eſtate as was limited; For the Freehold itſelf receives no Variation by the making of a Leaſe for Years, and if the Remainder to the Son ariſes, it cannot be bound by the Leaſe for Years; For Tenant for Life had only Power to deviſe it during his own Life. Quære tamen. Gilb. Law of Uſes &c. 139.

Sty. 249. S. C. and Roll Ch. J. inclin'd that the Contingent Remainder is not deſtroy'd becauſe it does not here depend upon the Particular Eſtate, but it ought to expect till the Remainder happen, and he conceived that the Word (Heir) and (Heirs) are all one here by the Intent of the Parties, and the Frame of the

6. If A. ſeiſed of a Copyhold in Fee ſurrenders it to the Uſe of his Will, and after deviſes it by his Will to B. for Life, the Remainder to his Heir of his Body begotten, for ever (admitting that the Heir takes this by Purchaſe) and after B. is admitted Tenant, and then ſurrenders it to the Lord of the Manor to the Uſe of the Lord of the Manor, to do his Will with it; and then B. dies. Quære, Whether the Contingent to the Heir of B. be deſtroy'd by this Surrender, inaſmuch as the Heir was not capable of it during the Life of B. becauſe he could not be Heir to B. during his Life, and the Surrender of B. has deſtroy'd his Eſtate for Life in his Life, at which time the Remainder could not veſt? But it is to be conſider'd, whether this * Surrender to the Lord, in Caſe of a Copyhold, ſo deſtroys the Eſtate for Life as in Caſe of Franktenement, that he in Remainder, if it be limited to a Perſon in Eſſe, might enter upon the Lord in the Life of Tenant for Life; for in † *Podger's* Caſe Co. it is agreed that if Copyholder for Life makes Feoffment in Fee, he in Remainder cannot enter; but the Lord ſhall have it during the Life of the Tenant for Life. P. 1651. between *Pawſey and Lowdall*, in Writ of Error upon Judgment in Banco, this was a Doubt among the Juſtices; but it was adjudged in Bank, that the Contingent was not deſtroy'd; and the Judgment now reverſed for another Cauſe, and not for this Matter. Intratur P. 1650. Rot. 279.

Conveyance. Ask. J. held it a good Eſtate of Fee-ſimple Conditional executed in B. and Jerman J. conceiv'd the contingent Remainder not deſtroy'd. Adjornatur. And afterwards Paſch. 1651 Ibid. 273. Roll Ch. J. Nicholas, and Ask J. agreed that the Deviſe is a Deviſe to the Heirs of B. and ſo a Fee-ſimple, and that the Party comes not in as a Purchaſor. And for this Cauſe the Judgment was revers'd.——— Lex Cuſtum. 125. cites S. C. that Per Cur. the Word (Heir) being limited to the Body of B. is Nomen Collectivum, and all one with the Word (Heirs) and ſo B. had a Fee executed, and his Heir ſhall have this by Deſcent, and not by Purchaſe.——Gilb. Treat. of Ten. 254. cites S. C. and ſays it ſeems that muſt be meant of a Fee-tail, becauſe the Heirs are reſtrain'd to the Body of B. That this Caſe does not at all contradict Coke, [Co. Litt. 8. b.] who ſays, that if an Eſtate be given to a Man, and his Heir, he hath but an Eſtate for Life; for that is meant by Feoffment &c. For he himſelf ſays, in the next Folio, that if a Man deviſe Land to a Man in perpetuum, it is a Fee. And here the Deviſe was to a Man and one Heir in perpetuum, which ſure will create a Fee, as well as where the Word Heir is left out; but becauſe it is added Heir of his Body, it ſeems the Deſign was to give a laſting Fee Tail: Neither is it like Archer's Caſe, where the Deviſe was to one for Life, and after to his Heir Male, and to the Heirs Male of the Body of ſuch Heir Male; for there wanted the Words (for ever) to give a Fee-Tail to the firſt Tenant for Life; and beſides, there the Inheritance is by expreſs Words given to the Iſſue.

* Gilb

* Gilb. Law of Uſes &c. 139. cites S. C. and ſays, the Surrender does not deſtroy the Contingent Remainder, becauſe in Copyholds a Surrender does not put the Eſtate out of the Tenant, as it does in Caſe of Franktenements; and therefore in ſuch Caſe there is a particular Eſtate to ſupport the Contingent Remainders.

† 9 Rep. 107. Paſch. 10 Jac.—S. C. cited Arg. 1 Saund. 151. Paſch. 20 Car. 2. in Caſe of Wade v. Bache.

7. If A. covenants with B. that if he doth not ſuch Act to ſtand ſeiſed of certain Land to the Uſe of B. and his Heirs, and after B. dies and the Act is not perform'd. The Uſe ſhall ariſe well enough to the Heir of B. for the Heir of B. ſhall have it in Nature of a Deſcent. 3 El. in the Court of Wards, adjudg'd, cited 1 Rep. Shelly, 99. Contra M. 40 & 41 Eliz. B. R. between * Parſons and Willis. G. Law of Uſes &c. 277.—— 1 Rep. 99. a in Shelley's Caſe, cites it as Wood's Caſe.

—— S. C. cited Hob. 136. pl. 185. Paſch. 15 Jac. in Dimmock's Caſe.——Cro. J. 409. pl. 5. cites S. C. that the Heir was in Quaſi by Deſcent, yet he was not in Ward, becauſe the Uſe never veſted in the Anceſtor.——S. C. cited by Wylde J. Vent. 373. Trin. 26 Car. 2. B. R. in Caſe of Pybus v. Mitford to ſhew that there is a great Difference between a Conveyance at Common Law and a Conveyance to Uſes; that at Common Law the Heir cannot take where the Anceſtor could not, but otherwiſe it is in the Caſe of Uſes.

If a Man makes a *Feoffment to the Uſe of one and his Heirs, and Ceſty que Uſe is then dead*, this is good by way of Uſe. Arg. Dal. 93. 15 Eliz. in Mutton's Caſe.

* Dubitatur. Mo. 547. pl. 732. Mills v. Parſons, S. C. which ſee at (O) pl. 11.——S. C. cited Arg 2 Mod. 209. in Caſe of Southcot v. Stowell.

8. If a Copyholder in Fee ſurrenders to the Uſe of J. S. an Infant in Fee, and if he dies before the Age of 21, or Marriage, then he ſurrenders it to the Uſe of J. D. in Fee, and after the Surrenderor dies before the Contingent happens. The Uſe ſhall not ariſe to J. D. tho' the * Contingent after happens; becauſe this doth not happen during the Life of the Surrenderor. M. 13 Ja. B. R. adjudg'd between Simpſon and Southwood. Adjudged that the Limitation is void; for ſuch a conditional Surrender cannot be made to operate *in Futuro*. * Fol. 795.

Cro. J. 376. S. C. but differently reported ——See (P) pl. 2. S. C. and the Notes there.

[9] 8. If A. covenants in Conſideration of natural Love and Affection, to ſtand ſeiſed to the Uſe of himſelf for Life, the Remainder to his Son for Life, the Remainder to D. his reputed Son (he being his Baſtard) for Life, with divers Remainders over, and covenants to levy a Fine, and makes Feoffment or other Aſſurance at the Requeſt of the Covenantees, for further Aſſurance, which ſhall be to the ſame Uſes, with a Proviſo that if he by his Writing &c. ſhall revoke, alter, change, diminiſh, enlarge, or otherwiſe limit, appoint or diſpoſe, to or with any other Perſon, or in any other Manner, and Form, any Uſe or Uſes, Eſtate or Eſtates, Intereſt or Limitation by the ſaid Indenture given, limited or conveyed to any Perſon of the Premiſſes, that then the ſaid A. and every other Perſon ſhould ſtand ſeiſed to the ſaid Uſes, and afterwards A. makes Feoffment in Fee to the ſaid Covenantees in Performance of the Covenants of the ſaid Indenture, to the ſame Uſes, Intents and Purpoſes in the ſaid Indenture declar'd, limited and appointed, and no other, which Uſes are not recited in the Deed of Feoffment, but generally referr'd to the Indenture. This Feoffment is not any Revocation of the Uſes raiſed by the Indenture, nor ſhall give any Eſtate in Remainder to D. the Baſtard Son, the Feoffment being made only for further Aſſurance, according to the Covenant. This was Sir *Ja. Perrot*'s Caſe, in the Exchequer, 3 El. adjudg'd, and he loſt the Land accordingly. For 'twas reſolv'd that the Covenant could not raiſe any Uſe to his * Baſtard Son, and then the Feoffment was only further Aſſurance, and no Revocation of the Uſes raiſed by the Covenant. S. C. cited G. Law of Uſes, 278. ſays if it were only ſaid (to the ſame Uſes,) and not ſaid (for further Aſſurance,) Quære whether D. would not take. * See (K) pl. 4. and the Notes there. —(K) pl 5. S. C.

[10] 9. J.

Cro. C. 358. pl. 12. S. C. accordingly. See (R) ſupra, pl. 1. S. C.

[10] 9. If A. ſeiſed in Fee of the Manors of D. and S. levies a Fine to B. of both Manors in Fee upon a Purchaſe made by B. of the Manor of D. and the Manor of S. is intended for a Security for the Purchaſe of the Manor of D. and the Uſe of the Manor of D. is limited to B. and his Heirs, and of the Manor of S. to the Uſe of A. and his Heirs, until Eviction of the Manor of D. by A. S. the Wife of A. and after ſuch Eviction to the Uſe of B. his Heirs, and Aſſigns till they ſhall be ſatisfied with the Profits of the Land for the Damages received by the Eviction, and after B. makes Feoffment of the Manor of D. to C. in Fee, and then C. makes a Leaſe for 1000 Years to E. of the Manor of D. and A. S. the Wife of A. enters into the Manor of D. and evicts it for her Life. No Uſe in this Caſe ſhall ariſe to C. who is the Aſſignee of B. in the Manor of S. becauſe the Word (Aſſignes) is no Word of Purchaſe but of Limitation, and this Contingent Uſe is not aſſignable over. Hill. 9 Car. B. R. adjudg'd per Curiam upon a Demurrer between the *Earl of Kent and Steward.* But the Court would not deliver their Opinions reſolvedly, whether by the Feoffment to C. of the Manor of D. and by the Leaſe of 1000 Years before the Contingent happen'd, the Contingent Uſe ſhould be deſtroy'd or not? But Richardſon and Croke ſeem'd that it was, and Jones and Berkley ſeem'd to incline e contra; becauſe the Feoffees do not make the Feoffment, but Ceſty que Uſe. For Jones ſaid, that here the Conuſee of the Fine, when the Contingent happens, is in by the Common Law, and not by the Statute: But Berkley ſeem'd that he was in by the Statute, becauſe he ſhall have it only Quouſque, ſcil. till he has Satisfaction for the Damages received. Intratur. Hill. 8 Car. Rot. 335. But the Court ſaid, that there ought to be Privity of Eſtate and Confidence in him that ought to be ſeiſed to an Uſe.

Fol. 796.

See 2 Sid. 64. 98. 129. 157. the Caſe of Leyns v. Villars, Paſch. 1659. B. R. which was a Caſe upon the ſame Title, and adjudg'd for the Defendant accordingly.— See the next Plea.

[11] 10. If A. ſeiſed in Fee in Conſideration of natural Love and Affection to his Wife and Children, covenants with B. to ſtand ſeiſed thereof to the Uſe of himſelf for Life, and after to the Uſe of his Wife for Life, and after to the Uſe of C. his Daughter for Life, and after to the firſt Son of the Body of C. begotten, and ſo after to the other Sons of C. in Tail, and after to his own right Heirs. And after A. by Indenture between him and F. reciting the ſaid Conveyance and Eſtates, he grants his ſaid Reverſion in Fee without any Conſideration to F. and his Heirs, to the Uſe of F. and his Heirs. This Grant of the Reverſion in Fee to F. is not any Deſtruction of the contingent Uſe limited to the firſt Son of C. but that [the Uſe to] the firſt Son of C. born after this Grant, and in the Life of A. or C. ſhall ariſe well enough; becauſe by the Grant to F. of the Reverſion, the firſt Uſes and Eſtates being recited in the Deed of Grant, and this being without any Conſideration, the Grantee ſhall ſtand ſeiſed to the firſt Uſes, inaſmuch as he has Conuſance of the firſt Uſes; and tho' he limits it to the Uſe of the Grantee and his Heirs, yet this does not alter the Truſt any more now than at the Common Law. Pa. 1651. between *Wigg and Villers*, upon a Special Verdict, adjudg'd per Curiam, præter Juſtice Jermin, who gave no Opinion in it. Intratur. Tr. 24 Car. Rot. 487. This was upon a Conveyance made by Sir Edward Coke.

S. C. cited Per Cur. Vent. 188. 189. in Caſe of Loyd v. Brooking.— S. C. cited Arg. Cart. 202. in Caſe

[12] 11. If A. ſeiſed of Land in Fee, covenants for natural Affection to ſtand ſeiſed to the Uſe of himſelf for Life, the Remainder to his Wife for Life, the Remainder to B. his Daughter for Life, the Remainder to the firſt Son to be begotten of the Body of B. and after to diverſe other Sons of B. in like Manner, the Remainder to his right Heirs; and after A. grants his Reverſion in Fee to J. S. to the Uſe of J. S. and his Heirs, but without any Conſideration, reciting in the Deed the ſaid Uſes, by which the Grantee has Conuſance of the Uſes, and ſo

ſo he is ſubject to the ſaid contingent Eſtate, and this Grant is no Diſturbance of them. And * afterwards A. makes Feoffment in Fee of the Land, and then B. takes Baron, and has Iſſue a Son, and then A. dies, and his Feme enters, and after B. dies, and then the Feme dies ſo ſeiſed. In this Caſe the contingent Uſe to the firſt Son of B. is not deſtroy'd, but he may enter; for the Feoffment of A. was a Forfeiture of his Eſtate, and of the Eſtate of his Wife in Remainder during the Coverture; ſo that B. might have enter'd for the Forfeiture during the Coverture, and ſo B. had a † Right of Entry which was ſufficient to ſupport the contingent Remainder to the firſt Son &c. without Queſtion. But the Caſe had been more dubious if B. had not had any Eſtate for Life, but that the ** contingent Remainders had depended on the Eſtate of the Wife immediately, where the Feoffment of the Baron had deſtroyed them, inaſmuch as the Feoffment of the Baron paſs'd his Eſtate and the Eſtate of the Wife during the Coverture; ſo that none can enter during the Coverture; and ſo neither the Eſtate of the Baron, nor of the Wife in Eſſe during this Time, to ſupport the contingent Uſes. But this Doubt does not come in Queſtion in this Caſe, inaſmuch as B. had an Eſtate for Life in Remainder, which was only deveſted by the Feoffment, and turn'd to a Right, and ſhe had a preſent Right of Entry for a Forfeiture. And when A. the Baron died, and his Wife entred, this reduced her Eſtate for Life, and the Eſtate of B. for her Life, and ſo the contingent Uſe reduced alſo, and veſted by Force of the Statute of Uſes in the firſt Son of B. Paſch. 1651. B. R. between *Wegg and Villers* Per Curiam adjudged, præter Juſtice Jermin, who gave no Opinion, propter Ægritudinem, after diverſe Arguments at Bar. This was upon a Conveyance made by Sir Edward Coke. Intratur Tr. 4 Car. Rot. 487.

of Richardſon v. Chilcott.——

* If Sir Edward Coke had made a Feoffment before he had granted the Reverſion, in ſuch Caſe the contingent Uſe had been utterly deſtroy'd, notwithſtanding the Entry of the Wife; Per Glyn Ch. J. 2 Sid. 159 Paſch. 1659. B. R. in the Caſe of Heyns v. Villars.——

† See ſupra, pl. 3.——

** Adjudg'd that the Feoffment of the Baron deſtroy'd the contingent Remainder for the Reaſons here given. See Remainder (O) pl. 2. The Caſe of Biggot v. Smith.

Fol 797

[13] 12. In the Debate of this Caſe between me and my Brothers Nicholas and Aske; 'twas agreed and reſolved, that if a Feoffment be made by A. and B. in Fee to the Uſe of A. for Life, the Remainder to C. for Life, the Remainder to the eldeſt Son of C. in Tail, with diverſe Contingent Uſes after in Remainder, the Remainder to the right Heirs of A. in Fee, that in this Caſe the Feoffment of A. will not deſtroy the Contingent Uſes, becauſe the Remainder to C. tho' it be deveſted, yet he ſhall have a Right of Entry for a Forfeiture, and a Right to the Remainder, which is ſufficient to ſupport the Contingent Uſes; for this is the Common Aſſurance upon Marriages, and the Common Practice.

[14] 13. And it was alſo agreed and reſolv'd by us, that in the ſaid Caſe, if C. who is in Remainder for Life, enters into the Land, either in the Life of A. or after his Death, this ſhall reduce the Contingent Remainders, ſo that if a Son be born in his Life, his Contingent Eſtate ſhall be ſettled and executed by the Statute of Uſes, without any Re-entry by the firſt Feoffees; for this is an Incident to the firſt Livery.

[15] 14. It was alſo reſolved and agreed between us, that if after the Feoffment of A. if C. had not enter'd, but died before Entry, yet if the firſt Son of C. was born in his Life he cannot enter, tho' his contingent Eſtate is not deſtroy'd, becauſe this was not executed in the Life of C. the Eſtate of C. being turn'd to a Right, and ſo the Contingent diſturb'd. But in this Caſe the firſt Feoffees may enter to revive this contingent Uſe, and then by their Entry the contingent Uſe ſhall be ſettled and executed in the firſt Son, by the Statute of Uſes; for there is a Scintilla Juris in the Feoffees to enter, in ſuch

Caſes of Neceſſity, to revive contingent Uſes; for otherwiſe the contingent Uſe would be deſtroy'd.

[16] 15. It was alſo agreed and reſolved by us, that when a Feoffment is made to certain Uſes, with diverſe Remainders over in Contingency, and no Eſtate left in the Feoffees, and after the Feoffees enter into the Land, and diſſeiſe the Tenant in Poſſeſſion, and make Feoffment in Fee, that this does not deſtroy the contingent Uſes, if the Tenant in Poſſeſſion, or any in Remainder, in whom an Eſtate certain was ſettled before the Feoffment, re-enters; for his Re-entry ſhall reduce all the contingent Remainders, and ſhall make them capable of Execution by the Statute of Uſes; for the Feoffees are but Conduits to convey the Eſtates, and have not any Power left in them to deſtroy any contingent Uſes.

[17] 16. It was alſo agreed and reſolved by us, that when a Feoffment is made to certain Uſes, with diverſe Remainders over in Contingency, and no Eſtate left in the Feoffees, yet if the Eſtates in Eſſe are deveſted either by Diſſeiſin, or by Feoffment, or otherwiſe, before the Contingents happen, and after the Contingents happen during the Deveſtment, and after the Eſtates in Eſſe determine before any Re-entry, if the Feoffees releaſe all their Right in the Land, or make Feoffment of the Land, or bar their Entry by any other Way, in this Caſe, the Contingent can never be revived to be executed by the Statute of Uſes, becauſe the Feoffees who had Scintillam Juris in them in Caſe of Neceſſity to revive the contingent Uſes, have barr'd their Entry to revive the contingent Uſes, and no other can revive them; ſo that they cannot be executed by the Statute.

18. If a Feoffment be made *to the Uſe of Feoffor in Tail*, and afterwards the *Feoffees execute Eſtate to him in Fee*, the Uſe of the Eſtate is determin'd. Br. Feoffments to Uſes, pl. 47. cites 30 H. 8.

19. Baron makes *Feoffment* before the taking of the Wife; ſhe ſhall never take; for the *Poſſeſſion and State of the Land is alter'd* and chang'd, and transferr'd to the Poſſeſſion of another before the Title of the Feme accrues; but if no deveſting or Alteration had been, then the Uſe ſhould veſt in the Wife. 1 Rep. 136. in Chudleigh's Caſe, cites 17 Eliz. D. 340. Brent's Caſe.

2 Le. 14. pl. 25. S. C.— The Caſe was, A. made Feoffment to the Uſe of himſelf and his Wife; and if he ſhould ſurvive her, then to the Uſe of him and ſuch Wife as he ſhall marry, for Life, the *Remainder over in Fee*; but before the taking ſuch Wife, the *Remainder-man and Feoffees, with Conſent of the Baron, made a Feoffment.* See D. 339. b. 340. &c. pl. 48. &c. Hill. 17 Eliz. Brent's Caſe.——S. P. By the greater Part of the Juſtices that argued in the Caſe of Dillon v. Freſne. Mo. 391. in Perrot's Caſe, cites D. 340.——Poph 76. in the Caſe of Dillon v. Frain, Anderſon ſaid that as to Brent's Caſe, he had always taken the better Opinion to be, that the Wife cannot take in the Caſe for the mean Diſturbance, notwithſtanding the Judgment which is entred thereupon, which was by Aſſent of the Parties, and given only upon a Default made after an Adjournment upon the Demurrer; and ſaid he had view'd the Roll thereof on Purpoſe.

20. *Conditional Uſe* on Payment of 100 l. to Feoffor, ſhall on *Breach* be reduc'd to the Feoffor without any Entry, and then the *Uſes limited after* are void; for an Uſe cannot be limited on an Uſe; quod fuit conceſſum per tot. Cur. Le. 6. pl. 10. Mich 25 & 26 Eliz. B. R. Stonely v. Bracebridge.

And. 233. pl. 248. S. C. accordingly.

21. A. ſeiſed in Fee of the Manor of L. *covenanted* with J. S. *for Advancement of his Heirs Males* &c. *to levy a Fine* thereof *to the Uſe of himſelf for Life*, and afterwards *to the eldeſt Son of his Body*, with diverſe *Remainders over.* Before he levied this Fine, he by Fraud and Covin to defeat the ſaid Covenant, *made a Leaſe* of the ſame Lands *for* 1000 *Years, and then levied the Fine.* It was reſolv'd, upon Conference with the other Juſtices, that natural Love and Affection is not ſuch good Conſideration as is intended by the Statute of 27 Eliz. of Fraudulent Conveyances; for Valuable Conſideration only is good within this Act. And tho' the Iſſue was a Purchaſor, yet he was not ſo in vulgar and common Intend-

Intendment. 3 Rep. 83. b. cites Paſch. 32 Eliz. as referr'd out of Chancery to two Juſtices, in the Caſe of Nedham v. Beaumont.

22. A. ſeiſed of the Manor of D. had Iſſue 4 Sons, and made a *Feoffment in Fee to the Uſe of himſelf, and his Heirs of the Body of Mary then the Wife of T.* &c. and *after his Death to the Uſe of his Will, and then* to the Uſe *of the Feoffees and their Heirs, during the Life of B. his eldeſt Son, Remainder to his Iſſue in Tail Male*, and ſo *to C. D. E. and F. his other Sons*, Remainder *to his own right Heirs. A. died without Iſſue by M.* the *Feoffees made a Feoffment in Fee to B. without any Conſideration* (he having Notice of the firſt Uſes.) Afterwards B. *had Iſſue a Son*, and after that another Son, *and made a Feoffment to J. S.* &c. *with Warranty.* All the Juſtices, except Periam Ch. B. and Walmſley, agreed that the Feoffment made by the Feoffees to B. (who had Eſtate for Life by Limitation of the Uſe) had deveſted all the Eſtates, and all the future Uſes; and that this new Eſtate could not be ſubject to the ancient Uſes which aroſe out of the ancient Eſtate deveſted by this Feoffment. 1 Rep. 120. 134. b. 135. a. Dillon v. Freine, alias, Chudleigh's Caſe.

Poph. 70. Mich. 36 & 37 Eliz. S. C. accordingly.—— And. 309. pl. 318. S. C. —— Jenk. 276 pl. 98. cites S. C. the contingent Remainder to the 1ſt Son of B. he not being born at the Time of the Feoffment, is deſtroy'd for want of a particular Eſtate to ſupport it; and want of Conſideration, or having Notice of the firſt Uſe, operates nothing; for B. being Tenant for Life, was not in Privity of the Eſtate in Fee, out of which the Uſes were rais'd; for this Fee was left in A. inaſmuch as no Uſe of the Fee is limited after the Eſtates aforeſaid determin'd; and the ſaid Feoffee being Tenant for Life, created a new Fee.—— S. C. cited 3 Mod. 308. Trin. 2 W. & M. in Caſe of Thompſon v. Leach.

23. A. *Tenant for Life levied a Fine to B. who was in Reverſion, to the Uſe of B. and his Heirs, upon Condition that* B. ſhould *pay to A. yearly during his Life* 4 *l. and if* there be any *Default* of Payment thereof, *it ſhould be to the Uſe of the Conuſor for Life, and one Year over.* B. made a Feoffment to J. S. who made a Leaſe to the Plaintiff; the 4 l. was not paid nor demanded; A. entred. Reſolved the Feoffment hath not deſtroy'd the future Uſe, which is to ariſe for Non-performance of the Condition; for it was a Charge or Burden upon the Land, which goes along with the Land in whoſe Hands ſoever it comes; Per all the Juſtices, præter Glanvill. And adjudged for the Plaintiff accordingly. Cro. E. 688. pl. 23. Trin. 41 Eliz. C. B. Smith v. Warren.

24. A. covenanted to ſtand ſeiſed for natural Affection to the Uſe of *himſelf for Life*, and after *to W. the eldeſt Son of his Brother for Life*, Remainder *to the firſt Son of the ſaid W.* and ſo to the 8th &c. Remainder *to the right Heirs of A.* A. was *attainted* of Treaſon, and executed *before any Son born to W.* It was reſolv'd by the two Ch. Juſtices and Ch. Baron, that the Sons born after are all utterly barr'd by the Attainder; and that the King ſhall have the Fee, diſcharg'd of all the Remainders limited to the Sons not yet born. Noy 102. Tr. 9 Ja. Sir Tho. Palmer's Caſe.

Mo. 815. pl. 1103. Trin. 9 Jac. in the Star-Chamber accordingly; but ſays, Nota, that for ſundry vehement Preſumptions of Forgery of the Deed, the Deed was cenſur'd and damn'd, but there was not any Cenſure of any Perſon.—— S. C. cited by Hale Ch. J. Vent. 380. Trin. 26 Car. 2. B. R. in Caſe of Pibus v. Mitford.

25. If a Feme Covert or an Infant be *infeoff'd to an Uſe precedent* ſince the Statute, the Infant or Baron comes too late to diſcharge or root up the Feoffment; but if an *Infant* be *infeoff'd to the Uſe of himſelf and his Heirs*, and [if] J. D. pay ſuch a Sum of Money, to the Uſe of J. G. and his Heirs, the Infant may diſagree, and overthrow the contingent Uſe. Ld. Bacon's Readings on the Statute of Uſes 348.

26. Contrary Law, if an Infant be *infeoff'd to the Uſe of himſelf for Life*, the Remainder *to the Uſe of J. S. and his Heirs*, he may diſagree to the Feoffment as to his own Eſtate, but not to deveſt the Remainder, but it ſhall remain to the Benefit of him in Remainder. Ld Bacon's Readings on the Statute of Uſes 348.

(T) *Fine.*

Fol. 798. (T) *Fine.* Uſes. What ſhall be a *good Limitation* of an Uſe *to bind a Feme Covert.*

Note, that Beckwith's case in 2 Co. 56. b. & the other books cited below in pl. 1. is the leading case in this subject.

And. 164. pl. 209. S. C. by the Name of Colgate v. Blith, Trin. 27 Eliz. accordingly.——Mo. 196. pl. 347. S. C. accordingly.——4 Le. 88. pl. 188. Blithe v. Colegate, S. C. accordingly.——Goldsb. 12. pl. 13. S. C. adjornatur.——Ibid. 67. pl. 13. S. C. adjudg'd accordingly.——S. P. Parl. Caſes 144. in Caſe of Morley v. Jones.——S. P. Unleſs her Diſaſſent appears by ſome manifeſt Sign. G. Law of Uſes &c. 40. cites S. C.——See Fines (S. a) pl. 3. and the Notes there.

1. IF Baron and Feme levy a Fine of the Land of the Feme, and the Baron only declares the Uſe, this ſhall bind the Feme, if ſhe does not diſſaſſent, becauſe it ſhall be intended that ſhe agrees in the Limitation of the Uſe as well as in the Fine. Reſolv'd 2 Rep. 57. *Beckwith's* Caſe. D. 12 El. 290. *Acc.* 3. Rep. 105.

If the Wife join with her Husband in a Fine, and ſhe then will *not conſent* to make a Deed *to declare the Uſes*, then the Husband may declare the Uſes without her Conſent; Per Powel J. Holt's Rep. 735. in Caſe of Buſhel v. Burland, cites 2 Rep. 57. Beckwith's Caſe.

Godb. 179. pl. 253. S. C. which was, that A. who intended to marry M. covenanted by Indenture with J. D. that he would marry the ſaid M. being then 17 Years old; and that after the Marriage had between them, they would levy a Fine of diverſe Lands, which ſhould be to the Uſe of J. D. and his Heirs; and after the Marriage they levied a Fine accordingly to J. D. and his Heirs, without any other Uſe implied or expreſs'd other than in the ſaid Indenture.

2. So this ſhall bind the Feme, tho' the Feme be within Age; for an Infant may limit the Uſe as well as levy a Fine. Tr. 8 Jac. B. Per Curiam, between *Bury and Taylor.*

G. Law of Uſes &c. 41. cites S. C. ſays, that by her refuſing to ſeal the Indenture, it being brought to her for that Purpoſe, ſhe cannot be preſum'd to concur after ſuch Refuſal.

3. If Baron and Feme levy a Fine of the Land of the Feme, and an Indenture is written in the Name of the Baron and Feme, by which the Land is limited to certain Uſes, and the Baron ſeals and delivers it, and the Feme will not, but diſagrees to it, this Limitation of the Baron ſhall not bind the Feme, tho' the Feme had not expreſs'd her Diſagreement by any Deed, or by Limitation of other Uſes. Mich. 15 Jac. B. R. Agreed and ruled per totam Curiam in Writ of Error between *Webb and Worfield.*

See Tit. Fines (S. a) pl. 3. and the Notes there. —It is preſum'd to be to the Uſe of the Conuſee and his Heirs, and conſequently is binding. G. Law of Uſes &c. 248.—A. and his Wife ſeiſed in Fee to them and the Heirs of A. in Conſideration of 20 l. covenanted that he and his Wife would ſuffer a *Common Recovery*, and that it ſhould be *to the Uſe of the Recoverors till they had made a good and ſufficient Leaſe for* 40 *Years*, by Indenture; and after that they ſhould ſtand ſeiſed to the Uſe of A. and his Wife, and the Heirs of his Wife. The Recovery was ſuffer'd, and the Leaſe made. And adjudg'd a good Leaſe, and ſhall bind the Wife after A.'s Death; for the old Eſtate is gone, and the new Eſtate is by the Limitation of Uſe, and is under the Recovery and Leaſe.——D. 290. pl. 61. Trin. 12 Eliz. Luſher v. Banbourgh.——Jenk. 238. pl. 17. S. C.——S. C. cited 2 Rep. 57. b. in Beckwith's Caſe, ſays it was held by all the Juſtices that this Declaration ſhould bind the Wife who ſurviv'd the Husband, tho' the Husband alone made it.—It was held that no Uſe ariſes to the Baron and Feme, and the Heirs of the Feme, till the Determination of the Leaſe; for the *Leaſe ſtops the riſing of the future Uſe.* D. 290. pl. 61. Marg. cites Mich. 2 Jac. in the Argument of the Caſe of Vickery v. Yoland.

4. If Baron and Feme ſell the Land of the Feme to another for Money by Parol, and after levy a Fine to the Vendee and his Heirs, this ſhall bind the Feme, without any Writing proving her Aſſent. Reſolv'd 2 Rep. 57. *Beckwith's* Caſe.

See (S. 2) pl. 1. S. C.

5. If Baron and Feme levy a Fine to the Uſe of the Conuſee in Fee, both ſealing the Indenture, which limits the Uſe for a certain Sum given by the Conuſee to the Baron and Feme. But there is a Condition of

of Re-entry on Payment of a certain Sum, which amounts to the principal Sum given and the Uſe, according to 10 l. for the 100 l. at a certain Day 3 Years afterwards; ſo that by the Law the Conuſee is to have the Profits of the Land in the mean Time, and ſo more than 10 l. for the 100 l. and ſo the Conveyance uſurious. The Baron may after, before the Fine ingroſs'd, rectify it, and explain his Intention by another Indenture between him and the Conuſee, expreſſing their Agreement that the Baron and Feme ſhall have the Profits in the mean Time till the Condition broken; and this ſhall bind the Feme, tho' ſhe diſagrees to this Indenture; for the Uſe paſſes by the firſt Indenture, and this laſt Indenture only rectifies the Matter of uſury, explaining the Contract, which belongs more properly to the Baron, inaſmuch as he did this, and he received the Money. M. 15 Ja. B. R. between *Webb and Worfield* in a Writ of Error, this was a Queſtion; but this did not come under Judgment, becauſe the uſury was not expreſsly found.

6. Husband and Wife, *ſeiſed* of Lands *in the Right of the Wife*, levied a Fine. The *Husband alone*, before and at the Time of the Fine, *declar'd the Uſes one way*; and the *Wife*, before the Fine, *declar'd* the Uſes *another way*. It was reſolved, that both the Declarations of the Uſes were void, unleſs ſo far as to bind the Intereſt of the Baron during the Coverture. Mo. 196. pl. 347. Trin. 27 Eliz. Beckwith's Caſe.

2 Rep. 56. b 58. a. S. C. reſolv'd accordingly, tho' the Variance was only in the firſt particular Uſe; the Feme limiting it only to herſelf for Life, and the Baron limiting it to himſelf and his Wife for their Lives, and all the other Uſes in Remainder, limited in both the Indentures, are agreeable to both their Conſents, yet all the Uſes are void.——S. C. cited Gilb. Law of Uſes, 40. ſays this binds the Husband during the Coverture, but not the Feme afterwards; for the Husband cannot declare the Uſes without Concurrence of the Wife, becauſe he has no Eſtate, and ſhe cannot be preſumed to concur where the contrary appears by her Deed; and ſhe cannot declare the Uſes alone, becauſe during Marriage ſhe is not Sui Juris; and without the Husband ſhe has no diſpoſing Power. And if there be no Uſe declared upon this Fine, it is to the Uſe of the Wife; for where there is no other Intent of a Fine declared, it is ſuppoſed to be deſign'd as a farther Security to the preſent Poſſeſſor, and the Uſe is ſtill in the Wife, ſince in this Caſe ſhe has not departed with it.

Sir W. Harnad's Ch. Rep. 196. Hinn. 275.

If *Baron and Feme* be *ſeiſed in the Right of the Feme, and join in a Fine*, the Baron cannot declare the Uſe for longer Time than the Coverture, and the Feme cannot declare alone; but the Uſe goes according to the Limitation of Law unto the Feme and her Heirs. But they may both join *in Declaration of the Uſe in Fee*, and *if they ſever*, then *it is good for ſo much of the Inheritance as they concurr'd in*; for the Law voucheth all one as if they join'd. And *if* the *Baron declares* an Uſe *to J. S. and his Heirs*, and *the Feme another to J. D. for Life, and then to J. S. and his Heirs*, the Uſe is good to J. S. in Fee. Lord Bacon on the Statute of Uſes, 355, 356.——*So if it be by joint Purchaſe during the Coverture.* Ibid. See pl. 7. and the Notes.

7. If Baron and Feme levy a Fine of the Lands of the Wife, and *agree in Limitation of the Uſe of Part of the Land, and vary in the Limitation of the Reſidue*, this is good for the Part in which they agree, and void for the Reſidue. 2 Rep. 58. a. Trin. 27 Eliz. in the 4th Reſolution in Beckwith's Caſe.

The Reporter ſays, nota Reader a *Diverſity* between a Variance touching the Limitation of the *Uſe of Part of the Eſtate of the Land*, and touching Limitation of the *Uſe of Part of the Land itſelf*. Ibid.——G. Law of Uſes &c. 246, 247. ſays, as to the firſt Point, that the Reaſon is, becauſe as to that Part of the Land in which they both agree, all the Requiſites are found neceſſary to make a Declaration, and the Defect of the other Part can have no Influence on that which is good; but as to the Diverſity taken by the Reporter, if they agree in the Limitation of Uſes for Part of the Eſtate in the Land, and diſagree in the other Eſtates, there all is void; for elſe there will be another Moulding of the Eſtates than the Feme deſigns, and her Conſent is requiſite to every Eſtate that ſhall be created by the Limitation of Uſes, and it is to be order'd by her Direction. Thus if the Husband declares the Uſes to himſelf and Wife for Life, the Remainder to the Heirs of the Wife, and the Wife declares the Uſes to herſelf for Life, and then to her own right Heirs, both Declarations are void, and it ſhall not ſtand good for the Remainder in Fee, and be void for the reſt; for the Eſtate moving from the Wife, whatever Uſes do take Effect muſt be by her Direction and Conſent, and in the ſame Manner as ſhe pleaſes. Tho' the Husband has Power over the Eſtate of the Wife, during Coverture, yet if ſhe declares the Uſe one way, and he another, his Declaration is abſolutely void, and it ſhall not ſtand good during the Coverture. The Reaſon of the Difference ſeems, that in other Caſes the Husband having Power over the Wife's Eſtate, he may grant an Intereſt as from himſelf, during the Coverture, for ſo long as he has Power over her Eſtate; but when they levy a Fine in Fee, the Eſtate paſſes ſolely and entirely, as one Eſtate in Fee-ſimple, from the Wife; and the Uſes that are declared thereupon

muſt be all with the Conſent of the Wife for the whole Eſtate, becauſe the whole Eſtate and Intereſt paſſes from the Wife.

Fol. 799.

See Tit. Fines, (M. a) &c.

(T. 2) *What* ſhall be ſaid *a Direction of the Uſes of a Fine or Recovery.*

3 Bulſt. 251. in the Caſe of Fabergill v. Fare, Arg. cites Whetſtone and Withypole's Caſe, (Swanſted v. Elyot being the Parties in Court) where the

1. IF a Man ſuffers a Common Recovery in Octabis Michaelis, 3 E. 6. and an Indenture is made, dated 14 November then next following, in which it is expreſs'd, That all Recoveries hereafter to be ſuffer'd, between the Parties, ſhall be to the Uſe contain'd in this Indenture. The Recovery ſuffer'd before ſhall not be to the Uſe of this Indenture, tho' all Michaelmas Term is but one Day in Law; for the Word (hereafter) excludes all Recoveries before ſuffer'd, without an Averment of the Intent of it. Mich. 42 & 42 El. B. R. per Curiam, between *Whetſtone and Wentworth.* But adjudged Tr. 43 El. accordingly.

Covenant was to levy a Fine before *ſuch* a Day to certain Uſes, and the Fine bears Date before the Indenture. Reſolved, that this ought to be taken to be to the Uſe in the Indenture, if the ſame be aver'd to be ſo, and ſo given in Evidence; but that if the Jury find it generally, it ſhall not be intended to the ſame Uſes, viz. where the Fine is firſt, and then the Indenture of Uſes, which Fine ſhall be levied to the ſame Uſes.

G. Law of Uſes &c. 271, 272. cites S. C. ſays, it ſeems that if there be an Averment that it was the Intent of the Party, in that Indenture, to guide the Uſes of the precedent Recovery, it will be good. But Quære, ſince the Statute 29 Car. 2. whether that will do; for as the Statute of Wills requires that a Will ſhould be in Writing, and if that be not ſufficient that is writ, no Averment will help out the Defect; ſo the Statute 29 Car. 2. requiring a Declaration of Uſes to be in Writing, it ſeems, by the ſame Reaſon, no Parol Averment can help it.

But contra *if Uſes are contain'd in the Indenture,* and 'tis covenanted that A. ſhall recover to the Uſe of A. and his Heirs, and

2. If *Covenants* and Agreements are contain'd *in Indentures*, and no Uſes, and it is covenanted by this Indenture, *That A. ſhall recover againſt B. his Land in D. to the Uſe of the Recoveror and his Heirs, and to the Uſes of the Covenants and Agreements in the Indentures*, there, if he recovers, the Recovery ſhall be to the Uſe of the Recoveror and his Heirs, and not to the Uſes of the Covenants and Agreements in the Indenture, where no Uſes are in the Indenture. Br. Feoffments al Uſes, pl. 58. cites 32 H. 8.

to the Uſes in the Indenture, there the Recovery ſhall go accordingly, and ſhall be executed by the Statute 27 H. 8. Br. Feoffments al Uſes, pl. 58. cites 32 H. 8.

3. B. ſeiſed of Land acknowledged a Fine, and the *Conuſee granted and render'd to A. and his Wife for Life*, the *Remainder to the right Heirs of A.* and 2 *Years after B. the Conuſor did declare* by Indenture *the Uſe* of the Fine to be *to A. and his Wife for Life*, the *Remainder to the Wife in Fee*, ſhe being *his Baſtard*; and if this new Declaration ſhall croſs the Grant and Render was the Queſtion; and it ſeems it ſhall not; but the Re-grant in the Fine ſhall amount to a Declaration of the Uſe; and it ſhall be intended done by the Procurement of the Conuſor of the Fine himſelf. Ergo. Clayt. 94, 95. pl. 160. Jennings v. Chauntery.

See Tit. Fines, (Q. a) pl. 1.

4. A *Deed* of Uſes, *precedent* to a Recovery, was *explain'd by a Deed ſubſequent*, and ſo the Land coming by the Wife was ſecured to her Heirs, failing Iſſue by the Husband. D. 307. b. pl. 71. Paſch. 14 Eliz. Vavi-ſor's Caſe.

5. Indenture

5. Indenture declares the Uſe of a Fine with Render of Rent to B. *and his Heirs*, but the *Special Render to B. in Tail*, with Remainder to the Lord Mountjoy, being agreeing with the ancient Eſtate is to be preferr'd. Agreed by the Juſtices. Mo. 107. pl. 249. Mich. 17 & 18 Eliz. in Andrews's Caſe.

6. If Uſe is declared by Indenture, yet the Parties may *alter the Uſe* by other Indenture at any time *till Eſtate executed*, and the laſt Indenture ſhall guide the Uſe. Mo. 107. pl. 249. Agreed by the Juſtices in Andrews's Caſe.

7. *Covenant was to levy a Fine with Proclamations*, which ſhall be to ſuch Uſes mention'd in a Deed &c. It was held, that a Fine *without Proclamation* will not do it, viz. raiſe the Uſes. Clayt. 148. pl. 269. Anon.

8. One after the Term ſells his Land, with Covenant to levy Fine &c. and takes Fine and Recovery, and cauſes it to be *enter'd of the Term before*, yet the Deed ſhall guide the Uſe. And. 127, 128. pl. 173. in Caſe of Dowlman v. Vaviſor.

9. *Before the Statute of Frauds*, even a Parol *Declaration* of the Uſes of a Fine was good. 4 Mod. 269. per Cur. Paſch. 6 W. & M. in B. R. in Caſe of Jones v. Morley.

(T. 3) What Aſſurance ſhall be *guided by the firſt Indenture.*

1. **If a Man** covenants **by Indenture** to levy a Fine to 4 Perſons by Name, **to certain uſes limited in the Indenture, and after** 2 of the Perſons, **to whom the Fine ought to be levied,** die; **and after the** Fine is levied to the 2 Survivors, **to the uſe aforeſaid; this ſhall be well guided by the ſaid Indenture. Mich. 16 Ja. B. R. Admitted per Curiam; but they over-ruled it before upon Argument at Bar, between** *Havergil v. Hare.*

2. A. ſold Land to B. by Deed indented, *on Condition of Re-entry*, on Payment of 20l. and that all Aſſurances ſhall then be to him and his Heirs; and *covenants to make other Aſſurances, and that they ſhall be to the Uſe in the Indenture.* Afterwards *A. infeoffs B.* to the Uſe of B. and his Heirs, and afterwards levies a *Fine* to B. which was to the Uſe *in the Indenture.* Adjudged that notwithſtanding this abſolute Feoffment, and to an expreſs Uſe, yet it being upon *no New Agreement*, 'tis guided by the Covenant, and it ſhall rule it as well as an expreſs Limitation of the Uſe, ſo that the Eſtate is conditional ſtill. Cro. E. 300. pl. 14. Paſch. 34 Eliz. B. R. Clever v. Gyles.

S. C. cited 2 Rep. 73. b. 78. a. in Ld. Cromwell's Caſe.

(T. 4) Declaration.

(T. 4) Declaration. *What amounts to a Declaration* of Uſes of a Feoffment.

2. *Baſtard* ſeiſed of a Manor makes his Will, by which he *deviſes the Manor*; after he *makes Feoffment* of the ſame Manor to the Uſe of ſuch Perſons, and for ſuch Eſtates as he had declared by his laſt Will, bearing Date &c. Tho' this was now a * *countermanded Will*, it was ſufficient to declare the Uſe of the Feoffment, and ſo no Eſcheat. Mo. 789. pl. 1090. 2 Jac. in the Exchequer-Chamber, Huſſey's Caſe.

* S. P. Mo. 823. pl. 111. Mich. 12 Jac. in Chancery, in Damus's Caſe —See Select Caſes in Chan. 99. by Holt Ch. J. in Caſe of Bath v. Mountague.

(T. 5) Declaration of Uſes. *Good. In reſpect of the Perſons* making it, *and* the *Manner.*

1. THE *King*, *upon his Letters Patents*, may declare an Uſe, though the Patent itſelf implies an Uſe, if none be declared. Lord Bacon on the Statute of Uſes, 355.

2. If the *Queen gives Land to J. S. and his Heirs, to the Uſe of all the Churchwardens of the Church of Dale*, the Patentee is ſeiſed to his own Uſe upon that Confidence or Intent; but *if a common Perſon had given Land in that manner*, the Uſe had been void by the Stat. 23 H. 8. and the Uſe had return'd to the Feoffor and his Heirs. Ld Bacon on the Statute of Uſes 355.

3. A *Corporation* may take an Uſe without Deed, but can limit no Uſe without Deed. Ld Bacon on the Statute of Uſes 355.

4. An *Infant* may limit an Uſe upon Feoffment, Fine, or Recovery, and he cannot countermand or avoid the Uſe, except he avoid the Conveyance. Ld Bacon on the Statute of Uſes 355.

See Tit. Fines (M.a) pl. 1. and the Notes.

(T. 6) Declaration of Uſes of Fine or Recovery. Being *made by ſome of the Parties only.*

See (T)

1. THE Father was *Tenant for Life*, *Remainder to the Son in Tail.* A Præcipe was brought againſt the Father, who vouch'd the Son, and a Common Recovery had; and the Indenture recited that this Recovery was made between the Father and others; but inaſmuch as *no Proof was of the Conſent of the Son to ſuch Declaration*, *nor was he Party to the Indenture*, the Court directed the Jury to find the Uſes * accordingly, and the Eſtate which they had at the Time of the Recovery. Lat. 82. Paſch. 1 Car. Argol v. Cheney.

Palm. 405. Mich. 21 Jac. B. R. the S. C. —— * In Palm. the Words are (According to the Eſtate.)—— Noy 77. S. C. according to Palm.

2. *So* they * argu'd, that if *two Jointenants ſuffer* a Recovery, and one declares the Uſes of the whole, this ſhall bind only for a Moiety, unleſs the Conſent of the other be prov'd. Lat. 82. in Caſe of Argol v. Cheney.

* Agreed Palm. 405. S. C.—— Noy 77. S. C. accordingly.

(U) Uſes. Contingent. In what Caſes the *Contingency* ſhall be ſaid to be *happen'd* to raiſe the Uſe.

1. IF a Man by Indenture grants a Rent Charge of 20 l. in Fee, payable at two Feaſts by equal Portions, ſcil. 10 l. at Michaelmas and 10 l. at Lady-Day, and covenants to levy a Fine to the Uſes following, ſcil. that if the ſaid Rent be arrear at any of the Feaſts or Days of Payment, and no Diſtreſs upon the Land, or Replevin ſued &c. then it ſhall be well lawful for the Grantee to enter into the Land, and to retain it till Satisfaction of the ſaid Arrearages; and afterwards the Fine is levied accordingly, and after 10 l. Rent is arrear, and no Diſtreſs upon the Land, or Replevin ſued. Tho' all the 20 l. is not Arrear, yet the Uſe ſhall ariſe by this Indenture; for the being Arrear of 10 l. is a being Arrear of all the Rent, as a Diſſeiſin of part is a Diſſeiſin of all; for this is but one Rent tho' there are ſeveral Days of Payment. M. 16 Ja. B. R. adjudg'd per totam Curiam, and would not argue it; between Habergill and Hare.

Cro. J. 510. pl. 22. S. C. accordingly, that the 10 l. being Arrear is a ſufficient Cauſe of Entry; agreed by all the Juſtices. —— Poph. 126. Trin. 15 Jac. S. C. but the Court was divided.—— But Ibid. 147. Mich. ſhall be ſaid

16 Jac. Reſolved by all the Juſtices, that when 10 l. only is Arrear, the Rent of 20 l. Arrear, whereupon there ſhall be a Title of Entry.——3 Bulſt. 250. S. C.—— 2 Roll. Rep. 12 Hill. 15 Jac. S. C. argued.

(X) Uſes. *Relation.* From what Time the Uſe ſhall be ſaid to ariſe.

Fol. 800.

1. IF a Man grants a Rent Charge out of certain Lands by Indenture to another in Fee, and covenants to levy a Fine of the Land to the Uſes following, ſcil. that if the ſaid Rent be Arrear, and no Diſtreſs upon the Land, or a Diſtreſs taken and a Replevin ſued, or Reſcous made of the Diſtreſs, or Pound Breach, then and from thenceforth it ſhall be well lawful to the Grantee or his Heirs to enter into the Land and to retain it till Satisfaction of the Arrearages; and after the Rent is Arrear, and after the Fine is levied, and then a Diſtreſs is taken and a Replevin ſued by the Tenant of the Land. It ſeems that the Grantee cannot enter and have this Uſe by this Fine and Indenture, becauſe the Fine was levied after the Rent was Arrear, tho' the Replevin was ſued after the Fine; for the being Arrear of the Rent is as well Parcel of the Cauſe of the ariſing of the Uſe, as the ſuing of the Replevin, and the Words (then and from thenceforth) imply that it ſhall be from the Fine levied, and not for any Cauſe before. Dubitatur. 16 Car. B. R. Doderidge and Houghton, that it ſhall not ariſe, and Montague and Croke, e contra, between Habergill and Hare.

Cro J. 510. pl. 22. S. C. accordingly. —— Poph. 147. S. C. accordingly.— 3 Bulſt. 250. S. C. accordingly.

2. A. covenants with B. in Conſideration of Marriage, to ſuffer a *Recovery before the Feaſt of St. Michael*, and if A. before the ſaid Feaſt doth not, then he ſhall be ſeiſed to Uſe of B. *Trinity-Term paſſes without any Recovery*; no Uſe ſhall ariſe before the ſaid Feaſt; Per Popham. Arg. 4 Le. 170. And Per Clark J. Ibid. 174. pl. 276. in Sir Francis Englefield's Caſe.

3. The Quality of all future Uſes is, that tho' they ſhall take their Conſtruction by future Act, yet their *Inception* and Perfection *precedes the firſt Livery*, and they *are regarded as Uſes upon the firſt Livery*; As if A. covenanted by Indenture, in Conſideration of 100 l. received for a Marriage to be had between A.'s Son and the Daughter of the Covenantee, that if the Marriage does not take Effect, he and his Heirs will be ſeiſed of Black-acre to the Uſe of Covenantee and his Heirs, till Re-payment of the 100 l. The Covenantee dies, his Heir within Age, and after the Marriage does not take Effect, it is there taken that the Heir ſhall be in Ward, and ſhall take this Land by Deſcent; yet all which was in the Father was but Inception of future Uſe, which Inception, by the Breach of the Marriage, became Uſe in Perfection; but this was after the Death of the Father: Yet this had ſo ſtrong Relation to the Time of the Commencement, which was in the Life of the Father, that it was held to be an Inheritance deſcended to the Heir. Arg. Mo. 517. in Lord Buckhurſt's Caſe, cites 3 Mar. Br. Feoffments al Uſes 59.

(Y) *Rais'd. How.*

There muſt be 4thly, a clear and *apparent Intent*. And 5thly, *apt and proper Words*. Arg. Vent. 140. in Caſe of Croſſing v. Scudamore.

1. WHEN a Man will raiſe an Uſe by way of Covenant, there are 4 *neceſſary Things* which ought to concur. 1ſt. A ſufficient *Conſideration*, as of Blood, or Marriage, or other collateral Conſiderations; as if I covenant with you, that when you infeoff me of certain Land, I will ſtand ſeiſed to the Uſe of you and your Heirs; but if the Conſideration be for Money, the Deed ſhould be inroll'd, or otherwiſe no Uſe will ariſe. 2dly. There muſt be a *Deed* to teſtify this Agreement, as was reſolv'd 38 Eliz. in Caſe of Collard v. Collard. 3dly. He that covenants muſt be *ſeiſed at the Time* of the Covenant, as was reſolv'd 37 Eliz. in Yelverton's Caſe. 4thly. The *Uſes muſt agree with the Rules of the Common Law*; as in Chudleigh's Caſe a Man covenanted to ſtand ſeiſed to the Uſe of A. for Years, the Remainder to the right Heirs of J. S. it is a void Remainder, tho' by way of Covenant and Uſe; for the Freehold may not be in Abeyance; Per Hutton J. Winch 59. Hill. 20 Jac. C. B. in Caſe of Buckley v. Simmonds.

Jenk. 247. pl. 36.

2. Uſes may be *rais'd* two Ways. 1ſt. By *Tranſmutation of Eſtate*; as by Feoffment, Fine, Recovery. 2dly. Without Tranſmutation, as by Bargain and Sale, and by Covenant to ſtand ſeiſed to the Uſes. Now to raiſe Uſes by way of Covenant or Bargain and Sale, there muſt be a Conſideration; but in Caſe of Tranſmutation of Poſſeſſion, they may ariſe *without any Conſideration at all*. Arg. Cart. 143. in Caſe of Garniſh v. Wentworth.

3. In Covenant to ſtand ſeiſed the *Eſtate continues in the Covenantor till the Execution of the Uſe* in Ceſty que Uſe, who for that muſt *participate of the Conſideration* of natural Affection, which is the Conſideration to raiſe a Uſe by Covenant to ſtand ſeiſed. If *Money* be the Conſideration, there muſt be an *Inrolment*, and the Deed enures by Bargain and Sale. Gib. 301. in Caſe of Goodtitle v. Pettoe.

(Z) Ariſe.

(Z) Ariſe. Void and Good. In what Caſes, tho' *ſome* Uſes are void, or take not Effect, *yet others* that are *Good* ſhall ariſe. See Tit. Grants (G. a. 5)

1. THere is a great *Difference between* an Uſe rais'd *by Feoffment, and* an Uſe rais'd *by Covenant to ſtand ſeiſed*; for in the firſt Caſe the Feoffor doth diſpoſſeſs himſelf utterly, and if it takes not Effect to one Purpoſe it ſhall take Effect to another Purpoſe. But in Caſe of a Covenant it is otherwiſe; for the Uſe ariſes according to the Contract, and not otherwiſe. Arg. Le. 196. in Ld Paget's Caſe. In the firſt Caſe it is all out of the Feoffor, the Land is gone, the Uſe is gone, and the Truſt is gone, and nothing remains but a bare Authority to raiſe Uſes out of the Poſſeſſion of the Feoffees, and being new Uſes, there, tho' *ſome are void the other ſhall ſtand*; but in the 2d Caſe the Covenantor continues in Poſſeſſion, and the Uſes limited, if they be according to Law, ſhall raiſe and draw the Poſſeſſion out of him; but if not, the Poſſeſſion ſhall remain in him till a lawful Uſe ariſe, which before its Time ſhall not ariſe for any *Defect in the preceding Uſe.* Arg. 197. Ibid.——1 Rep. 154. a. b. in the Rector of Chedington's Caſe, cites S P. held by Manwood Ch. B in Ld Paget's Caſe.——& C. cited Arg. Litt. Rep. 262. in Beck's Caſe.

(A. a) Ariſe in what Caſes. *In Reſpect of the Intent.*

1. THE * *Intention of the Parties* is *the principal Foundation of the Creation of Uſes*; *if by any Clauſe* in the Deed it appears that the Intention of the Parties was to paſs it in Poſſeſſion by the Common Law, there no Uſe ſhall be rais'd; and therefore if any *Letter of Attorney* be in the Deed, or a *Covenant to make Livery*, or the like, there nothing ſhall paſs by way of Uſe, but according to the Intention of the Parties in Poſſeſſion by the Common Law. 2 Inſt. 672. S. P. 8 Rep. 94. Fox's Caſe. —— * S. C. cited per Cur. Sid. 26. pl. 7. Hill. 12 Car. 2. in Caſe of Fore v. Dix; but ſays this Intent muſt have *three Qualifications*, viz. Firſt, It muſt be *manifeſt out of the Deed.* 2dly, It muſt be *agreeable to the Rules of Law.* 3dly, It muſt be *taken upon the entire Deed*; for *Et Res & Modus Habendi* is to be conſider'd; and to this Purpoſe cites the Caſe of Buckler v. Symonds; which ſee at (O. 4) pl. 1.

2. A *Recovery* was ſuffer'd *by A.* to the *Intent that Recoveror ſhould make an Eſtate to A. and his Feme for their Lives*, *Remainder* Seniori Puero in Tail, Remainder over. It was agreed that after the Recovery ſuffered the Recoverors ſhall be ſeiſed to their own Uſe; for if they ſhall be ſeiſed to the Uſe of B. then they cannot make the Eſtate. But per Southcot and Wray, *if they do not make the Eſtate in convenient Time, an Uſe ſhall be raiſed in A.* againſt whom the Recovery was had. And they agreed that this *Word (Intent)* is a good Word to *create an Uſe*, *but not preſently*, as the Caſe here is. D. 166. Marg. pl. 8. cites Paſch. 17 El. Humerſton's Caſe.

3. A *Fine* was levied *by A.* and the Words of the Indenture leading the Uſes were, That the Fine *was levied to the Intent that Conuſee ſhould make an Eſtate to him to whom A.* the Father, who was the Conuſor, *ſhould name*; and a *Proviſo was in the End of the Indenture, That the Conuſee ſhould not be ſeiſed to any other Uſe except unto that Uſe ſpecified.* It was held by all the Juſtices, that it ſhall be to the Uſe of the Conuſee in like manner as to the Recoveror, in the Caſe above, and after the Nomination they ſhall be ſeiſed to the Uſe of ſuch Nominee; but *if A. dies without Nomination*, then the *Law will ſettle the Uſe in his* [*Heirs.*] D. 166. Marg. pl. 9. cites 17 El. Betnam v. Bateſton. 4 Le. 22. pl. 72. 18 Eliz. B. R. S. C. by Name of Bettuan's Caſe, accordingly.

4. A.

And ſo it was adjudg'd in C. B. upon this very Deed, upon a Special Verdict there; upon which Judgment the now Defendant recover'd the Poſſeſſion; and ſo the Leſſor of the Plaintiff brought his Ejectment here. Carth. 343. Leigh v. Brace.

4. A. ſeiſed in Fee made a *voluntary Feoffment to J. S. and J. W. and their Heirs, to the Uſe of A. for Life, and* then to the Uſe *of B. and his Heirs for ever*; and *for Default of Iſſue of the Body of B.* then *to the Uſe of the right Heirs of the ſaid A.*——*A. died*, and *B. enter'd, and* by his Will *deviſed* thoſe Lands to the Leſſor of the Plaintiff, *and then died without Iſſue*, and the Defendant was right Heir to A. the Feoffor. The Queſtion was, Whether by the Limitation of the Uſes in this Feoffment B. took an Eſtate in Fee-ſimple, or elſe but an Eſtate-Tail only, (as if it had been in a Will;) for it was agreed on all Sides, that ſuch a Limitation in a Will would be only an Eſtate-Tail, becauſe the Limitation of a Remainder over, upon his dying without Iſſue of his Body, ſhews that it was only intended the Heirs of his Body, and the Intention of the Teſtator governs his Will. But this being a Conveyance in the Life-time of the Feoffor would make a Difference, as it was objected. Sed per Cur. It makes no Difference, becauſe it was a *Conveyance by way of Uſe*, which *has been always conſtrued like Wills, with reſpect to the Intention of the Parties*, and it is not tied up to the ſtrict Forms of Conveyances at Common Law. Judgment for the Defendant. Carth. 343. Hill. 6 W. 3. B. R. Rot. 929. Leigh v. Brace.

(B. a) Uſes raiſed *by an improper Conveyance, being conſtrued as a proper* Conveyance, *or as another Kind of Conveyance.*

ſee 2. Wils. 22. & 75.

For if the *Words of a Covenant may be preſumed by Operation of Law*, as by *Deſcent* in the Caſe above, there no Uſe ſhall ariſe; but otherwiſe if it *cannot* be perform'd by Act in Law; and therefore if, in the Caſe above, the Covenant had been That the 20 l. per Ann. ſhould deſcend to a Stranger, or to the Daughter and a Stranger, there the Uſe would ariſe; per Anderſon Ch. J. D. 55. Marg. pl. 3. cites P. 24 Eliz.

1. A. Seiſed of 30 l. per Ann. covenants that *he will ſuffer* 20 *l. per Ann. to deſcend* and come to his Daughter and Heir, *after his Death.* Per all the Juſtices, This does not raiſe an Uſe to the Daughter, but ſhe ſhall only have Covenant, if it be not perform'd. D. 55. Marg. pl. 3. cites P. 24 Eliz.

S. P. agreed by all. Poph. 21. Hill. 31 Eliz. in Sir Francis Englefield's Caſe.——But if the Word *Deſcend* had been join'd it would be otherwiſe; for there is Election how he is to have it. D. Marg. pl. 3. cites 21 Eliz. when it was ſo held per Manwood and Chute in Scacc. and cites 2 H. 7. 16.——Br. Feoffments to Uſes, pl. 16. cites 21 H. 7. 18.

2. A. covenants, in Conſideration of *Natural Affection*, to ſtand ſeiſed to the Uſe of himſelf for Life, and that *after his Deceaſe it ſhall deſcend* or *remain to his Couſin B. in Fee.* Reſolved, per omnes J. Angliæ, that no Uſe is raiſed by reaſon of the ſaid *diſ-junctive* (Remain or Deſcend;) but that it is Covenant only. Jenk. 267. pl. 75.

3. If *ſufficient Agreement appears, the Word (Covenant) is not neceſſary*, As if I will agree and declare to ſtand ſeiſed to the Uſe of my Son; per Hobart Ch. J. Winch. 61. Hill. 20 Jac. C. B. in Caſe of Buckley v. Simmonds.

4. Where a *Deed is void in the Frame of it*, as where A. *gave, granted*, and confirm'd Lands *to his Son after his Death*, this ſhall not enure as a Covenant to ſtand ſeiſed; for it had been void if Livery had been made. 2 Vent. 319. in Caſe of **Samon v. Jones**, cites Mar. 50. [pl. 78. Trin. 15 Car.] Pitfield v. Pierce.

5. A.

5. A. ſeiſed in Fee of a *Rent-charge*, *granted it to a Kinſman for Life*, and the *Grantor died before Attornment*. It was reſolved, that upon the Sealing and Delivery of the Deed an Uſe aroſe. Mod. 177, 178. Arg. in Caſe of Scudamore v. Croſſing, cites it as adjudged in the late Time in C. B. in the Caſe of Saunders v. Savin.

2 Lev. 213. Mich. 29 Car. 2. in the Caſe of **Walker v. Hall**, cites S. C. That *Attornment was by one who in Fact proved not to be Tenant*, and ſo was no Attornment; but that it was *adjudged*, Hill. 1655. C. B. *that it ſhould enure as a Covenant to ſtand ſeiſed*.——S. C. cited Raym. 48. Mich. 13 Car. 2. B. R. in Caſe of **Foſter v. Foſter**, ſays *the Indenture was by the Words Gives, Grants, and Aſſigns* to H. and M. his Wife, and John Savil, *for and in Conſideration of Good Will*; *Habendum, to H. and M. for their Lives*, the *Remainder to John Savil and the Heirs of his Body*. And by Hale and Atkins, tho' the Conveyance was a Conveyance at Common Law, yet an Uſe did ariſe thereby. Trin. 1657. C B.——S C. cited by Rooksby J. 3 Lev. 372. in Caſe of Oſman v. Sheaſe, as remember'd by him to have been adjudg'd as a good Covenant to ſtand ſeiſed.——S. C. cited per Cur. 2 Vent. 261. Mich. 2 W. & M. in C. B. in Caſe of Lade v. Barker.

6. In Ejectment on Not Guilty pleaded, a Special Verdict was That P. the *Father*, ſeiſed of Land 1 Sept. 1640. *by Deed* gave to his Son in theſe Words, viz. The Father, *in Conſideration of tender Affection, hath abſolutely given*; and *Livery was indorſed, but not made*; and adjudg'd an Uſe did ariſe to the Son. And a *Difference* taken where the Father by Feoffment gives to a Stranger *to the Uſe of himſelf, Remainder over*, there no Uſe ariſes; but when the Conveyance is *to the Party himſelf*, there the Uſe will ariſe. Arg. Raym. 48, 49. in Caſe of Foſter v. Foſter, cites Mich. 1657. Sympſon v. Keyles.

7. A. ſeiſed in Fee, *by Indenture between him and B. his Son of the one Part, and 2 Strangers of the other Part*, in Conſideration of *Natural Love to his Son, gives, grants, and enfeoffs the 2 Strangers* to the Uſe of himſelf for Life, Remainder to B. in Tail Male, Remainder over; and *covenants with the 2 Strangers that they ſhall enjoy the ſaid Land* to the Uſes aforeſaid, and *exonerated, freed &c. from other Incumbrances*. The Deed was ſeal'd and deliver'd, but no other Execution by Livery, nor by Attornment. Reſolved that no Uſe was raiſed by this Deed, and that (A. being dead) B. was ſeiſed of the ancient Fee; for no Eſtate paſs'd to the Strangers for want of Livery, and no Uſe for want of Conſideration; and had it been raiſed to them, it could not have come back to A. and B. becauſe an *Uſe cannot be raiſed upon an Uſe*. Here could be *no Tranſmutation of Poſſeſſion*, there being no Execution by Livery, and the Words being Give, Grant, and Enfeoff. S.d. 25, 26. pl. 7. Hill. 12 Car. 2. C. B. Hore v. Dix.

S. C. cited 2 Vent. 319. in Caſe of Samon v. Jones.

8. *Nor* in the Caſe above can the *Covenant with the Strangers, as above*, raiſe an Uſe; becauſe, 1. It is made *to the Strangers*. 2. It is made between the Parties only, *without Mention of their Heirs*, and ſo is intended to be perſonal. 3. *If the Deed had been good it would enure to another Intent*, viz. *to free* the Land *from Incumbrances*. Sid. 26. pl. 7. Hill. 12 Car. 2. C. B. Hore v. Dix.

9. A. ſeiſed in Fee *by Deed inroll'd*, did, *in Conſideration of Natural Love, Augmentation of her Portion, and Preferment of E. his Daughter in Marriage, and for other good and valuable Conſiderations, give, grant, bargain, ſell, alien, enfeoff, and confirm to the ſaid E. and her Heirs*, with a *Covenant for her quiet Enjoyment, and a Special Warranty*. All the Court held, the Land ſhould paſs by way of Covenant to ſtand ſeiſed. Vent. 137. 141. Trin. 23 Car. 2. B. R. Croſſing v. Scudamore.

2 Lev. 9. S. C. in B. R. adjudged accordingly, and ſays it was affirm'd in the Exchequer-Chamber.

——Mod. 175. pl. 11. **Scudamore v. Croſſing**, S. C. in the Exchequer-Chamber, ſays that no Conſideration of Money was mention'd, nor was the Deed inroll'd, nor any Conſideration of Natural Affection expreſs'd, otherwiſe than what is implied in naming the Grantee his Daughter, and that there was no Livery endorſed, nor any found to have been made, nor was the Daughter in Poſſeſſion at the Time of the making the Deed; and that 6 Judges were for affirming the Judgment; but Vaughan Ch. J. and Thurland Puiſne Baron, e contra. The Reaſons of the 6 Judges were, 1. That in a Covenant to ſtand ſeiſed, thoſe Words of covenanting to ſtand ſeiſed to the Uſe of &c. are not abſolutely neceſſary; and that it is ſufficient if there are Words that are tantamount. 2. That no Conveyance admits of ſuch

Variety of Words as does this of a Covenant to ſtand ſeiſed. 3. That Judges have always endeavour'd to ſupport Deeds, ut res magis valeat &c 4. That the Grantor in this Caſe, by putting in Plenty of Words, ſhews that he did not intend to tie himſelf up to any one ſort of Conveyance. 5. That if the Words Give and Grant had been alone in the Deed, there would have been no Queſtion; and that if ſo, then Utile per inutile non vitiatur. 6. That every Man's Deed muſt be taken moſt ſtrongly againſt himſelf. 7. That the Words Give and Grant enure ſometimes as a Grant, ſometimes as a Covenant, ſometimes as a Releaſe, and muſt be taken in that Senſe which will beſt ſupport the Intent of the Party. 8. That the very Point of this Caſe has received two full Determinations upon Debate; and that it were a thing of ill Conſequence to admit of ſo great an Uncertainty in the Law as now to alter it. 9. That there is here a clear Intent that the Daughter ſhould have this Eſtate, [viz.] a Deed, a good Conſideration to raiſe a Uſe, and Words that are tantamount to a Covenant to ſtand ſeiſed. Wherefore the Judgment was affirm'd. —S. C. cited 3 Lev. 372. in Caſe of Oſman v. Sheaf.

2 Jo 105. S. C. adjudg'd accordingly.—2 Show. 11. pl. 7. S. C. adjudg'd Paſch. 31 Car. 2. that the Limitation to the Mother amounted to a Covenant to ſtand ſeiſed &c. and this Judgment was afterwards affirm'd upon a Writ of Error.—Pollex. 523. S. C. ard Ibid. 537. ſays it was affirm'd in the Exchequer.—S. C. cited 3 Lev. 372. in Caſe of Oſman v. Sheaf.

10. A. *ſeiſed in Fee dies, leaving a Wife and Son and Daughter.* The *Widow enters upon the Eſtate, and takes all the Profits*; the *Son comes of Age, and to prevent Differences, the Widow*, and her now Husband, *by Deed (to which the Son is Party) covenant for Love and Affection to ſtand ſeiſed to the Uſe of the Son* &c. and at laſt the *Son covenants, that if he die without Iſſue, he does give and grant the Lands in* Queſtion *to her and her Heirs.* The Son dies without Iſſue. The Mother enters, and the Daughter brings Ejectment. After long Conſideration it was reſolv'd that the Uſe was well rais'd to the Wife by the Covenant, being the Intent of the Parties. 2 Lev. 225. Trin. 30 Car. 2. B. R. Coltman v. Senhouſe.

A. *gave, granted, and confirm'd to M. his intended Wife, Habendum to her, her Heirs and Aſſigns, with a Letter of Attorney* in the Deed, but *a Blank left for the Attorney's Name.* The Deed was *indors'd*, viz. *Mdm. that Livery and Seiſin was made by* *Attorney*, with a Blank left for his Name, and *no Witneſſes indors'd of the Livery, tho' there were to the Sealing and Delivery of the Deed.* The Queſtion was, whether this ſhould enure as a Covenant to ſtand ſeiſed. The Point was argu'd, & adjornatur; but the Reporter ſays he afterwards heard that Judgment was given by all the Barons, that this *operates* well *as a Covenant to ſtand ſeiſed*; and that they relied principally upon the Caſe of Croſſing v. Scudamore. 2 Lev. 213. Mich. 29 Car. 2. in the Exchequer, Walker v. Hall.———S. C. cited 3 Lev. 372. Arg. in Caſe of Oſman v. Sheaf; and ſaid to have been reſolv'd upon diverſe Arguments.

11. A. in Conſideration of Marriage to be had between him and M. by *Indenture inroll'd, granted, infeoff'd, and confirm'd* to J. S. and his Heirs the Manor of D. to the *Uſe of himſelf for Life, Remainder* to his *intended Wife for her Life, with Warranty*; there was no Livery or other Execution. A. married M. and died. It was argu'd that no Eſtate paſs'd to the Wife; for it appears by the Inrolment that the Intent was not to take Effect by Covenant to ſtand ſeiſed; and if there was any valuable Conſideration, the Uſe ſhould be to the Grantee, and a Truſt only for the Wife. And the Intention appears clearly to paſs at Common Law; for, 1ſt. The Uſe is limited to ariſe out of the Eſtate of the Grantees. 2dly. The Warranty otherwiſe would be deſtroy'd. 3dly. There is a Covenant to make further Aſſurance to the Grantees. But no Judgment was given. 2 Jo. 123. Trin. 30 Car. 2. B. R. Key v. Gamble.

Vern. 182. pl. 179. S. C. but not S. P.

12. A. by Deed *granted, infeoff'd, and confirm'd* his Land *to Truſtees to ſtand ſeiſed* to the Uſe of his three *Brothers in Conſideration of Blood*, natural Love, and Affection; but there was *no Livery* made. This ſhall work as a Covenant to ſtand ſeiſed; Per North K. And in the Caſe, tho' not taken Notice of, was an expreſs *Covenant that Ceſty que Truſt ſhould enjoy* according to, and for and during the Eſtates thereby reſpectively limited. Vern. Rep. 141. pl. 133. Hill. 1682. Thorne v. Thorne.

13. It was allow'd that a *Conveyance purporting a Feoffment*, may operate as a Covenant to ſtand ſeiſed. Vern. 40. pl. 38. Paſch. 1682. Thompſon v. Atfield.

3 Lev. 306. 307. Trin. 3 W. & M. in C. B. the S. P. was reſolv'd accordingly,

14. C. being ſeiſed in Fee, did *by Deed* &c. *in Conſideration of a Marriage to be had, covenant to levy a Fine before Whitſuntide next* following, and *declar'd that the ſaid Fine*, and all other Fines levied and executed before the ſaid Feaſt, *ſhall be, and the ſaid C. and his Heirs ſhall ſtand and be ſeiſed to the Uſe* &c. *no Fine was levied*; and the Queſtion was, whether

theſe laſt Words ſhall amount to a Covenant to ſtand ſeiſed; and adjudg'd that they ſhould not; for if ſo, it would amount to a Covenant to ſtand ſeiſed preſently, and prevent the levying the Fine, as was intended. 3 Lev. 126. Paſch. 34 Car. 2. C. B. Hule v. Cockerill.

and upon the very ſame Deed. Barrington v. Crane.

15. And the Caſe above is *not like to a Covenant to levy a Fine, or make a Feoffment before ſuch a Day to ſuch Uſes, and that for Default thereof, or other Defect in the Conveyance to ſtand ſeiſed*; for in ſuch Caſe there is a Time left for the levying of the Fine, or the making the Conveyance the Way intended, which cannot be in the principal Caſe. 3 Lev. 126. Paſch. 34 Car. 2. C. B. Hule v. Cockerill.

16. A Settlement was thus, viz. *if I have no Iſſue*, and in Caſe I die without Iſſue of my Body lawfully begotten, then *I give, grant and confirm* my Land &c. to my Kinſwoman A. B. to have and to hold the ſame to the Uſe of my ſelf for Life, and *after my Deceaſe to the Uſe* of the ſaid A. B. and the Heirs of her Body to be begotten, with Remainders over. Adjudg'd a Covenant to ſtand ſeiſed. 3 Mod. 237. Trin. 4 Jac. 2. B. R. Harriſon v. Auſtin.

Comb. 128. Trin. 1 W. & M. in B. R. the S. C. the Deed was in Conſideration of natural Affection and that the Lands might remain in his Blood and Kindred. The whole Court inclined that it was a Covenant to ſtand ſeiſed; and afterwards Judgment was given accordingly for the Plaintiff. ——Carth. 38. S. C. and the whole Court held accordingly.

17. Where the *Intention of a Deed is to transfer an Eſtate to a Son, and that the Uſes ſhould ariſe out of the Eſtate ſo transferr'd*, As where A. ſeiſed of a *Reverſion in Fee expectant on an Eſtate for Life*, did by Deed Poll in Conſideration of natural Love to his Wife, and B. his Son, and M. his Daughter, *give, grant, and confirm to the Son* all thoſe Lands &c. the Reverſion and Reverſions &c. *to hold to his Son to the Uſes following* (that is to ſay) to the Uſe of himſelf for Life, then of the Wife for Life, then of B. and the Heirs of his Body, then of M. and the Heirs of her Body &c. This Deed had a *Warranty but no Execution beſides Sealing and Delivery*, either by Inrollment, Attornment or otherwiſe. A. died, the Wife died, the Son died without Iſſue, yet no Uſe ſhall ariſe to M. 2 Vent. 318. Paſch. 2 W. & M. adjudg'd and affirm'd in Parliament, and ſo reverſed a Judgment in the Exchequer Court, Samon v. Jones.

But where *no Uſes are limited on the Eſtate intended to be convey'd* by the Words Give, Grant, &c. and the Perſons to whom are capable, and the Conſideration good, there for Want of due Execution, ſince the Eſtate can't paſs at Law, it ſhall paſs by raiſing an Uſe. 2 Vent. 319. cites 2 Roll. a. 687. Popplewell's Caſe, and Mod. 175. Croſſing v. Scudamore.

18. A. in Conſideration of *natural Affection, and 5 s. to him paid by his Son, Dedit & Conceſſit* &c. This will amount to a Covenant to ſtand ſeiſed, there being *no Attornment*. But then it muſt not be pleaded as a Grant, but as a Covenant to ſtand ſeiſed expreſsly. Carth. 253. Mich. 4 W & M. in B. R. Baker v. Lade.

2 Vent. 149. Lade v Baker S. C. accordingly. — 3 Lev. 291. S. C. accordingly. — 4 Mod. 149. Barker v. Lade S. C. accordingly. —— Skin. 315. S. C. accordingly. —— Comb. 190. S. C. accordingly.

19. In Replevin, the Caſe was that J. S. *granted a Rent Charge of* 14*l. a Year to A. and her Heirs*, iſſuing out of the Place where &c. and *A. by Deed, for the Love and Affection which ſhe did bear to her Kinſman B. did give and grant to him and his Heirs her Annuity* of 14 l. per Ann. And upon Demurrer the Queſtion was, Whether this Deed ſhould operate as a Covenant to ſtand ſeiſed? Reſolved that it ſhould, the Conſideration being expreſſed to be for Love and Affection to her Kinſman &c. and that the Defendant had done well in pleading it as a Conveyance by Way of Covenant to ſtand ſeiſed; for had he pleaded it as a Grant of the Rent, it would have been void. And Judgment accordingly. Carth. 307. Paſch 6 W. & M. in C. B. Oſmere v. Sheaſe.

3 Lev. 370. Mich. 5 W. & M. the S. C. adjornatur, but afterwards it was adjudg'd accordingly. — 2 Lutw. 1205. to 1211. S. C. but nothing ſaid as to this Point by Court or Counſel, tho' 3 Nels. Abr. 489. pl. 28. cites S. C. from thence as adjudg'd &c. nothing whereof is there

there, but is taken from what Rooksby J. ſaid. 3 Lev. 372. in his citing the Caſe of Sanders v. Savile.

Select Caſes in Canc. in Ld. King's Time, St. S. C. but S. P. does not appear.

20. A. ſeiſed in Fee convey'd to Feoffees to the Uſe of himſelf for 99 *Years*, Remainder to *Truſtees to ſupport Contingent Remainders*, Remainder as to Part to his Wife for her Life, Remainder to his *firſt and other Sons in Tail*, Remainder to his *own Right Heirs*, with a *Covenant for him and his Heirs, That he* the ſaid A. *was ſeiſed* of the Lands *in Fee, and ſhould continue ſo ſeiſed till the Execution* of the ſaid Deed. It was argued, that the Deed *cannot have the Force of a Covenant to ſtand ſeiſed*; for tho' the Covenant is for A. and his Heirs, yet *it is not that he and his Heirs ſhall be ſeiſed*; ſo that at moſt the *Covenant can bind* the Lands *only for his Life*, and the Land muſt deſcend to his Heir at Law, diſcharged from the Covenant: But as this Caſe is, it is impoſſible the Deed ſhould have that Effect; for the *Truſtees being Strangers in Blood* to A. no Uſe can ariſe to them, and then there will be no Eſtate of Freehold to ſupport the Contingent Remainders; for the Limitation to A. himſelf is only for 99 Years. Ld. Chancellor was of Opinion the Deed could not enure as a Covenant to ſtand ſeiſed, for the ſecond Reaſon given by the Counſel; but he took no Notice of the other Reaſon. Gibb. 146, 147. Mich. 4 Geo. 2. in Canc. Jackſon v. Jackſon.

(C. a) Ariſe *at what Time.*

1. IF *before the* Statute of 27 *H.* 8. *a Man will'd by his Teſtament that his Feoffees ſhould make Eſtate to ſuch an one*, an Uſe was raiſed preſently, tho' no Eſtate was ever made by the Feoffees; ſic dictum fuit in C. B. Dal. 88. pl. 3. 15 Eliz. in the Caſe of Audley, alias, Tutchet v. Daniel.

Mo. 101. pl. 247. Mich. 16 & 17 Eliz. S. C. —D. 334. b. pl. 33. Trin. 16 Eliz. S. C.

2. A Fine was levied of the Manor of R. to the Uſe of J. S. viz. *of Part of the Lands of* 20 *Marks Value*, and *of the Reſidue to other Uſes*; and it was held, that the other Uſes ſhall not take Effect till *Election* made of the 20 Marks Land. Arg. Mo. 494. cites D. 335. Sir Fr. Calthrop's Caſe, and Windham's Caſe.

So if A. covenants with B. in Conſideration of Marriage before the Feaſt of St. Michael, and *if A. before Michaelmas, does not ſuffer ſuch Recovery, then he ſhall be ſeiſed to the Uſe of* C. if Trinity Term paſſes without any Recovery had, yet no Uſe ſhall ariſe before the ſaid Feaſt. Arg. 4 Le. 170. and ibid. 174. per Clerk J. S. P. in Sir Francis Englefield's Caſe.

3. If one *covenants to ſuffer a Common Recovery within a Year*, and if not, to ſtand *ſeiſed to the Uſes*; if all the Terms of the Year paſs, it is impoſſible to ſuffer the Recovery, yet the Uſes ſhall not ariſe till the Year ended. Arg. Mo. 328. and agreed by the other Side Arg. But ſays, if the Covenant had been That *before 2 Years in Term-time he would ſuffer a Recovery, or otherwiſe ſtand ſeiſed to the Uſes*, there the Uſes ſhall ariſe as ſoon as the Terms are paſs'd, before the 2 Years expire. Mo. 333. in Englefield's Caſe.

4. If a Man covenants that *after his Death his Son and Heir ſhall have the Lands*, now the Father has but an Eſtate for Life, and the Inheritance is veſted in the Son. Arg. Le. 195. in Ld. Paget's Caſe.

5. *A.*

5. A. *covenants* that after 24 *Years* he and his Heirs *will ſtand ſeiſed to the Uſe of B. his Son &c.* there the Uſe in Fee veſts in B. preſently. Arg. Le. 195. in Ld. Paget's Caſe. And he ſhall enter immediately after the Death of A. the

Eſtate for 24 Years made to the Covenantees being void for want of a Conſideration; but if A. had made the Covenantees Executors, and charged them with Payment of Debts, it had been good to them for the 24 Years. Le. 194. S. C.

6. A. *covenants* that *after his Death* he and every one that ſhall be ſeiſed &c. *ſhall be ſeiſed to the Uſe of B. his Brother*, the Uſe ſhall riſe to his Brother preſently. Arg. Le. 195. in Ld. Paget's Caſe.

7. A. covenants to ſtand ſeiſed to the Uſe of B. his Couſin of certain Land *for Life*, and *of other Land* to the Uſe *of another Couſin for Life*, and after to the Uſe *of a 3d Couſin in Fee, after the ſaid two Eſtates ended.* The Eſtate of the 3d Couſin ſhall commence reſpectively after the two Eſtates ended. Jenk. 272. pl. 90.

(D. a) *Out of what* Things they may ariſe.

1. *Common, Way*, or ſuch like, granted by Feoffees in Uſe, ſhall be to the Uſe of the Grantees. Br. Feoffments al Uſes, pl. 10. cites 14 H. 8. 4. S. P. & S. C. cited G. Law of Uſes &c. 13, 14. For ex Naturâ

Rei, this cannot be but to the Uſe of the Grantee.——Uſes cannot be raiſed of ſuch *Things Quæ ipſo Uſu conſumuntur*, as *Commons, Ways in Groſs, Authority* granted to a Man and his Heirs *to hunt* in any Park, Chaſe, or Foreſt; per Doderidge J. Jo. 127. in Lord Willoughby's Caſe.—Cart. 46. Arg. cites Cro. J. 189. Beaudly v. Brook.

G. Law of Uſes, 281. ſays that Things which are *mere Rights* cannot be convey'd by way of Uſe, as *Commons* &c. *Ways in Groſs*; for a Man cannot walk over Ground to the Uſe of a 3d Perſon.

2. A Sum of *Money was deliver'd to J. S. to the Uſe* and Behoof *of a Woman, to be deliver'd to her on the Day of her Marriage*; and *before the Marriage the Bailor revoked it.* Two Juſtices held the Money countermandable, and 2 e contra. But Dyer, who was then abſent, ſays, it ſeems that the Property of the Money cannot be changed by the Words, To the Uſe or Behoof. Dyer 49. a. b. pl. 7. &c. Paſch. 33 H. 8. Lyte v. Penny.

3. Uſe may be of a *Leaſe* or *Chattle.* Agreed per Cur. And. 294. Englefield's Caſe.

4. An Uſe cannot be raiſed out of a *Power.* Arg. Le. 148. pl. 205. in Caſe of Read v. Naſh.

5. In Caſe, the Plaintiff declared that the Defendant *ſeiſed in Fee of the Lands over which there was a Way, and of other Lands, by* Indenture of *Bargain and Sale inroll'd, convey'd his Lands to J. S. in Fee, with a Way over his Lands*, and that J. S. leas'd the Premiſſes to the Plaintiff, and that the Defendant diſturb'd him. The Court were all of Opinion that by this Bargain and Sale the Land only paſs'd, and not a Way over the ſame, becauſe nothing but the Uſe paſs'd by the Deed, and there *cannot be the Uſe of a thing which is not in Eſſe, as a Way, Common* &c. *newly created*, and no Uſe can be rais'd by Bargain and Sale, and conſequently nothing paſs'd by the Indenture. Cro. J. 189. pl. 13. Mich. 5 Jac. B. R. Bewdly v. Brook. S. C. cited Arg. Cart. 46. Trin. 17 Car. 2. in Caſe of Tinker v. Lidcott, and that a *Poſſibility* is not a Thing in Eſſe. And Ibid. 48. in S. C. he urg'd again that a Poſſibility is not a Thing in Eſſe, and a Uſe cannot ariſe out of it; and ſaid that That is the Pinch of that Caſe; and adjornatur.

6. One ſeiſed in Fee may bargain and ſell, grant and *demiſe* Land to *B. and his Heirs to the Uſe of C. for Years*, becauſe he has a Fee-ſimple. But Leſſee for Years cannot grant and ſell his Life to the Uſe of one for Years. Brownl. 40. a Nota there.

G. Law of Uſes &c. 281. ſays, The Lords decreed that the Office of High Chamberlain could not be granted by way of Uſe.

7. Tho' an *Office*, as the Office of Great Chamberlain of England, be perſonal in the Execution, yet it is real in the Perception of Profits; and therefore an Uſe may be rais'd thereof. The Statute of 27 H. 8. is general, and the Word (Other) Hereditaments is very ſignificant, and reaches to this Caſe; For no Man can doubt but this Office is an Hereditament, and other than was mention'd before, and ſuch an Hereditament whereof an Eſtate Tail may be created; Per Crew Ch. J. Jo. 117. 1 Car. in Parliament, Lord Willoughby's Caſe.

8. A *Seigniory* conſiſting of Homage and Fealty, the Service being meerly perſonal, and to be perform'd by the Perſon of a Man, and reſting in Feaſance, may be granted to an Uſe in reſpect of the Poſſibility that the Tenancy may eſcheat, which perhaps never will be; Per Crew Ch. J. Jo. 117. 1 Car. in Ld Willoughby's Caſe.

9. A *Stewardſhip* or *Bailiwick in Fee-ſimple of a Manor*, may be granted to an Uſe being Perſonal Offices in Point of Service; Per Crew Ch. J. Jo. 117. in Lord Willoughby's Caſe.

10. So a Liberty of *Retorna Brevium*, which is Perſonal, conſiſting in Execution of Proceſs; Per Crew Ch. J. Jo. 118. in Ld. Willoughby's Caſe, cites it as rul'd 42 Eliz. B. R. in the Counteſs of Warwick's Caſe.

11. So of a *Shrievalty of a County*; Per Crew Ch. J. Jo. 118. in Lord Willoughby's Caſe, cites 3 Jac. the Earl of Cumberland's Caſe.

Therefore the *Diverſity* is manifeſt between a *meer and naked Truſt*, wherein he that hath it has *neither Jus in Re, nor Jus ad Rem, nor Remedy by the Common Law*, but only *mere Perception of the Profits by the Permiſſion of the Ter-tenant* and an *Eſtate of Inheritance*, wherein the Owner has both *Jus in Re & Jus ad Rem*, by the *Rule of the Common Law*, and for the Profit whereof the Law gives the Owner Remedy by Writ of Aſſiſe, and a Præcipe quod reddat, as the Caſe requires; and the Confidence requir'd in the Perſon for the executing the Office may be an Objection (tho' a weak one) that it cannot be transferr'd over, but not that an Uſe, that is, a Pernancy of the Profits cannot be raiſed out of the Eſtates, the Truſt in the Perſon is no Objection at all; for the Uſe reſpecteth the Eſtate of Inheritance, and not the Perſon. Per Crew Ch. J. Jo. 118. 1 Car. in Parliament, in Ld. Willougby's Caſe.

12. Where it is ſaid that a Truſt cannot be rais'd out of a Truſt, and therefore a *Bargain and Sale by Deed indented and inroll'd*, cannot be limited to an Uſe, becauſe an Uſe cannot be limited to an Uſe; yet notwithſtanding when a Man is *ſeiſed of an Eſtate of Inheritance of an Office holden by grand Serjeanty*, wherein there is requir'd Truſt in the Perſon, yet *an Uſe, which is a Pernancy of the Profits belonging to that Office, may be rais'd of the Eſtate of Inheritance*, otherwiſe no Land holden by Grand Serjeanty could be transferr'd to an Uſe, nor any Uſe rais'd out of the ſame; Per Crew Ch. J. Jo. 118. 1 Car. in Parliament, in Lord Willoughby's Caſe.

S. C. cited G. Law. of Uſes &c. 281. that all Lands and Inheritances Real may be granted to an Uſe, *but no Inheritance Perſonal* can be granted to an Uſe, as *Annuities*, and the like; for their having the Inheritance conſiſts in taking the Rents; ſo he cannot have the Freehold upon the Truſt and Confidence to permit another to take the Profits.

13. All Lands and *Inheritances local*, as Rents in Eſſe, *Advowſons in groſs*, *Common for ſo many Beaſts*, *Liberties*, Franchiſes viſible or local, may be convey'd by way of Uſe. Jo. 127. by Dodderidge J. in Parliament in Lord Willoughby's Caſe.

14. But Inheritances *Perſonal*, which have no Relation to Lands or local Hereditaments, cannot be convey'd by way of Uſe, as *Annuities*; Per Dodderidge J. Jo. 127. 1 Car. in Ld Willoughby's Caſe.

15. Nothing that *paſſes by way of Extinguiſhment*, can be granted to an Uſe. G. Law of Uſes &c. 281.

(E. a) *To whoſe Uſe* a Feoffment &c. may be.

See Tit. Churchwardens (A) pl. 2.

1. A Feoffment or Gift to the Uſe of an *Alien born*, is good; for Uſe is nothing but in Conſcience; Per Yaxley. Br. Feoffments to Uſes, pl. 29. cites 12 H. 7. 27.

If A. covenants to ſtand ſeiſed to the Uſe *of his Brother, an Alien*, the ſame is good, and the Uſe will ariſe; Per Curiam. Godb. 275. pl. 388. Hill. 16 Jac. B. R. in Caſe of Godfrey v. Dixon.——But by Roll Ch. J. the Chancery cannot compel one to execute a Truſt for an Alien. Sty. 21. Paſch. 23 Car. in Caſe of the King v. Holland.

An Alien could not compel the Feoffee to execute an Uſe; for it is contrary to the Policy of the Law that an Alien ſhould plead or be impleaded touching Lands in any Court of the Kingdom G. Law of Uſes &c. 43.——The King ſhall have the Uſe of an Alien upon his Purchaſe; for the Advantage a Man receives from his Duty, can extend no farther than the Obligation of that Duty reaches; but the Allegiance of an Alien is Temporary, and therefore ſo is his Property; and ſince he is incapable of Perpetualneſs of Subjection, he cannot be protected in any Eſtate that is of Perpetual Continuance; and the Inconvenience is the ſame if this be a Freehold at Law, or a Truſt. Ibid.—But the King cannot ſeiſe the Land, but may have a Subpœna to get the Profits or the Eſtate executed to him. Ibid. 204.

2. So to the Uſe of a *Monk* is good; Per Yaxley, for the ſame Reaſon. But quære of Monk, and yet a Monk may be Executor. Br. Feoffments to Uſes, pl. 29. cites 12 H. 7. 27.

A Monk cannot have an Uſe, becauſe he has vow'd Perpetual Poverty, and therefore cannot have Property; but he may be an Executor, becauſe poſſeſs'd to another's Uſe. G. Law of Uſes &c. 44.

3. A Feoffment to the Uſe of the *Pariſhioners of A.* is void; by the beſt Opinion. And a Diverſity was taken by Tremaile, that of Things which have Continuance, as Feoffment, Leaſe &c. Pariſhioners have no Capacity; but contra of Chattles perſonal. Br. Feoffment to Uſes, pl. 29. cites 12 H. 7. 27.

An Uſe cannot be limited to *Pariſhioners* any more than the Land itſelf can; Per Dyer. 2 Le. 18. in Brent's Caſe.——G. Law of Uſes &c. 44. ſays, The Limitation of a Uſe to the *Poor of the Pariſh of D.* is good, tho' no Corporation; For tho' they are capable of no Property at Common Law in the Thing truſted, becauſe the Rules of Pleading require Perſons claiming to bring themſelves under the Gift; and no indefinite Multitude, without publick Allowance, can take by a general Name, yet they are capable of a Truſt; For here the Complainants do not derive to themſelves any Right or Title to the Eſtate, but ſhew that it has been abus'd and miſemploy'd by the Owners, contrary to Conſcience.——Ibid. 204. S. P.

4. Feoffment made to the Uſe *of Salisbury Plain, or of the Moon*, the Feoffment is good, and the Uſe void; Per Brian. But per Markham, All is void. Quære inde; for it ſeems that the Feoffment ſhall be to the Uſe of the Feoffor, becauſe it was done without Conſideration. Br. Feoffments to Uſes, pl. 37. cites 7 E. 4. 16.

5. In Quare Impedit the Defendant pleaded a Feoffment of the Manor, with the Advowſon appendant, *to the Uſe of the* Defendant *for Life*, and *after to the Uſe of the King*; and per Cur. the King cannot take but by Matter of Record; * for he *cannot have Feoffees to his Uſe.* Br. Feoffments &c. pl. 17. cites 21 H. 7. 28.

* S. P. nor is the Uſe any thing at Common Law. Br. Aid del Roy, pl. 66. cites S. C.——The King may be Ceſty que Uſe; but then the Declaration of Uſe, and the Conveyance itſelf, muſt both be Matter of Record, becauſe the King's Title is compounded of both; I ſay, not appearing of Record, but by Conveyance of Record: And therefore if I *covenant with J. S. to levy a Fine to him to the King's Uſe*, which I do accordingly, and this *Deed* of Covenant be *not inroll'd*, and the Deed be found by Office, the Uſe veſteth not; but e converſo [if] inroll'd, and the Feoffment alſo be found by Office, the Uſe veſteth. Ld. Bacon's Readings on the Statute of Uſes, 349.——But if I levy a *Fine, or* ſuffer a *Recovery to the King's Uſe, and declare the Uſe by Deed of Covenant inroll'd*, tho' *the King* be *not Party*, yet it is good enough. Ld. Bacon's Reading on the Statute of Uſes, 350.——G. Law of Uſes &c. 44. ſays that tho' the King cannot have Feoffees to his Uſe, becauſe he cannot take but by Matter of Record; yet he may take it when the Uſe is found of Record, where an Office is found of the whole Matter.

6. A

If one makes Feoffment to the Uſe of himſelf for Life, and after to the Uſe of his *firſt Iſſue Male hereafter to be born*;

6. A *Fine* was levied to J. S. *to the Uſe of B. for Life*; and after to the Uſe *of the Children of C. procreatis*. C. at the Time of the Limitation, had 2 Sons, and before the Death of B. had Iſſue two Daughters. It was adjudged by 3 Juſtices, but Owen e contra, in this Caſe, that the Daughters poſtnatæ ſhould not take, but only the Children which were *in Eſſe* at the Time of the Limitation. Cro. E. 334. pl. 1. Trin. 6 Eliz. C. B. Frederick v. Frederick.

Here no Uſe veſts in the Son. Arg. Dal. 113. pl. 4. 16 Eliz. in Gilbert's Caſe.

7. A Uſe to a *Perſon uncertain* is not void in the firſt Limitation, but executes not till the Perſon be in Eſſe; ſo that this is poſitive, that an Uſe ſhall never be in Abeyance, as a Remainder may be, but ever in a Perſon certain, upon the Words of the Statute; and the Eſtate of the Feoffees ſhall be in him or them which have the Uſe. The Reaſon is, becauſe no Confidence can be repoſed in a Perſon unknown and uncertain, and therefore if I make a *Feoffment to the Uſe of J. S. for Life, and then to the Uſe of the right Heirs of J. D.* the Remainder is not in Abeyance, but the Reverſion is in the Feoffor (quouſque;) ſo that upon the Matter all Perſons uncertain in Uſe, are like Conditions or Limitations precedent. Ld. Bacon's Reading on the Statute of Uſes, 350.

8. *So* if I enfeoff one *to the Uſe of J. S. for Years*, the *Remainder to the right Heirs of J. D.* this is in Abeyance not executed, and therefore not void. Ld. Bacon's Reading on the Statute of Uſes, 350.

A Corporation may take a Uſe without Deed, but cannot limit a Uſe

9. A *Corporation* may take an Uſe, and yet 'tis not material whether the Feoffment or the Declaration be by Deed; but I may infeoff J. S. to the Uſe of a Corporation, and this Uſe may be averr'd. Ld. Bacon's Reading on the Statute of Uſes, 350.

without Deed. Ibid. 355.

10. If a Man covenants *to ſtand ſeiſed to the Uſe of ſuch Perſons as J. S.* ſhall name, this is void, tho' J. S. names one of the Covenantor's Sons. But if a Man covenants to ſtand ſeiſed to the Uſe *of ſuch of his Sons or Couſins as J. S. ſhall name*, this is good, if he makes the Nomination; for a general Covenant that extends farther than a Man's own Kindred is void, and falls not within the equitable Conſideration; and being in its Creation void, it can never be made good. G. Law of Uſes &c. 49.

(F. a) Deed and Will. Out of what the Eſtate will ariſe. *Out of* the *Deed*, *or* out of the *Will*.

S. C. cited G. Law of Uſes &c. 36, 37. That the Leaſe ſhall bind the Son; for it being expreſsly declared to be to the Uſe of his Will, it ſuppoſes a

1. A Man made a *Feoffment* to C. *to the Uſe of his laſt Will, expreſs'd in the ſame Deed*, viz. To his own proper Uſe for his Life, and after to S. his Son in Tail &c. and after he made a Leaſe for Years, and died. And it was the Opinion of the Court, and all except Shelley, that he may alter his Will in this Caſe; for where this *Word Will is expreſs'd in the Deed or Schedule*, he may *alter* his Will notwithſtanding the other Words; but where the Uſe is declared upon the Livery, without this Word Will, there he cannot alter his Will. Br. Feoffments &c. pl. 1. cites 19 H. 8. 11.

Power in him to change it. ——— Ibid. 212. ſays it is the ſame if he ſuffers a Recovery to the

the Uſe of his laſt Will, and declares Uſes by Deed in the mean time; yet they are revocable, being founded on a Recovery ſuffer'd to Uſes that were alterable at the Will of A. Therefore in ſuch a Caſe he may either declare new Uſes, or if he makes a Leaſe for Years, that ſhall bind the Perſons nominated by the Declaration of the Uſes to the Will, cites Hob. 349. Bro. 337. b. 19 H. 8. 12. Dy. 166. 324.

2. When Feoffment is made *to perform his Will*, or *to the Uſe of his Will*, and after the Feoffor deviſed that his Feoffees ſhall have the Land for certain Time. Adjudged that the Land paſſes by the Will; for there is a Diverſity where *Feoffment is* made to the Uſe of a Will, or of Performance of a Will, or *to ſuch Uſes as Feoffor ſhall declare by his Will*; for in the firſt Caſe the Uſe of the Feoffment immediately executes in the Feoffor; in the laſt Caſe it is in him only, for want of the Conſideration in the Feoffees till the Will is made: So that in the firſt Caſe the Deviſe ſhall be Deviſe of a Tenant in Poſſeſſion of the Land; in the 2d Caſe the Will ſhall be but Inſtrument to convey the Uſe of the Feoffment. Mo. 280. pl. 434. Mich. 31 & 32 Eliz. C. B. Batty v. Trevilion.

And. 245. pl. 259. S. C. and agreed that the Feoffor has the Fee, and may do with the Land as if no Feoffment had been made. —Le. 192. pl. 276. S. C. but S. P. does not appear. —— S. C. and ſame Diverſity cited Mo. 516. in Lord Buckhurſt's Caſe, that when the Reference is to the Diſpoſition by his Will, there the Will is the Subſtance to guide the Matter. But when the Reference is to Perſons whom he ſhall name by his Will, there the Will is but Circumſtance, and Inſtrument to name the Perſons; and the Perſons ſhall take nothing but the *Naming* by the Will, and the *Subſtance* by the Livery. —— See pl. 3.

3. It was Reſolved by Advice of all the Juſtices in England, 1ſt. That when Feoffment is made *to the Uſe of a laſt Will*, the *Feoffor has the Land again* by the Uſe, and this is intended *to the Feoffor and his Heirs*. 2dly, That when he *limits the Uſe upon Eſtate* * *executed to ſuch a Perſon, and of ſuch Eſtate as he ſhall name by his Will*, there he has Power to limit a Uſe by the Will; and this ſhall not enure by Will as a Deviſe, but upon the Statute executed as Limitation of Uſe. 3dly, *If he has Eſtate which he may paſs by Will*, and *has* alſo *a Power to limit a Uſe of the ſame Land as is* aforeſaid, that in ſuch Caſe, if he *deviſes the Land generally*, the Deviſee is in by the Deviſe in Eſtate; but if he *limits the Uſe by Special Words*, he ſhall be in of the Uſe upon the Statute executed. 4thly, If he has *Power to limit an Uſe, and no Power to deviſe the Land in Eſtate*, there if he deviſes the Land generally, this ſhall enure as a † Limitation of the Uſe; becauſe otherwiſe it ſhall be void, as in the principal Caſe he could not deviſe the Land becauſe he had convey'd two Parts before. Mo. 567. pl. 773. Parker v. Sir Edward Clere.

6 Rep. 17. b. Mich. 41 & 42 Eliz. Sir Edward Clere's Caſe, S. C. accordingly, and Judgment affirm'd in B. R. —— Cro. E. 877. pl. 5. Paſch. 44 Eliz. B. R. S. C. but adjornatur. —— Cro. J. 31. pl. 2. Trin. 2 Jac. B. R. S. C. and

Judgment affirm'd. And Coke Attorney General, ſaid that Lutſey's Caſe in the Exchequer, after Argument, was adjudg'd accordingly, that it ſhould not enure as a Deviſe, but as a Limitation upon the former Feoffment; for otherwiſe the Will would be utterly void. —— S. C. cited Mo. 611. pl. 842. —— Gilb. Law of Uſes 210, 211. cites S. C. and the Diſtinction as above in Mo. —— S. C. cited ibid. 204, 205. and ſays the Reaſon of the Diverſity ſeems to be this, in the firſt Caſe he having limited no Uſes, and having a Uſe to him and his Heirs, the Feoffment in both Caſes being made without Conſideration, the Statute executes the Eſtate fully in him again, and leaves nothing in the Feoffee; but in the latter Caſe, there being Uſes expreſsly named, tho' the Feoffor had his Eſtate again, yet there is a Poſſibility left in the Feoffee, which becomes an Eſtate when the Contingency happpens: But then it will be objected, that the firſt Feoffment being made upon Truſt and Confidence to perform his laſt Will, this was a Uſe in Contingency; and ſo there is the ſame Reaſon for this Caſe as for the other; but it may be anſwer'd, that this is no Uſe; or if it were one at Common Law, yet that 'tis now deſtroy'd by the Feoffee, who can never perform the Truſt repoſed in him becauſe the Eſtate preſently by the Act out of him; at Common Law, it might be a Uſe, for he had an Eſtate in him; ſo that he could perform the Will of the Deviſor. But in the other Caſe, the Will is but a Direction of the Perſons, and the Eſtates they ſhall have according to this Power reſerved upon the Feoffment, and there upon the original Feoffment there was nothing for the Feoffees to do.

When the Feoffment was made to the Uſe of the Feoffor's laſt Will, this was expounded to be no more than reſerving a Power to diſpoſe of the Land by Will, which as Owner he might do before, and not that he deſign'd himſelf to raiſe a particular Authority to limit an Uſe to this or that Perſon upon the Feoffment; ſo the Feoffment being made without Conſideration, was to the Uſe of him and his Heirs; and therefore when he diſpoſes of the Land, tho' he did it as having a Power by the Feoffment, yet the Will took Effect, as he was Owner of the Land. But this Diſtinction ſeems to me to have no Manner of Reaſon or Ground for it in any fair Conſtruction. Gilb. Law of Uſes, 210.

* *As* if one levy a *Fine to ſuch Uſes as he ſhall name by his Will*, and he declares them after by his Will, yet this ſhall not be Deviſe of the Land, but it ſhall paſs by the Eſtate executed. Arg. Mo. 262. pl. 412. in Lady Greſham's Caſe.

† And ſhall not enure as a Deviſe. Arg. Mo. 519. cites 35 Ellz. at St. Alban's Term, reſolved in the Caſe of Thomas v. Gwinn.

It was argued, that tho' a Conveyance may enure in ſeveral Courſes, yet it can't enure for Part in one Courſe and Part in another, and for that this Deviſe *enures as a Deviſe for one Acre and Declaration of the Uſe of the Feoffment for the other Acre*; for it is agreed in Sir Rowland Heywood's Caſe, 2 Rep. 35. a. 6 Rep. 18. a. Sir Edward Clere's Caſe, and alſo in this Caſe, the Deviſor has expreſsly declared That the Land ſhall paſs by the Feoffment, and that the Will ſhall be but a Declaration of the Uſe of the Feoffment, and ſo nothing ſhall paſs by the Deviſe; to which the Juſtices ſeem'd to accord, and ſo it was adjudg'd accordingly. 2 Brownl. 52. Bone v. Stretton.

4. *Feoffment* by A. *of 2 ſeveral Acres*, whereof *one was leaſed to B.* and the other to C. to the Uſe of his laſt Will. A. *makes Livery* on the ſeveral Acres, but *B. refuſes to attorn.*—A. makes his Will, and declares the Uſe to himſelf for Life, the Remainder to a Stranger. B. *grants his Eſtate to the Feoffee*, and the Feoffee dies. Per Cur. This does not enure to make Attornment and Surrender, as expreſs Surrender will; for expreſs Surrender admits the Reverſion to be in the Grantee to whom the Surrender is made. But here, before Attornment, the Grantee has nothing; and after Attornment, the particular Eſtate being granted, it ſhall be drown'd in the Reverſion; and tho' the Words of the Deviſe are That his Feoffees and all other Perſons, which after his Deceaſe ſhall be ſeiſed, ſhall be ſeiſed to the ſame Uſes before declared; and of B.'s Acre he has no Feoffee, but the *Feoffment void for want of Attornment*, yet it was agreed that the Deviſe was good. 2 Brownl. 51. Hill. 8 Jac. C. B. Bone v. Stretton.

Ley 39. Mich. 9 Jac. in the Court of Wards. Brand's Caſe.

5. A *Fine is levied* to the Uſe of ſuch Perſons, and for ſuch Eſtates, as the Conuſor ſhould limit and appoint by his laſt Will. He after this *covenants to ſtand ſeiſed of theſe Lands to the Uſe of his 2d Son and his Heirs*, and then *makes his Will, and diſpoſes of the Eſtate therein according to the Power*. The Queſtion was, which of theſe Diſpoſitions ſhould take Place, the Deed or the Will? The Will was according to the Power, reſerved upon the Fine, and the *Deed intervened before they came to execute this Power*. It was there held, that having made a Diſpoſition of the Eſtate by Deed, tho' by a Covenant to ſtand ſeiſed, that ſhould take Effect; and *the Will*, tho' made according to the Power, *came too late* to execute it. Chan. Caſes, 100, 101. per Holt Ch. J. in his Argument in Caſe of Bath v. Montague, cites Lee 39. Broad's Caſe.

6. *Copyholder ſurrenders* to the Uſe of his laſt Will. The Will is only declaratory of the Uſes of the Surrender, and nothing paſſes by the Will, but all paſſes by the Surrender; per Williams J. and agreed per Fleming Ch. J. Bulſ. 200. Paſch. 10 Jac. Semaine v. ....

7. A. *infeoff'd* B. and C. to the Uſe of *himſelf for Life*, and after his Deceaſe to the Uſe of ſuch Perſon or Perſons as he ſhould appoint by his Will, for ſuch Intereſts or otherwiſe as in his ſaid Will ſhould be ſpecified.—A. made his Will, which being without Reference to the Feoffment, the Law will conſtrue it as the Will of him that is Owner, and may diſpoſe of it as Owner, and not as Declaration of the Uſes, which is an Authority only; ſo that what the Will was ſufficient to paſs as a Will, paſſes by it; but other Things therein deviſed, which would paſs as by a Declaration of the Uſes of the Deed, will not paſs; and it cannot be conſtrued a Will for one Part, and an Authority for another; Per 3 Juſtices againſt Croke J. Cro. Car. 38. pl. 5. Trin. 2 Car. C. B. Brown v. Tailor.

* Cited per Fleming Ch. J. 1 Bulſ. 200. in Semaine's

8. Sir W. D. *enfeoff'd* ſeveral to ſuch Uſes *as he ſhould declare by his Will* in Writing. If, in Purſuance of that Feoffment, he had limited the Uſes by his Will, the Will had been but *declaratory*; tho' if he had made a *Feoffment to the Uſe of the Will* it had been otherwiſe, according to

to * Sir Edw. Cleer's Caſe. 6 Rep. 18. Vent. 194. Paſch. 24 Car. 2. B. R. in Sir Ralph Bovey's Caſe. Caſe, and ſays that the Will is only directory.—— 10 Rep. 86. in Loveis's Caſe.

9. *And* Hale ſaid, That my Lord Coke made a *Feoffment (provided that he might diſpoſe by his Will)* to the Uſe of the Feoffee and his Heirs; and reſolved, in that Caſe, he might declare the Uſe by his Will, which ſhould ariſe out of the Feoffment. Vent. 194. in Sir Ralph Bovey's Caſe.

10. If a *Settlement* be made *and Lands charg'd with ſuch a Sum of Money as a Will ſhall declare*, the Will in ſuch Caſe will be but *Declarative, and not Operative*. Cited 2 Vent. 367. in Lord Pawlet's Caſe, as the Caſe of Bond v. Richardſon.

(G. a) *Rules* relating to Uſes.

1. USES are not *allowable* but as they are *conſonant to* the Rules in *Law and Reaſon*, by Anderſon Ch. J. Cro. E. 334. Trin. 36 Eliz. C. B. in Caſe of Frederick v. Frederick.

2. This *Rule* is to be obſerved in Uſes, that in every Caſe there is to be *Donor and Donee*, who ſhall take as well in Limitation of an Uſe as of an Eſtate executed; and tho' the Common Law knows nothing of Uſe, yet now *by the Statute* an *Uſe is an Eſtate*, and to take ſuch an Eſtate there ought to be a Donee; per Walmſley. Cro. E. 334. in Caſe of Frederick v. Frederick.

(H. a) Good or not. *Limited upon what.*

1. AN Uſe to be raiſed *on an Impoſſibility* ſhall never ariſe, *as* if I covenant to ſtand ſeiſed to the Uſe of B. and his Heirs, *after the End of a Term* for Years, *which J. S. has in the Manor of D.* whereas *J. S. has no Term, in it* in ſuch Caſe the Uſe ſhall never ariſe. Arg. Le. 195. And S. P. admitted, ibid. 199. pl. 279. in Ld. Paget's Caſe.

2. An Uſe ſhall begin *on a Contingency*; Per Gawdy J. and cites 27 H. 8. 5. And if A. and B. covenant by Indenture that A.'s Sons ſhall marry P's Daughter, on which B. pays A. 100 l. and A. covenants that if the Marriage don't take Effect, that A's Feoffees ſhall ſuffer B. his Executors and Aſſigns to have the Iſſues and Profits of certain Lands, till B. his Executors and Aſſign ſhall be contented of the ſaid 100 l. by A. his Executors or Aſſigns, there if the Marriage takes not Effect upon ſuch Contingent, the Uſe ſhall ariſe to B. Per Manwood J. 2 Le. 16. pl. 25. in Brent's Caſe.

3. A *future* Uſe may well be raiſed on *Non-Performance of a Condition*; Per Glanvil. Cro. E. 689. in Caſe of Smith v. Warren, cites it as adjudg'd in Pl. C. Bracebridge's Caſe. Le. 264. 266. pl. 355. 20 Eliz. in C. B. Bracebridge's Caſe accordingly.——Mo. 99. pl. 243. S. C. by Name of Harwell v Lucas.——2 Le. 221, 222. pl. 281. S. C.——S. P. by Manwood J. 2 Le. 16. pl. 25. in Brent's Caſe.

(I. a) Limited

(I. a) Limited *in futuro.*

1. IF a Man covenants that *after his Deceaſe his Heirs ſhall ſtand ſeiſed* to the Uſe of his younger Son, 'tis void; Per Hobart Ch. J. Hob. 313. in Caſe of Kibbet v. Lee.

2. Limitation of an Eſtate *on a Covenant to ſtand ſeiſed* may be made to *commence after the Anceſtor's Deceaſe*; for the old Seiſin of the Covenantor is enough to ſupport it. Arg. 2 Mod. 208. in Caſe of Southcot v. Stowel.

So of a *Bargain and Sale* if the Conſideration be good; and ſo of Limitation of Uſe upon *Feoffment, Fine, or Recovery*; for Uſe is volatile, and may commence in *futuro*; but not ſo where the Eſtate paſſes by *Livery* to avoid Abeyance and the Incongruity that any ſhould have a particular Eſtate without Donor or Leſſor; and this is by Rule of Common Law. But in the Caſe of Uſes 'tis raiſed out of Franktenement, and when 'tis raiſed, the Statute 27 *H.* 8. transfers that to the Poſſeſſion. Jenk 247. pl. 37.

3. Where a *New Rent* is created, tho' for Life or in Fee, it may *in its Creation* be limited to take Effect at any Time *in futuro*, becauſe it has no Exiſtence till that Time comes, and ſo no Suſpenſion of any Freehold. Carth. 308. Paſch. 6 W. & M. B. R. Oſmere v. Sheaf.

But where an *Old Rent* is granted for Life, or in Fee to commence *in futuro*, there the Grant is void, becauſe there is a Rent in Eſſe, and ſo the Freehold of that Rent which was in Eſſe at the Time of the Grant will be ſuſpended, and therefore ſuch Grant is void. Carth. 308. Oſmere v. Sheaf.—Carth. 352. Arg. S. P. in Caſe of the King v. Kemp.—The *ſame* Law of a *New Office*; and the ſame Difference is between a new and old Office as between a new an old Rent. Carth. 352. Trin. 7 W, 3. B. R. the King v. Kemp.

4. A Feoffment to the Uſe *of the Right Heirs of J. S. after the Death of J. S.* is a future Uſe; but if it were limited to ariſe after the Death of one without Iſſue, this is void, without a particular Eſtate to ſupport it. So is Pell and Brown's Caſe, unleſs the dying without Iſſue be within a certain Term, as within the Life of a Man; for otherwiſe the Law will not expect the Veſting of it; but will conſtrue the Limitation to be void, becauſe the Poſſibility is foreign; Per Holt Ch. J. and ſays that Holcroft's Caſe in * Moor is expreſs. 12 Mod. 39. Paſch. 5 W & M. in Caſe of Davis v. Speed.

* Mo. 486. pl. 686.

(K. a) *New Uſes.* Where well limited *upon a Revocation or Power reſerved.*

1. A Suffer'd a *Common Recovery*, and 13 H. 8. declar'd the Uſes to be *to the Intent the Recoverors ſhould perform his Will* touching the Diſpoſition of thoſe Lands, and then Will'd ſo and ſo; Per Dyer Ch. J. A. may at any *Time alter this Will* and the Uſes directed in it; for Will and Laſt Will are intended all one. And this Indenture is Quaſi a Will which is changeable; And the other Juſtices agreed to this Opinion. D. 314. b. pl. 97. Trin. 14 Eliz. Anon.

2. A. ſeiſed in Fee, and having Iſſue only three Daughters, B. C. and D. *covenanted to ſtand ſeiſed to* the Uſe of *himſelf for Life, and after* his Deceaſe, then *to the Uſe of his Daughters, and if any die without Iſſue their Part to go to the Survivors and the Heirs of their Bodies, provided that it*

Cro. E. 34. pl. 1. Mich. 26 & 27 Eliz. Wildmay v.

it ſhall be lawful for the ſaid A. to limit any Part of the ſaid Land by Will for the Advancement of any Perſon for Life, Lives or Years, for Payment of his Debts, or Legacies, Preferment of his Servants, or other reaſonable Conſideration. B. died without Iſſue, then *A. aſſign'd* great *Part of the Land limited* before *to B. to D.* for the Advancement of D. and the Heirs of her Body for 1000 Years. Adjudg'd by all the Juſtices of England, that the Limitation for 1000 Years was void, and not warranted by the ſaid Proviſo. 1 Rep. 175. a. b. Hill. 26 Eliz. in the Court of Wards, Mildmay's Caſe.

Standiſh S. C. and Judgment was affirm'd in B. R. For the Proviſo was to limit any Part for Payment of Debts &c. Preferment of his Servants, or other reaſonable Conſiderations &c. and this Demiſe for 1000 Years is not reaſonable, nor can it be for the Advancement of the Blood of A. which was the Intent of the Indenture; for it ſhall go to D.'s Husband if he ſurvives her, and if D. ſurvives him, it will go to her Executor on her Death, and by no Poſſibility can go to the Heirs or Blood of A. but will go to Strangers. Beſides C. by the Indenture was to have a Part of it, whereas by this Leaſe all her Intereſt in Effect is quite taken away contrary to the Intent of the Indenture. —— Mo. 144. pl. 287. S. C. —— Jenk. 247. pl. 36. S. C

3. M. a Widow made a *Feoffment* in Fee *to the Uſe of herſelf for Life,* Remainder to *B. her youngeſt Son in Tail,* Remainders over, Reverſion *to her own right Heirs,* with a Power of Revocation on tender of 10 l. to the Feoffees, and that then the ſaid Uſes ſhould be void, and that the Feoffees ſhould ſtand ſeiſed to ſuch new Uſes as ſhe ſhould declare; afterwards *by another Deed ſhe did revoke* the former Uſes, *and declared, that the Feoffees* and their Heirs *ſhould ſtand ſeiſed* of the Lands *to the Uſe of G. W. for Life, Remainder to herſelf for Life, Remainder to B.* in Tail, with Remainder as before; afterwards B. died, leaving Iſſue a Daughter, then M. died, leaving A. her eldeſt Son and Heir. It ſeems, that if A. had enter'd after the Death of M. (which he did not) that in ſuch Caſe he had defeated clearly the Eſtates and Uſes limited by the firſt Indenture; but not having enter'd, the Attorney General thought it clear that the Eſtate limited in Tail to B. was not avoided. And yet it ſeems that the laſt Limitation in the new Indenture is not ſufficient to ſettle good Uſes de Novo, but that the old Uſes being void the Land deſcends. Mo. 744. pl. 1023. Paſch. 42 Eliz. in the Court of Wards. Vernon's Caſe.

4. A. ſeiſed in Fee *infeoffed J. S. and J. N. to the Uſe of himſelf for Life, Remainders over* with a *Power of Revocation* on Tender of 12 d. &c. to the Feoffees, and then *the ſaid Uſes to ceaſe, and to be to the Uſe of him and his Heirs*; accordingly *A. revokes, and by a new Deed declares that J. S. and J. N. for good Conſideration in the Deed expreſſed, ſhould ſtand ſeiſed* of the ſaid Land to the Uſe of himſelf &c. But held that this 2d Indenture is not ſufficient to raiſe the new Uſes; for tho' the Conſideration, (viz. Blood and Affection) be ſufficient, yet he does *not covenant to raiſe them out of his own Poſſeſſion, but that his Feoffees ſhould be ſeiſed.* So that none but they ſhall ſtand ſeiſed, whereas he *has not any Feoffees,* and therefore no Uſe can ariſe. And the Intent ſhall not make it to be conſtrued that he himſelf ſhall ſtand ſeiſed, ſeeing that he has no Feoffees. Cro. E. 856. pl. 21. Mich. 43 & 44 Eliz. C. B. Atwaters v. Bird.

Noy. 38. Allwaters v. Bird, S. C. but S. P. does not appear.

See Executory Deviſe.

(L. a) Limitation. Good. *Fee after a Fee.*

1. *FEoffment in Fee* by A. *to two* to the Uſe of A. and *B.* for their Lives, Remainder to C. their Son for his Life, and *after to other two* Feoffees to the Uſe of the Heirs of the Body of C. &c. All the Juſtices held that the 2d Feoffees had not the Fee, becauſe the Fee-ſimple was given before to the firſt Feoffees; and one Fee-Simple cannot depend on another, notwithſtanding that after the determining of the former Uſes for Life, the Fee-Simple ſhould be veſted again in the Heirs of the Feoffor: And that the Words (That the 2d Feoffees ſhould be ſeiſed) ſhould be void. And the latter Uſe is utterly void, and ſhall not be raiſed by Indentment. But otherwiſe it had been if it had been *by Deviſe*. Godb. 7. pl. 9. Paſch. 23 Eliz. C. B. Anon.

2. *A. ſeiſed of Land in Fee and of other Land in Reverſion after the Death of J. Tenant for Life, levied a Fine of the Whole, as to that Parcel in Poſſeſſion to* the Uſe of *himſelf for Life*, the Remainder *to M. his Wife for Life*, Remainder *to B. his Son and Heir apparent, his Heirs and Aſſigns for ever*; And *as to the other Parcel* in the Poſſeſſion of J. *after the Death of J. and A. to* the Uſe of *B. his Heirs and Aſſigns for ever. And in Caſe B. die, living A.* then *the Whole to the Heir of A. and his Heirs for ever.* B. dies leaving Iſſue C. then J. and M. die. A. conveys the Land to a Stranger and his Heirs. And whether C. or the Grantee of A. ſhould have the the Land, is the Queſtion. This Caſe was argued by Pollexfen for C. the Heir of B. and he reports that the Court was of Opinion that the Clauſe, *And in Caſe B. dies &c.* being by Way of Limitation of an Uſe, was a good Limitation; but that no Judgment was given, becauſe there were diverſe Imperfections in the Verdict, but that a new Venire facias was awarded, and afterwards the Parties agreed. Pollex. 72. and 99. 22 Car. 2. B. R. Carpenter v. Smith.

(M. a) Uſes *upon Uſes.*

1. USE cannot be on a Uſe. See (O 3) pl. 4. and the Notes there.

2. *Poſſeſſion is transferr'd to the Uſe by the Statute*, and therefore an *Uſe* cannot be expreſs'd *upon an Uſe*, as *Feoffment to J. S. to his own Uſe*, and that he ſhall be ſeiſed *to the Uſe of R. H.* This is void to R. H. becauſe the Uſe and Poſſeſſion was to J. S. before. Mo. 46. pl. 138. Per Brown J. Mich. 5 Eliz. Anon.

3. A. enfeoffed B. and C. (his two Sons) *to the Uſe of himſelf for Life*, and after to the *Uſe of them and their Heirs, Ad ultimam Voluntatem ſuam perimplendam*, and afterwards deviſed it to D. Per Gawdy, D. ſhall not have the Land, for an Uſe can't be limited to an Uſe. So that when he limits it to the Uſe of his two Sons and their Heirs, he cannot afterwards limit it to the Uſe of his laſt Will; but the Words, Ad ultimam &c. are void Words, as to the limiting any Uſes thereby. And to that Opinion Clench J. agreed; but Fenner J. doubted. Adjornatur. Cro. E. 382. pl. 2. Paſch. 37 Eliz. B. R. Girland v. Sharp.

(N. a) *Springing*

(N. a) *Springing Uſes.* What are, and good.

1. IF A. *covenants* with B. *that when A. ſhall be enfeoffed by B. of three Acres* in D. that *then* the ſaid *A. and his Heirs, and all others ſeiſed of the Land of the ſaid A. in S. ſhall be thereof ſeiſed to the Uſe of the ſaid B. and his Heirs*; there if A. makes a Feoffment of his Land in S. and after B. enfeoffs A. of the ſaid three Acres in D. then A's Feoffees ſhall be ſeiſed to the Uſe of B. notwithſtanding that he had no Notice of the Uſe; for the Land is and was bound with the Uſe aforeſaid, * to whoſe Hands ſoever it ſhall come; and it is not like to the Caſe where the Feoffee in Uſe ſells the Land to one who has no Notice of the firſt Uſe. For in this firſt Caſe the Uſe was not in Eſſe till the Feoffment be made of three Acres, and then the Uſe commenced. Br. Feoffments al Uſes, pl. 50. cites 30 H. 8. 1 Rep. 99. a. cites S. P. adjudg'd in the Court of Wards. 3 Eliz. Wood's Caſe. —— * 2 Sid. 98. ſays, Arg. that this was denied in Chudley's Caſe.

2. Tho' Uſes of *a Fine* by A. to B. are upon *Condition to pay* to A. 40 l. per Ann. for his Life, but in Caſe of *Default*, then to the Uſe of A. for his Life. Per Glanvil J. this being to the Conuſor himſelf is a Condition. But if it had been *limited to a Stranger* to have ariſen on ſuch a Condition, it had been a ſpringing Uſe to him on the Non-Performance thereof. Cro. E. 689. pl. 23. Trin. 41 Eliz. C. B. Smith v. Warren.

3. A ſpringing executory Uſe to *ariſe after a dying without Iſſue* the Law will not expect. Per Cur. 2 Salk. 675. Hill. 3 W. & M. in B. R. in Caſe of Davis v. Speed.

4. *Feoffment* to the Uſe of A. and his Heirs, *to commence 4 Years from thence*, is good, as a Springing Uſe, and the whole Eſtate remains in the Feoffor in the mean Time; Per Holt Ch. J. 2 Salk. 675. in Caſe of Davis v. Speed. So it is, if it were to commence *after the Death of A. without Iſſue, if he die without Iſſue within 20 Years*; Per Holt. Ch. J. 2 Salk. 675. in Caſe of Davis v. Speed. —— 12 Mod. 39. S.C. and S. P. —— Mod. 120. in Caſe of Pybus v. Mitford.

5. *Feoffment to the Right Heirs of B.* This is no good Springing Uſe, per tot. Cur. becauſe it is by Way of *Preſent Limitation*. Aliter, where it is future, as to the Right Heirs of B. *after his Deceaſe*. 1 Salk. 225. pl. 3. 5 W & M. in B. R. in Caſe of Lamb v. Archer. Or to the Uſe *of ſuch Son as J. S. ſhall name*, it is good if J. S. nominate; Per Bridgman Ch. J. Raym 83. Mich. 15 Car. 2. C. B. in Caſe of Bate v. Amherſt and Norton. cites 1 Rep. 176. b. Mildmay's Caſe, and 8 Rep. 95. Manning's Caſe.

6. If A. *covenants to ſtand ſeiſed* to the *Uſe of the Heirs of his own Body, begotten after the Deceaſe of B.* This is a good Limitation of a Springing Uſe; and the old Eſtate remains in A. till the Contingency happens; Per Holt Ch. J. who ſaid that this was the Opinion of Hale Ch. J. Carth. 263. in Caſe of Davis v. Speed. Mod. 161. in Caſe of Pibus v. Mitford.

7. The *firſt Uſe* may be a Springing Uſe; for if *A. bargains and ſells to the Uſe of B. 5 Years hence* this is a good future Uſe; Per Holt Ch. J. 12 Mod. 39. in Caſe of Davis v. Speed. If I *bargain and ſell* my Land *after 7 Years*, the *Inheritance of the Uſe only paſſes*, and there *remains an Eſtate for Years* by a kind of Subſtraction of the Inheritance or Occupier of my Eſtate, but meerly at the Common Law. Ld. Bacon, on the Statute of Uſes, 352.

(O. a) *Second*,

(O. a) *Second, or ſhifting* Uſes.

1. NOTE if a Man made a *Feoffment in Fee* before the Statute of Uſes, made Anno 27 H. 8. cap. 10. or after this Statute *to the Uſe of W. and his Heirs till A. paid* 40 *l.* to the ſaid W. and *then to the Uſe of the ſaid A. and his Heirs*, and after comes the Statute of Uſes and executes the Eſtate in W. and after *A. pays* to W. the 40 l. there *A. is ſeiſed in Fee if he enters*; by ſeveral. But by ſome, A. ſhall not be ſeiſed in Fee by the ſaid Payment, unleſs the Feoffees enter; Quære inde. And therefore it ſeems to be ſureſt to enter in the Name of the Feoffees, and in his own Name, and then the one Way or the other the Entry ſhall be good, and ſhall make A. to be ſeiſed in Fee; and therefore ſee that a Man at this Day may make a Feoffment to Uſes, and that the Uſe *ſhall change from one to another by Act Ex poſt facto by Circumſtance*, as well as it ſhould before the Statute 27 H. 8. of Uſes. Br. Feoffments al Uſes, pl. 30. cites 6 E. 6.

As if I make a Feoffment *to the Uſe of my Wife that ſhall be and my firſt begotten Son for their Lives*, and I marry; my Wife takes the whole Uſe; and if I afterwards have a Son, he takes jointly with my Wife. Ld. Bacon on the Statute of Uſes, 351.

2. If I limit an Uſe *jointly to two* Perſons *not in Eſſe*, and the *one comes to be in Eſſe*, he ſhall take the intire Uſe; and yet if *the other afterwards comes in Eſſe*, he ſhall take jointly with the former. Ld. Bacon on the Statute of Uſes, 351.

2 Le. 221. pl. 281. Paſch. 16 Eliz. C. B. Bawell v. Lucas S. C. and Dyer ſaid that the Attornment, tho' after the 15 Days is good to raiſe ſecondary Uſes, tho' the firſt Uſes did not take Effect; for the Condition is not annex'd to the State of the Land, but to the Uſe only; and the Meaning was, that the Feoffor ſhould never have the Inheritance again. ——— And. 113. pl. 157. S. C. by the Name of Bracebridge v. Bracebridg but S. P. does not appear. —— Le. 264. pl. 355 20 Eliz. C. B. Bracebridge's Caſe S. C. and S. P. adjudg'd accordingly, that the Limitation beyond the firſt Uſe ſhall not be defeated for Want of Attornment to the firſt Uſes.

3. A. *ſeiſed of the Manor* of K. *leaſed* 6 *Acres, Parcel* of it *to J. S. for* 21 *Years, without any Remainder*, and *after lets the* 6 *Acres to J. D. for* 20 *Years, to begin after the Expiration of the firſt Leaſe, rendring Rent*; and afterwards *made a Feoffment of the Manor and all his Lands to the Uſe of the Feoffees and their Heirs, upon Condition if they did not pay* 10,000 *l. within* 15 *Days*, then *it ſhould be to the Uſe of himſelf and M. his Wife*, the *Reverſion to C. their* 2*d Son in Tail*, with divers Remainders over, the *Remainder to his Right Heirs*; *Livery was made of the Land in Poſſeſſion*, and *not in the ſix Acres*, the *Money was not paid*; afterwards *J. S. attorn'd*; *A. and M. died*; the *firſt Leaſe ended*; *J. D. died*; M. married the Defendant; C. diſtrein'd for the Rent. Adjudg'd, that tho' the Reverſion of the 6 Acres did not paſs by the Livery without Attornment, yet the Attornment of J. S. the firſt Leſſee, was ſufficient; and altho' the Uſe to the Feoffees and their Heirs was determin'd before the Attornment, yet the Attornment was good to paſs the Reverſion to the laſt Contingent Uſe, and ſo the Title of C. to the Rent was good. Mo. 99. pl. 243. Hill. 14 Eliz. Harwell v. Lucas.

4. Conveyance by Fine to A. B. *to the Uſe of C. D. and M. his Wife for Life*, Remainder after their Deceaſe to the *Uſe of C.'s Executors for ſix Months*, and after the ſix Months ended to the Uſe *of E. and the Heirs Male of his Body*, Remainder to C. and his Heirs, *provided if C. at any Time after have Iſſue* of his Body, or any Wife of C. at his Deceaſe be Enſient with any Iſſue begotten by C. then *after ſuch Iſſue had, and after* 500 *l. paid to G.* or tender'd and refuſed, *within ſix Months after the Birth* of ſuch Iſſue, then the Uſe of the ſaid Lands immediately after the ſix Months expired ſhall be *to C. and the Heirs of his Body, and in Default to C. and*

C and his Heirs for ever. M. dies, and C. marries N. Per Plowden and Dyer, before the Performance of the Contingent, C. has no larger Eſtate than he had before. D. 314. pl. 96. Trin. 14 Eliz. Anon.

5. A. made a Feoffment to the Uſe of himſelf in Tail, *Remainder to B.* his Son *in Tail.* A. died, *B.* enter'd, and by Indenture *bargain'd and ſold* (without any Words of Dedi & Conceſſi) the Lands to the Uſe of J. S. *in Fee*; and in the Indenture was a Letter of Attorney to make *Livery*, which was made accordingly. J. S. by the ſaid Indenture covenanted, that if B. before ſuch a Day paid 40 s. that then J. S. and his Heirs would ſtand ſeiſed &c. to the Uſe of B. and his Heirs, and *if B. did not pay* &c. *then if the ſaid J. S. did not pay to the ſaid B.* within 4 Days after, 10 l. that *J. S. and his Heirs ſhould thenceforth be ſeiſed to the Uſe of the ſaid B. and his Heirs* &c. and B. covenanted further to make ſuch further Aſſurance as the Counſel of B. ſhould adviſe. *Both fail'd of Payment*; *B. levied a Fine to J. S. without any Conſideration.* It was adjudg'd a good Feoffment well executed by the Livery, notwithſtanding the Words of Bargain and Sale only; and that the Covenant to be ſeiſed to the *new Uſes conditionally*, upon Payment and Non-payment, being in one and the ſame Deed, ſhould raiſe the Uſe upon the Contingency according to the Limitation of it. Le. 25. pl. 31. Trin. 26 Eliz. B. R. Benicombe v. Parker.

6. A. made a Feoffment to the Uſe of *himſelf for Life*, Remainder to his *Wife for Life*, Remainder *to his right Heirs*, with a *Proviſo* if his Son interrupted his Wife it ſhould be *to the Uſe of the Wife and her Heirs.* A. made a Leaſe for Years, to begin after * his Deceaſe, and died. The Son diſturb'd the Wife. Reſolved, that the Uſes will not ariſe to give the Wife the Fee. Arg. Cro. E. 765. in Caſe of Wood v. Reynold, cites it as Hill. 42 Eliz. The Caſe of Leigh v. Burton.

But Godfrey Arg. ſaid he conceived the Reaſon thereof to be, becauſe the *Uſe limited to the right Heirs was the ancient Reverſion, and no new Eſtate*, and a *Condition cannot be annex'd thereto.* Ibid.——Accordingly Mo. 742 pl. 1022. Mich. 41 & 42 Eliz. Barton's Caſe, S. C. ſays it was to begin after the * Wife's Deceaſe. Reſolved by Popham and Anderſon Ch. J. clearly, that the future Uſe was check'd by the Leaſe, and never ſhall ariſe; but ſince it could not ariſe at the Death of the Wife, by reaſon of the Leaſe for Years, it is deſtroy'd for ever; yet nota, (ſays the Reporter) that the Leaſe was only an Intereſſe Termini all the Time of the Wife's Life; and the Diſturbance which ought to raiſe the Uſe in Fee to the Wife, was made in her Life before the Commencement of the Leaſe.——G. Law of Uſes &c. 138, 139. cites S. C. and ſays the Wife ſhall not have the Reverſion, becauſe the Leaſe has alter'd it; for there is the ſame Eſtate to be executed in the Wife as was in Being at the Diſpoſition of the particular Eſtate.

7. A. *bargain'd and ſold Land to B. and his Heirs* for 500 l. *upon Condition* That *if A. paid B. 500 l.* he might *re-enter, and be ſeiſed to the Uſe of himſelf and his Heirs, until* he attempt to alien without the Aſſent of B. *and then to the Uſe of B. and his Heirs*, and a *Fine* was levied to thoſe Uſes. A. paid the 500 l. and enter'd. Afterwards A. alien'd to J. S. without the Aſſent of B. Per Ld. C. Egerton, No Uſe will ariſe to B. becauſe B. entering for the Condition broken, ought to be in of the old Uſe and Eſtate, and cannot be ſeiſed to the other Uſe; alſo the Fine was levied to B. by which B. who was the Conuſor, and alſo Bargainor, who came in by the Uſe of the Fine, cannot *ſtand ſeiſed* to any other Uſe; for then there ſhould be Uſe upon Uſe. Mo. 761. pl. 1054. Paſch. 3 Jac. in Chancery, Holloway v. Pollard.

(P. a) *Ceſſer* of Uſes. How. And in what Caſes they ariſe again.

1. RENT was granted by Fine, *with Condition that when any Heir is within Age*, that *the Rent ſhall ceaſe during the Nonage*, and the *Feme recover'd Dower during the Nonage*, & *Ceſſet Executio, till the full Age of the Heir.* Nota. Br. Judgment, pl. 41. cites 24 E. 3. 61.

2. A. levied a *Fine of Five Yard-Land to* the Uſe of *himſelf for Life*, Remainder to the Uſe of B. his eldeſt Son, and M. his Wife, and the Heirs of the Body of B. *Proviſo if Baron die, living A. that M. ſhall have one Yard-Land and a half in Poſſeſſion for her Life*; but does not ſay what Yard-Land and a half in certain. B. dies. M. enters, and *elects one Yard Land and a half.* Adjudged by all the Juſtices except Anderſon, with the Advice of Popham and Periam, That the Uſe for the Life of A. ceaſes by the Election, *without Entry into the Land elected by M.* Mo. 602. pl. 832. Trin. 39 Eliz. C. B. Marſhall v. Marſhall.

3. An *Eſtate Tail* may ceaſe for a Time, and yet riſe again; and may ceaſe as to one Perſon, and be in Force and Eſſe as to another; per Hobart Ch. J. Hob. 257. in Caſe of Duncomb v. Wingfield, cites Beaumond's Caſe.

4. If I *entail a contingent Uſe*, both Eſtates are alike ſubject to the contingent Uſe when it falleth; *as* when I make a *Feoffment in Fee to the Uſe of my Wife for Life*, the *Remainder to my firſt begotten Son, I having no Son at that Time*, the *Remainder to my Brother and his Heirs*; if my *Wife dies before I have any Son*, the Uſe ſhall not be in me, but in my Brother: And yet if I marry again, and have a Son, it ſhall diveſt from my Brother, and be in my Son. Ld. Bacon's Readings on the Statute of Uſes, 350, 351.

(Q. a) Uſes *interrupted.*

1. LESSEE *for Life*, with *Condition to have Fee, makes a Leaſe for Years.* This does not ſuſpend the Power to increaſe the Eſtate by the Condition. Arg. See Mo. 612. in pl. 842. Anon.

2. *Nothing will* diſturb a future Uſe, *but what* would deſtroy a preſent Uſe at Common Law. Arg. See Mo. 614 in pl. 842.

3. A. levied a *Fine* to the Uſe *of himſelf and his Heirs, till a Marriage* had *between B.* his Son *and M.* and after to the Uſe *of A. for Life*, and after to his Executors for 21 Years, for Payment of Debts and Legacies; and after Determination of the ſaid Term, or for want of Limitation of the ſame, to the Uſe *of B. in Tail*, Remainder to the Uſe of A. in Tail, Remainder over. *A. deviſed Portions to his Daughters out of the Land* by his Will, *and died, before the Marriage*, ſeiſed of the ſaid Lands. Afterwards the Marriage took Effect. The two Ch. Juſtices, for Difficulty, would not reſolve the Caſe; but they inclin'd clearly, that if there had been a *Deviſe of the Land*, that this would interrupt the Riſing of the future Uſe for the Jointure and the Entail; but they doubted of the Deviſe, becauſe he deviſed the Portions *out of the Lands*, and did not deviſe the Land. Mo. 731. pl. 1018. Strangewayes v. Newton.

G. Law of Uſes &c. 126. cites S. C. thus, viz. Feoffment to the Uſe of A. in Fee, and if B. pays ſo much &c. then to B. in Fee. A. deviſes this Land, and dies. It deſtroys the contingent Eſtate; otherwiſe it is, if he had deviſed Portions out of the Land; for that could not alter the Freehold.

4. A. covenants to ſtand ſeiſed *to the Uſe of his Wife which ſhall be*, and then he makes a *Leaſe* of the Land, and afterwards takes a Wife. This is ſuch an Interruption, that the Uſe ſhall not ariſe to the Wife. Lane. 61. in Sir Edward Dimmock's Caſe, it was ſaid by Bromley J. to have been ſo adjudged, but that in **Winter's Caſe**, 4 Jac. B. R. and alſo in **Ruſſell's Caſe**, tho' it ſeem'd agreed that the Leaſe for Years ſhould be good, yet it was not reſolved but that the Wife may have Freehold well enough, by virtue of that Covenant.

5. *Feoffment* to the Uſe of A. *when he marries my Daughter:* If I ſell the Land before A. marries her, and after he marries her, A. never ſhall have the Land. Arg. Litt. R. 254. in Beck's Caſe.

(R. a) Uſes. *Forfeited* or barr'd. In what Caſes.

1. IF Ceſty que Uſe be *attainted of Felony*, the Lord ſhall not be aided by Subpœna to have his *Eſcheat*; and if the Heir be barr'd by the Corruption of his Blood, then the Feoffee, as it ſeems, ſhall *retain the Land to his own Uſe*. Cary's Rep. 14, 15. cites Brooke, 34.

Br. Feoffment to Uſes, pl. 34. cites 5 E. 4. 7. and ſays that the Heir ſhall not have a Subpœna neither.——Uſe cannot be forfeited, but a Thing in Poſſeſſion or Seiſin only. Br Feoffment to Uſes &c. pl. 22. cites 4 H. 7. 18 ——Uſes are not forfeitable for Felony; for in ſuch Caſe the Lands are caſt upon the Lord of whom they are holden, for want of Heirs; but an *Uſe is held of no-body*, neither are they forfeitable for *Treaſon*; for all Tenures are forfeited by the Breach of Fidelity and Duty owed to the Lord; for the Tenants take their Eſtates under that Condition, and conſequently all Breaches of Allegiance forfeit the Eſtate to the King, ſince it originally came from him, and conſequently the Eſtate which is holden may be forfeited; but an Uſe is held *of no-body*. But this is *alter'd by the Statute*. G. Law of Uſes &c. 38, 39.

2. No Uſe can be forfeited at this Day, unleſs it be of *a Chattle or a Leaſe*; for all Uſes of Franktenement are, by the Statute of 27 H. 8. executed in Poſſeſſion; and ſo there is no Uſe which can be forfeited, and it would be in vain to give Uſes where no Uſe is at the Time. And. 294. pl. 302. in Sir Francis Inglefield's Caſe.

(S. a) Uſes chang'd. In what Caſes.

1. IF Ceſty que Uſe of a Manor does *bargain and ſell* 10 *l. Land Parcel of the Manor*, no Uſe is changed for the *Uncertainty*. Bridg. 12. Arg. cites 12 H. 7. 8. B.

Arg. Litt. Rep. 217. S. P. but ſays that in Caſe of Limitation of Uſe it is otherwiſe.

2. Where it was found by Office that it was *covenanted by Indenture between two, that the Lands* and Tenements *of the one ſhall deſcend, revert, or remain to his Son and Heir apparent in Conſideration of the Marriage, and to the Heirs of the Body of him and his Feme*, this ſhall not change the Uſe for two Cauſes, the one becauſe the Matter is future, and to be done and not executed, the other is inaſmuch as the Party by this disjunctive (Remain, Deſcend or Revert) may do which of them he will; therefore this ſhall not change the Uſe, but *reſts in Covenant expectant to be done*; and

But Brook ſays, Note that M. 34 H. 8. it was agreed by all the Juſtices, upon great Deliberation, in the Caſe of

Gantrel Eſq; of the County of North. who was attainted with the Lord Dacres of the South for the Death of a Man, that where he at his Marriage 31 H. 8. after the Statute of Uſes made 27 H. 8. covenanted for 100 l. and in Conſideration of the Marriage, *that he and his Heirs*, and all Perſons ſeiſed of his Lands and Tenements in H. *ſhould be* thereof *ſeiſed to the Uſe of* his Feme for Term of her Life, and after to the Heirs of her Body by him begotten, that this ſhall change the Uſe well enough, and is very good; and therefore the Land was ſav'd, and was not forfeited. Quod nota.

and ſo if this Matter be not done accordingly, there is not any Remedy but by Action of Covenant; Per Rede J. Br. Feoffments al Uſes, pl. 16. cites 21 H. 7. 18.

3. If Feoffee makes *Feoffment with Warranty* in Deed or by *Dedi*, which Caſe *implies a Recompence*, yet this ſhall not alter the Uſe. Arg. D. 10. pl. 31. Trin. 28 H. 8.

4. A Man cannot change a *Uſe by a Covenant that is executed before.* Br. Feoffments al Uſes, pl. 54. cites 36 H. 8. Per Hales.

As of Covenant *to be ſeiſed to the Uſe of W. S. becauſe W. S. is his Couſin.* Br. Feoffments al Uſe, pl. 54. cites 36 H. 8. Per Hales.—*Or* becauſe W. S. *ſometime before gave him* 20 *l.* unleſs the 20 l. was given to have the ſame Land. Br. Feoffments al Uſes, pl. 54. cites 36 H. 8. Per Hales.

As for 100 *l. paid for the Land at the Time of the Covenant, or to be paid at an After-day*, or *for marrying his Daughter*, or ſuch like; Per Hales, but ſeveral contrary in the Time M. 1. and that it may be good for Conſideration paſs'd. Br. Feoffments al Uſes, pl. 54. cites 36 H. 8.

5. *But* contrary of a *Conſideration preſent or future for the ſame Purpoſe.* Br. Feoffments al Uſes, pl. 54. cites 36 H. 8. Per Hales.

S. C. cited Arg. Mod. 263. in Caſe of Barker v. Keate; but Windham J. contra; and obſerv'd that this Caſe is made a Quære in the Book.

6. If a *Feoffment* be by Indenture *rendring Rent*, it ſeems that this does not alter the Uſe; for this Rent makes no Conſideration; becauſe it iſſues out of the Land, and the Feoffee ſhall be ſeiſed of it to the Uſe of the firſt Feoffor &c. Quære inde. Arg. D. 10. pl. 31. in Caſe of the Abbot of Bury v. Bokenham.

Upon a *Bargain and Sale* to make a *Tenant to a Præcipe*, a Reſervation of a *Pepper-corn*, without any Money mention'd, is a good Conſideration adjudg'd. 2 Mod. 249 253. Trin. 29 Car. 2. C. B. Barker v. Keat.——2 Vent. 35. Paſch. 32 Car. 2. C. B. the S. C. reſolv'd accordingly.

7. If A. in *Conſideration that B. had convey'd Lands to him in Fee after the Death of B. covenants to levy a Fine to R. and S. of other Lands to the Uſe of A. for Life, the Remainder to B. in Tail.* It was held that no Uſe ſhall be alter'd unleſs a Fine be levied; for if the Uſe ſhould be alter'd immediately, the Covenant could not poſſibly be perform'd. D. 96. a. pl. 41. Hill. 1 Mar. Bainton's Caſe.

8. Covenant *for Marriage* or *Money that B. ſhall have the Manor of D.* by expreſs Words, this ſhall change the Uſe. D. 96. pl. 41. in Bainton's Caſe.

9. A. covenanted *for Love and Favour*, and diverſe other Conſiderations her moving, *to aſſure ſuch Lands by Recovery* before ſuch a Day *to J. S. (who had married the Daughter* of A. and were Parties to the ſaid Indenture) *his Heirs and Aſſigns, to ſuch Uſes* &c. *therein after to be declar'd.* And *J. S. covenanted to make Eſtate within* 8 *Months after to the ſaid A. for her Life*, the *Remainder to J. S. and his Wife in ſpecial Tail*, Remainder *to the Wife in Fee.* The *Recovery was had, but no Eſtate executed again by the ſaid J. S.* It ſeem'd to the two Chief Juſtices, and Staunford and Dyer J. that no Uſe was chang'd by the Indenture and Recovery only, without an Eſtate executed; for if it was, then it would be impoſſible to perform the ſaid Covenants; and no Uſe is after declar'd. And they thought that after the 8 Months, and no Eſtate executed, the Uſe ought not to be chang'd; for then A. ſhould have her firſt Eſtate, viz. a Fee-ſimple, which never was imagin'd; and no Subpœna will lie for her as for

for Ceſty que Uſe to compel J. S. to execute Eſtate &c. becauſe ſhe has her *Remedy* at Common Law *by Action of Covenant*. D. 162. a. pl. 48. Trin. 4 & 5 P. & M. Wingfield and Littleton.

10. A. made a *Feoffment to Truſtees*, and afterwards by Indenture, reciting the Feoffment and the Date, and alſo that it was to the Intent that his Feoffees ſhould *perform his Will*, as follows in Effect, viz. *My Will is that B.* (one of the Truſtees) *ſhall receive* 100 *l. Debt*, and alſo *ſhall ſtand ſeiſed to pay A.'s Debts*, and after the Debts paid *ſhall make Eſtate of the ſaid Lands to him the ſaid A. and M. his Wife, and the Heirs of their Bodies*, with diverſe Remainders over. A. had Iſſue by M. and had a Daughter by a former Wife. The *Feoffees never made Eſtate to A. and his Wife*; and it was the Opinion of ſeveral Juſtices that no Uſe was chang'd; for it is not a laſt Will, but an Intent. And tho' the Feoffees ſhall be ſeiſed to the Uſe of A. the Feoffor and his Heirs, becauſe there was no Conſideration for which they ſhould be ſeiſed to their own Uſe, yet that cannot make a new Uſe to A. and M. in Tail, without conveying an Eſtate; for the *Wife is a Stranger* to the Land, and alſo to the other Uſe. And it cannot be a Teſtament or laſt Will; for the Eſtate mention'd in the ſaid Writing ought to be made to A. and M. and A. cannot take by his own Will. This was depending in Chancery; and the Advice of the Juſtices being requir'd, they gave their Opinions that no Uſe was chang'd, nor any Eſtate veſted in A. and M. And a Decree was made accordingly, till Proof might be made of ſuch an Eſtate made. 2 Le. 159. pl. 194. 28 Eliz. in Canc. Ld Awdley's Caſe.

4 Le. 166. pl. 270. S. C. in the ſame Words.—— Ibid. 210. pl. 341. S. C. in the ſame Words.— D. 166. a. pl. 8. Hill. 1 Eliz. S. C. ſays the Judges ſeem'd of Opinion, and ſo likewiſe did ſeveral Serjeants, that no Uſe was alter'd. —D. 324. b. 325. a. pl. 37. Paſch. 15 Eliz. this Caſe was brought in Queſtion

again, becauſe the Opinion of B. R. was againſt the former Reſolutions: Whereupon the Juſtices of both Benches, and the Chief Baron and the King's Counſel, met at Serjeant's-Inn, where the Caſe was debated; And by the Opinion of the Attorney General, the Ch. Baron, and the 4 Juſtices of C. B. the firſt Reſolution in 1 Eliz. was confirm'd. But Bromley Solicitor General ſeem'd e contra, and adher'd to the Opinion of the Juſtices of B. R. But the Book ſays there was an Addition to the principal Caſe, to inforce the Opinion, contrary to the former Reſolutions——S. C. cited Mo. 515. 516. in Lord Buckhurſt's Caſe.——Jenk. 217. pl. 72. mentions it as reſolv'd by all the Judges in England, that no Uſe veſted in A. and M. till an Eſtate-tail be made to them; and that this Indenture amounts not to a Declaration of A.'s laſt Will; For the Gift in Tail to him and his Wife, is to take Effect in his Life-time, which cannot be if it be taken for a Will; and alſo the Wife is a Stranger to the Land.——But Dal. 88. pl. 3. Audley v. Daniel, S. C. is that an Uſe was rais'd preſently.—— Such Words *in a Will* will alter the Uſe, but this being by Indenture, nothing ſhall be alter'd before the Eſtate executed. D. 166. Marg. pl. 9. cites 31 H. 6. Subpœna 23.

11. J. N. *Ceſty que Uſe in Tail*, 14 H. 8. by Indenture between him on the Part, and J. S. of the other Part, *in Conſideration of a Marriage between his Son and Heir apparent, and M. Daughter of the ſaid J. S. to be had, covenanted* with the ſaid J. S. *That neither he, nor any of the Feoffees ſeiſed to his Uſe, have made, or hereafter ſhall make any Eſtate*, Releaſe Grant of Rent, levy any Fine, or do any other Incumbrance whatſoever of any of his Manors, Lands, &c. *But that all* the ſaid Manors &c. *ſhall immediately deſcend or remain to his ſaid Son, or the Heirs of his Body, after the Deceaſe of the ſaid J. N.* It was the clear Opinion of all the Juſtices in this Caſe, that by the ſaid Indenture no Uſe is chang'd in J. N. nor any Uſe rais'd to the ſaid Son and Heir; but that it is only a bare Covenant. 3 Le. 6. pl. 18. Mich. 4 Eliz. C. B. Anon.

And. 25. pl. 55. S. C. accordingly.— Bendl. 121. pl. 153. S. C. accordingly.

12. Covenant *that Bargainee ſhall ſtand ſeiſed to the Uſe of the Bargainor* and his Heirs *on Payment of* 20 *l.* The Uſe is not alter'd by a *Tender*, but upon *Payment* it is. But otherwiſe in Caſe of a Feoffment; Per Dyer. Mo. 35. pl. 115. Trin. 4 Eliz. Anon.

Dal 38. pl. 5. S. C. and S. P. by Dyer.

13. If the *Words* had been, that if the Feoffor *pays the Money to the Feoffee, or tenders them* &c. in this Caſe by the Tender the Uſe ſhall be alter'd; Per Dyer. Mo. 35. pl. 115. Trin. 4 Eliz. Anon.

Dal. 38. pl. 5. S. C. accordingly.

14. A. before the 27 H. 8. *covenanted with C. in Conſideration of a Marriage* to be had *between E. his Daughter and Heir apparent, and B.* the Heir apparent of C. *that he would retain Land for Life, and after his Death*

that his Daughter and her Husband ſhall have it in Tail, and that he and all others then or after ſeiſed, ſhall immediately after the Eſpouſals be ſeiſed to the ſaid Uſe; and alſo *that he would make Aſſurance to the ſaid Uſe.* The Marriage is had. Afterwards he bargain'd and ſold the Land for 200 l. (but nothing paid) to one who had Notice of the Covenants and Uſe, and levied a Fine and ſuffer'd a Recovery, but retain'd the Land during his Life, and died; and the Son and his Wife entred, and made a Feoffment to their firſt Uſe. And adjudg'd good, and the Uſe chang'd by the firſt Indenture and Agreement. D. 235. pl. 20. Mich. 6 & 7 Eliz. Aſſaby v. Lady Manners.

15. Covenant to ſtand ſeiſed *for Acquaintance to the Uſe of A. for Life*, and after to B. *for Conſanguinity in Tail*, or in Fee. The Remainder is good, and yet the particular Eſtate is not alter'd, but remains in the Covenantor during the Uſe of Ceſty que Vie. Arg. Mo. 310. in Engleſield's Caſe, cites Ld Paget's Caſe.

Covenant to ſtand ſeiſed to the Uſe of *himſelf for Life*, is an Alteration of the Eſtate, and not part of the old Eſtate. For he is become Tenant for Life by the Covenant, and he ſhall pay Fine for Alienation to the King; per Clark j. Mo. 334. in Engleſield's Caſe.——13 Rep 56. Reſolved Mich. 7 Jac. in Sammes's Caſe; for by the Operation of the Statute the Eſtate which he hath at Common Law is diveſted and a new Eſtate veſted in himſelf, according to the Limitation of the Uſe.

16. Covenant to ſtand ſeiſed to the Uſe of *himſelf for Life*, *Remainder* over, is an Alteration of the Uſe; but not if it be *without Remainder*, or if it be limited *to himſelf in Fee.* Arg. Mo. 528. in Engleſield's Caſe.

Per Holt Ch. J. Farr. 26. in Caſe of Machil v. Clark, cites Carrington's Caſe.——13 Rep. 56. S. P. reſolv'd in Samme's Caſe, for the Reaſon in the Plea above.

17. Covenant to ſtand ſeiſed to the Uſe of *himſelf in Tail*, is an Alteration of the Eſtate. Arg. Mo. 328. in Engleſield's Caſe.

18. If one *ſeiſed in Fee covenants to ſtand ſeiſed to the Uſe of himſelf for a leſs Eſtate, and after to the Uſe of another; ſo that the other cannot have his Eſtate without an Alteration of the Uſe in the Covenantor* himſelf, there the Uſe muſt of Neceſſity alter in himſelf, becauſe of the Eſtate of the other. Arg. Mo. 505. in Lord Buckhurſt's Caſe, cites it as ſo adjudg'd in the Exchequer in Engleſield's Caſe.

19. A *Fine* was *levied* to A. B. C. and D. and the Parties by Indenture declar'd that it was levied *ea Intentione, that the Conuſees ſhould make an Eſtate to ſuch a Perſon as the Conuſor ſhould name*; and afterwards was a *Proviſo that the Conuſees ſhould not be ſeiſed to any other Uſe than that which was ſpecified before, and that they ſhould not incumber the ſaid Lands.* The *Conuſor nam'd A. one of the Conuſees, and will'd that the other 3 ſhould releaſe to him.* Gawdy J. held, that by this Nomination the Uſe did veſt in A. but Wray and Jefferies e contra, becauſe after this Releaſe A. is in the whole by the Conuſor, and not by his Co-Feoffees; and by this Limitation the Conuſor ought to name ſuch a Perſon as ought to take the Eſtate, and ſo cannot one Jointenant do from his Companion; beſides the Words are, that they four ſhall take [make] the Eſtate. 4 Le. 23. pl. 72. 18 Eliz. B. R. Bettuan's Caſe.

20. A. *devis'd Land to the Uſe of B.* which Uſe by Poſſibility may or may not be good; if afterwards Ceſty que Uſe *cannot take*, the Deviſe ſhall be to the Uſe of the Deviſor and his Heirs; Per Anderſon. Le. 254. pl. 342. Trin. 33 Eliz. in the Court of Wards, in Ellis Hartop's Caſe.

21. If one covenants upon good Conſideration, that he will ſtand ſeiſed to the Uſe of the Feme during her Life for her Jointure of Lands whereof he is ſeiſed in Fee, or by Deed, or without Deed, bargains and ſells his Land for 100 Years, the Feoffee ſhall have for Life, the Bargainee for Years; and thoſe that had the Fee have it in them as they had before,

fore, and not of any new Eſtate, but out of their Eſtates of Fee thoſe Eſtates are deriv'd. And. 329. in Caſe of Dillan v. Frein, alias Chudleigh's Caſe.

22. If J. S. is ſeiſed *to Uſe of A. for Life*, of *B. in Tail*, and of *C. for Life*, and of the *Feoffor in Fee*, and the *Feoffor by Fine grants the Reverſion*, the Fee-ſimple paſſes, and the Feoffees have not the general Fee, as they had before, but Eſtate in Fee till all the particular Eſtates are determin'd. And if Tenant for Life in the firſt Limitation makes a Grant of the Land during his Life, yet Eſtate remains in the Feoffees to the Uſe of the Tenant in Tail in Uſe, and Remainder-man for Life; and ſo of like Eſtates created by the Statute. And. 333. in Caſe of Dillan v. Freine, alias Chudleigh's Caſe.

23. A Man infeoffs another *to the Uſe of A. for Life*, and after his Death to the Uſe *of his Daughter till B. pay her* 100 *l. and then to the Uſe of B.* Per Winch and Hutton J. only in Court, the Daughter has no Remedy for the 100 l. if B. will not pay it, except he makes a new Promiſe, and then upon that ſhe ſhall have an Action upon the Caſe, upon which, if ſhe recover, and have Satisfaction, the Uſe will ariſe to B. but otherwiſe not, tho' ſhe has Judgment to recover; and whether the ſame is diſcharg'd is triable by the Record of the Recovery. Winch. 71. Paſch. 22 Jac. C. B. Barley v. Foſter.

If a Man makes a Feoffment in Fee at this Day to the Uſe of *himſelf and his Heirs, and when ſuch a Thing ſhall be done*, then *to the Uſe of another and his Heirs*, this is good, and the Uſe ſhall well ariſe; cites 8 Rep. 69. 70. Whitlock's Caſe, As when J. S. ſhall marry, or come to his Age of 21 Years, then to the Uſe of another and his Heirs, this is good by way of Limitation of Uſe. Arg. 2 Bulſt. 273. in Caſe of Simpſon v. Southerne.

(T. a) *Determined. When* the Uſes ſhall be ſaid to be determined *in Reſpect of the* Words of Limitation.

1. A Gave Land *to W. R. and J. S. for their Lives and the Life of the Survivor, to the Uſe of B. for his Life*, without ſaying any thing more. *W. R. and J. S. die.* The Court thought the Eſtate determin'd, the Eſtate being gone upon which the Uſe was rais'd. D. 186. pl. 1. Mich. 2 & 3 Eliz. Anon.

Ibid. the Reporter ſays, but quære if the Eſtate above was made before the Statute of 27 H. 8. ——3 Bulſt. 185. in Caſe of Cowper v. Franklin, it was ſaid by Doderidge J. that this Caſe is good Law. ——A Rent was granted *to W. R. and J. S. during the Life of B. to the Uſe of B.* and afterwards *W. R. and J. S. die.* The Court held that the Rent continues to B. For the *Uſe is veſted by the 27 H. 8.* D. 186. a. Marg. pl. 1. cites Mich. 41 & 42 Eliz. Crawley's Caſe.—— Cro. E. 721. pl. 50. S. C. held, that it being granted to the Uſe of B. it veſted in him by the Statute 27 H. 8. ſo as he had an abſolute Eſtate during his Life; and the Lives of the Grantees are not material, the Eſtate being transferr'd from them: Otherwiſe it had been of a Grant to a Uſe before the Statute.—— Ow. 126. S. C. accordingly, and that the Statute has conjoin'd the Uſe with the Poſſeſſion.——2 And. 130. pl. 74. S. C. makes a Difference between a Grant of the Rent *to W. R. and J. S. to the Uſe of B. during his Life*, and a Grant of Rent or Land *to W. R. and J. S. during the Life of B. to the Uſe of B.* that in the firſt Caſe the Rent determines by the Death of the Grantees, and ſhall not be continued by the Statute, or otherwiſe; for B. had no greater Eſtate in the Rent than W. R. and J. S. had, and yet the Statute ſays, That Ceſty que Uſe ſhall be ſeiſed of ſuch Eſtate as he had in the Uſe; and the laſt Part of this Branch of the Statute is, That he ſhall have the Eſtate of him who is ſeiſed according to the Form, Manner, Quality, and Condition as he had the Uſe; In which Caſe none of thoſe Branches make B. by the Words, to have ſuch Eſtate in the Rent as he had in the Uſe; but that in the laſt Caſe B. ſhall have it during his Life, becauſe the Uſes and Eſtates agree together. And that all this was agreed by all the Judges.

2. Land was given *to Baron and Feme, to the Uſe of them and the Heirs of their Bodies.* This was adjudg'd an Eſtate Tail, and the Judgment affirm'd in Error; for this Limitation *is a Limitation of the Land itſelf, it being all to one Perſon*, and is as if it had been ſaid Habendum to them and

Cro. C. 230. pl. 11. Mich. 7 Car. Jenkins v. Young,

S. C. and 3 Juſtices were then of the ſame Opinion, but adjornatur. * See pl. 1.

and the Heirs of their Bodies; and is not like the Caſe in * D. 186. 2 & 3 Eliz. For true it is, when the Eſtate is limited to one or two to the Uſe of others, and their Heirs, the firſt Eſtate is not enlarg'd by this Implication, and the Uſe cannot paſs a greater Eſtate. But here it is to the ſame Perſon, which ſhews the Intent of the Parties, and is a good Limitation of the Eſtate; for *it is not a Uſe divided from the Eſtate*, as where it is limited to a Stranger, but the Uſe and Eſtate go together, and ſo the Limitation is all one as if it had been to them and the Heirs of their Bodies. Cro. Car. 244. 245. pl. 6. Hill. 7 Car. B. R. Meredith v. Jones.

(U. a) Revived.

1. AT *Common Law*, if Feoffee to Uſe had been *diſſeiſed*, this Diſſeiſin ſhould not have ſuſpended any contingent Uſe, but the *Entry of the Feoffee* might have reviv'd it, and Poſſeſſion ſhall be executed to the Uſe by the 27 H. 8. of Uſes; and if there be no Interruption or Deſtruction of it by Feoffment or Death of the particular Tenant before the Contingent happens. Jenk. 276. pl. 98. in Chudleigh's Caſe.

2. If Lands are given *to A. and the Heirs* which he ſhall beget *on the Body of an Engliſh-woman*, and *A. marries a French-woman*, who dies, and then he marries an Engliſh-woman; this was ſaid Per Catlin, to be a good Eſtate in ſpecial Tail. Ow. 32. Mich. 40 Eliz. in an Anonymous Caſe.

Cro. E. 917. pl. 8. S. C. adjornatur.

3. A. and M. his Wife ſeiſed &c. to them and to the Heirs of A. *bargain'd and ſold* the Lands to P. for 500 l. *upon Condition* that *if they, or either of them*, or their Executors &c. *paid the Money on ſuch a Day, they might enter as in their former Eſtate; and* that after ſuch Payment *the ſaid Indenture, and all Fines &c. ſhould be to the Uſe of A. and his Heirs*, and to no other Uſe. *They levied a Fine to P. before Inrolment of the Deed*; then *A. died*, leaving Iſſue only one Daughter E. who was *his Heir at Law*, and married to B. who *paid the* 500 *l.* in the Right of his Wife, *and entred*, and made a Leaſe to the Plaintiff, upon whom the Widow re-enter'd, claiming for her Life. Adjudg'd for M. againſt E. the Heir, becauſe P. was in by the Fine, and not by the Bargain and Sale; and by the Payment of the Money the old Uſe was again reveſted in M. as was the ancient Uſe before the Fine, and that by the expreſs Words in the firſt Part of the ſaid Proviſo. And *the ſubſequent Clauſe, which appoints the Uſe to A. and his Heirs, will be repugnant*, and ſo void, or otherwiſe it ſhall be conſtrued to be to the Uſe of A. and his Heirs in Reverſion, after the Eſtate for Life of his Wife. Mo. 680. pl. 933. Hill. 43 Eliz. Wilmot v. Knowles.

4. A Man ſeiſed of Lands in Fee, conveys it by *Feoffment to the Uſe of himſelf and Wife, and to the Heirs of the Survivor of them*; the Husband afterwards makes a Feoffment of this Land, and dies; the Wife enters and dies. Thr Feoffment of the Husband hath *deſtroy'd* this future contingent Uſe of the Fee; For whatſoever cannot accrue at the Time of the Death of the Party who firſt dies, cannot afterwards, by any Act, be reviv'd, but is abſolutely extinguiſh'd. Affirm'd in Exchequer Chamber. Cro. Car. 102. pl. 3. Hill. 3 Car. C. B. Biggot v. Smith.

(W. a) Sta-

(W. a) Statute of 1 *R.* 3. *cap.* 1.

1. 1 *R.* 3. *cap.* 1. *EVery Eſtate, Feoffment, Gift, Releaſe, Grant, Leaſes, and Confirmations of Lands, Tenements, Rents, Services, or Hereditaments made or had, or hereafter to be made or had by any Perſon or Perſons, being of* * *full Age, of whole Mind, at large, and not in Dureſs, to any Perſon or Perſons,*

The Reaſon of this Statute was, becauſe Ceſty que Uſe in Poſſeſſion often alien'd the Lands, and then the Feoffees entred, which caus'd a great deal of Vexation and Chancery-Suits; and ſo the Statute gave to Ceſty que Uſe an immediate Power of Alienation, without the Concurrence of the Feoffees. G. Law of Uſes &c. 27.

This Statute intends to remedy 4 great Miſchiefs, by Reaſon of *ſecret Feoffments to Uſes.* 1ſt *Uncertainty to the Purchaſors*, and other Subjects of the Queen. 2dly. *Trouble.* 3dly *Coſts.* 4thly, *Grievous Vexations*; ſo that it was not only Unſurety, but Unſurety with Trouble, and not that only, but with Trouble and Coſts, and alſo with great Vexation; Examples of which are given in the *Preamble.* Arg. 1 Rep. 123. a. in Chudleigh's Caſe.

This Act *extends only to* Ceſty que Uſe *in Poſſeſſion*; for Ceſty que Uſe *in Reverſion or Remainder*, is both out of the Letter and Intent of the Statute. Arg. Pl. C. 349. b. in the Caſe of Delamere v. Barnard.

* In *pleading a Feoffment* or Grant of Ceſty que Uſe, one muſt plead that he was of *full Age*, of *Sane Memory*, and *at large*, and *not in Dureſs*; Per Dyer. Pl. C. 376. b. in Caſe of **Stowell v. Zouch**, cites 16 H. 7. reſolv'd, becauſe the Purview of the Statute is, That all Feoffments &c. made by Perſons of full Age &c. ſhall be good &c So that it warrants no Feoffment &c. but of Perſons void of ſuch Defects; and therefore it muſt be ſhewn.

And * *all* † *Recoveries and Executions had or made, ſhall be good and effectual to him to whom it is ſo made, had, or given, and to all other to his Uſe, againſt the Seller, Feoffor, Donor, or Grantor thereof,*

* By this Word (*All*) *Feint Recoveries*, as well as Recoveries *upon good Title*, are comprehended. But they are good *only againſt the Grantors &c. and their Heirs claiming only as Heirs to ſuch Grantors* &c. So that they are not good againſt him that claims as *Heir to the Grantor and his Feme in Tail per formam Doni.* Arg. Pl. C. 4. a. b. Mich. 6 Eliz. in Manxell's Caſe.

† If a Man *recovers by erroneous Judgment, and makes Feoffment to his Uſe*, and the other brings Writ of Error, and reverſes the Judgment, he may enter without Scire facias againſt the Feoffees; For it is a Recovery, and therefore it ſhall bind him and his Heirs and Feoffees by the Statute 1 R. 3. Br. Feoffments al Uſes, pl. 3. cites 26 H. 8. 2. Per Englefield and Baldwin.——Br. Error, pl. 1. cites S. C.——G. Law of Uſes &c. 33. 34. cites S. C. and ſays this is within the Letter of the Statute.

And againſt the Sellers, Feoffors, Donors, or Grantors, his or their Heirs, claiming the ſame only as Heir or Heirs to the ſame Sellers, Feoffors, Donors, or Grantors, and every of them,

Yet if Ceſty que Uſe grants a Rent-charge, and the Feoffees are diſſeiſed, the Grant ſhall be good againſt the Diſſeiſor; and yet he does not claim only by the Ceſty que Uſe. Arg. 2 Le. 153. pl. 185. in Caſe of Cordel's Executors v. Clifton.——3 Le. 60. pl. 87. S. C. in the ſame Words.

And againſt all others having or claiming any Title or Intereſt in the ſame, only to the Uſe of the ſame Seller, Feoffor, Donor, or Grantor, Sellers, Feoffors, Donors, or Grantors, or his or their ſaid Heirs, at the Time of the Bargain, Sale, Covenant, Gift, or Grant made:

This Statute did *not take away* the *Power of Feoffees*; for they may *yet make Feoffments*; but *enlarged the Power of Ceſty que Uſe*, who may now make Feoffments likewiſe. Godb. 303. in Caſe of Lord Sheffield v. Ratcliff, cites Pl. C. 351, 352. The Caſe of Delamere v. Barnard.

Saving to every Perſon or Perſons ſuch Right, Title, Action, or Intereſt, by reaſon of any Gift in Tail thereof made, as they ought to have had, if this Act had not been made.

* It was agreed per Cur. that theſe Words are taken for Tenant in Tail in Poſſeſſion, and not Tenant in Tail in Uſe; for Ceſty que Uſe in Tail has no Right nor Intereſt. Br. Feoffment al Uſes, pl. 40. cites 24 H. 8.

2. *Feme Covert* was Ceſty que Uſe, and ſhe *and her Baron made Feoffment.* This was good but during the Life of the Baron only, by Equity and Reaſon, tho' the Statute 1 R. 3. ſays nothing of a Feme Covert. Br. Feoffment to Uſes, pl. 43. cites 6 H. 7. 3.

S. C. cited G. Law of Uſes, 37. ſays that Uſes are not extendable, becauſe there is no Proceſs at Law, but upon Eſtates at Law; whereas Uſes are merely Creatures of Equity, on which the Common Law can award no Execution. But pag. 38. ſays that by the Statute R. 3. it is held extendable upon a Statute Merchant, or Staple; for this is in Nature of a Grant or Leaſe for Years, and Grants of Leaſes are made good againſt Ceſty que Uſe and the Feoffees by the Statute.

3. Ceſty que Uſe is *bound in a Statute* Merchant, and the Court held that *Execution* ſhall be *ſued of the Land in Uſe.* And the ſame Law of Statute Staple and Elegit, by the Letter of the Statute 1 R. 3. For *this is in Effect a Leaſe*; and if this Execution was ſued before the Statute of 1 R. 3. was made, there the Plaintiff who recover'd might re-enter; per Keble; becauſe the Statute is That *all Feoffments, Gifts, Grants, Leaſes, Releaſes, and Confirmations of Ceſty que Uſe, made or to be made, ſhall be good.* But Jay contra; and that if Ceſty que Uſe had made a Feoffment, or ſuch like, before the Statute of R. 3. who continued in Poſſeſſion till the Statute made, this is good, and ſhall not be ouſted by the firſt Feoffees; but contra where the Feoffment was avoided by Entry before the Statute. Br. Feoffments al Uſes, pl. 25. cites 7 H. 7. 6.

So if the *Feoffee to an Uſe be bound in a Statute Merchant*, or ſuch like, the *Land ſhall be liable to the Execution.* Br. Feoffments al Uſes, pl. 10. cites 14 H. 8. 4. Per Newdigate Serjeant.——S. P. & S. C. cited G. Law of Uſes &c. 9. For the Chancery will not relieve againſt the Act of Law, where the Property is veſted upon valuable Conſideration, and with no fraudulent Deſign.

4. Kingſmill thought that where *others are ſeiſed to my Uſe*, and I afterwards ſell the Land, and *my Vendee makes Feoffment over*, this is within the Statute 1 R. 3. and ſhall bind the *Feoffee in Truſt*, and likewiſe *his Heir.* Otherwiſe if I am *ſole ſeiſed to my own Uſe*, and *my Vendee makes Feoffment*, this is out of the Statute 1 R. 3. but a *Subpœna* will lie againſt the *Vendee and his Heir*; and Frowicke Ch. J. and others were of the ſame Opinion. But yet they made a Doubt; for they ſaid the Law has been held the ſame in both Caſes within theſe 2 Years, tho' they thought the Law would alter: For where I am *in Poſſeſſion*, this remains at the Common Law, and is only in the Nature of a *Covenant*, which cannot make a Uſe; and where *another is Feoffee to my Uſe*, and makes a Feoffment over to *his own Uſe*, in Law the *2d Feoffee is Feoffee to my Uſe*; yet if *I make Feoffment*, this is out of the Statute; but a *Subpœna* lies *againſt the 2d Feoffee.* Kelw. 42. pl. 6. Paſch. 17 H. 7. Anon.

5. If *Feoffee* in Truſt *makes Feoffment over*, the Feoffor has no *Remedy againſt the Feoffee*; ſo if he *dies*, the *Heir* of Feoffee, it ſeems, is *ſeiſed to his own Uſe*; for the *Confidence* which the Feoffor put in the Perſon of his Feoffee can *not deſcend* to his Heir, nor paſs *to the Feoffee of the Feoffee*; but he is Feoffee to his own Uſe, as the Law was taken till the Time of *H.* 4. But if the *2d Feoffee* had *Notice of the Uſe*, a *Subpœna* would then lie; and the *Heir of the Feoffee* in Truſt was ſeiſed *to his own Uſe till* the Beginning of *Ed.* 4. and then commenced the Subpœna againſt the Heir, and againſt the Feoffee of the Feoffee. But it is a Doubt, at this Day, whether the *Heir* be within the Statute 1 *R.* 3. or not; but refers to the Words of the Statute. But as to the Matter, the Feoffor is only *Tenant at Sufferance*, and this merely at the Will of the Feoffee by the Common Law; Per Frowicke Ch. J. Kelw. 46. b. Mich. 18 H. 7. Anon.

S. C. cited G. Law of Uſes &c. 34. and ſays it ſhall go to his Heirs; becauſe

6. Where Ceſty que Uſe *leaſes Land for Term of Years, rendring Rent*, this is a good Reſervation, tho' the Statute of 1 R. 3. does not ſpeak of Reſervations; for when it *ſpeaks that Feoffments, Leaſes, Releaſes, and Confirmations ſhall be good*, then *all Things ariſing thereupon are good*, and ſuch Rent ſhall go to his Heir, tho' Heirs are not mention'd in the Reſervation

ſervation. Br. Feoffments al Uſes, pl. 18. cites 21 H. 7. 25. Per Reede Ch. J.

since the Statute has given him Power to make Eſtates at Law, they are govern'd by the Rules of the Common Law.

7. If Ceſty que Uſe makes *a Feoffment in Fee, with Condition to re-enter for Non-payment*, there he or his Heirs may enter; per Rede Ch. J. and Kingſmill J. Quod nota. Brooke makes a Quære, if by his Entry the firſt Feoffees may enter, and ſays it ſeems that they may not; for the Statute of 1 R. 3. ſays that the Feoffment ſhall be good, and then the Intereſt of the Fee of the firſt Feoffees is determin'd for ever. Br. Feoffments al Uſes, pl. 18. cites * 21 H. 7. 25.

S. C. cited G. Law of Uſes &c. 34. that Ceſty que Uſe may enter; for he only can take Advantage of his own Condition; and ſince the Statute allows the Act of Re-entry, by allowing him Power to make Leaſes, he ſhall for ever keep the Poſſeſſion againſt the Feoffees; but ſays Quære tamen.

* Br. Entre Congeable, pl. 43. cites S. C.

8. In Replevin the Defendant *avow'd for Rent-charge*, becauſe *J. D. and J. B.* were *ſeiſed* of 40 Acres of Land, out of which &c. *in Fee, to the Uſe of R. N. of the Gift of R. and granted the Rent to Alice, who was Feme to R. for Term of Life*, with Clauſe of Diſtreſs, and avow'd as in Land charged to his Diſtreſs; and the Plaintiff *ſaid that J. D. and J. B. were ſeiſed in Fee to the Uſe of W. N. and granted the Rent to the ſaid Alice, ſhe having Notice of the ſaid Uſe; and J. D. and J. B. infeoff'd H.* and after *W. N. who was the Ceſty que Uſe, releaſed to the ſaid H. all his Right in the Land, abſque hoc that the ſaid J. D. and J. B. were ſeiſed to the Uſe of the ſaid R. N.* And the Defendant demurr'd in Law upon the Bar to the Avowry; and the Matter is if the Rent ſhall be to the Uſe of Ceſty que Uſe, as the Land out of which &c. was; or if the Rent ſhould be to the Uſe of the Grantee; And per Pollard, Broke, & Fitzh. J. *the Rent ſhall be to the Uſe of Ceſty que Uſe*; and then the Releaſe of Ceſty que Uſe to the Feoffees ſhall extinguiſh the Rent by the Statute of 1 R. 3. which wills that the Releaſe of Ceſty que Uſe ſhall be good againſt him, his Heirs, and Feoffees and their Heirs. Br. Feoffments al Uſes, pl. 10. cites 14 H. 8. 4.

S. C. cited G. Law of Uſes &c. 13. that the Rent ſhall be to the Uſe of W. N. becauſe J. D. and J. B. had the Freehold in them, and now at Common Law may raiſe a Freehold out of it; but they have the Fee in Truſt, and ſo in Conſcience cannot raiſe a Freehold, but under the ſame Truſt; and ſince in that Caſe Notice was given of the Truſt, the Rent was created under the Truſt, according to the Power. And ſo if J. D. and J. B. make a Feoffment to D. without Notice, and B. releaſes to D. after the Statute of R. 3. and before the Statute of H. 8. this extinguiſhes the Rent; for by that Statute the Releaſe of Ceſty que Uſe is an Act ſufficient to convey the Freehold of the Rent, and ſo it is merg'd in the Land.

9. *If* Feoffees in Uſe *releaſe to the Tenants who hold of the Manor*, this ſhall not be to the Uſe of Ceſty que Uſe. Br. Feoffments al Uſes, pl. 10. cites 14 H. 8. 4.

10. *Grant, Leaſe, Releaſe, Feoffment*, nor *Recovery ſuffer'd by Ceſty que Uſe in Tail, ſhall not bind his Feoffees after his Deceaſe*; by almoſt all the Juſtices, and by Fitzherbert, and by the beſt Opinion. Quod nota. And this to be underſtood that the Feoffees may enter; for they were not ſolely ſeiſed to his Uſe, but to the Uſe of him and of the Heirs of his Body, and therefore the Statute of 1 R. 3. ſhall not ſerve it for ever. Br. Feoffments al Uſes, pl. 2. cites 19 H. 8. 13.—But ſee 27 H. 8. 20. that Fitzherbert was there in a contrary Opinion, and that it was good againſt the Heir, viz. Fine of Ceſty que Uſe in Tail. Br. Feoffments al Uſes, pl. 2. cites 19 H. 8. 13.

11. *Gift of Land* for Years, *or* of a *Leaſe for Years*, to a Uſe, is good, notwithſtanding the *Statute of Rich.* 3. For the Statute *is intended to avoid Gifts* of Chattels to Uſes, *to defraud Creditors only*; and ſo is the Preamble and Intent of this Statute. Br. Feoffments al Uſes, pl. 60. cites 3 M. 1.

12. Ceſty

12. Ceſty que Uſe, before the Statute of 27 H. 8. *ſeiſed of* 3 *Acres* in the ſame County, *diſtant from each other*, makes Feoffment, and delivers *Seiſin*, *by Attorney*, *of one in the Name of all*; whereas the Statute giving Power to Ceſty que Uſe to enter, *and make Feoffment*, he ſhould do it *in propria Perſona*. But on grand Debate it was held a *good Feoffment of all* 3. But Quære, if the Feoffor had been ſeiſed in *Demeſne* of that Acre of which the Livery was, whether it would extend to paſs the reſt. Dyer. 283. a. pl. 30. Paſch. 11 Eliz. Anon.

2 Le. 211. pl. 261. S. C. in totidem Verbis.

13 If *Ceſty que Uſe*, after the Statute of 1 *R.* 3. *makes Leaſe for Years*, and afterwards the *Feoffees releaſe to Leſſee and his Heirs*, having *Notice* of the Uſe that Releaſe is to the firſt Uſe. But where the *Feoffees are diſſeiſed*, and they releaſe to the Diſſeiſor, tho' they have Notice of the Uſe, yet the ſame is to the Uſe of the Diſſeiſor, and no Subpœna lies againſt Diſſeiſor; per Anderſon Ch. J. 3 Le. 196. pl. 245. Trin. 29 Eliz. C. B. The Ld. Compton's Caſe.

1 Rep. 128. S.P. in Chudleigh's Caſe.

14. If after the Stat. 1 R. 3. and before the 27 *H.* 8. A Man made *Feoffment* to the Uſe of *B. for Life* or in *Tail*, and after to the Uſe *of another for Life or in Tail*, and after to the Uſe *of another in Fee*, *thoſe in Remainder* could not *make Feoffment* or *Grant* of their Eſtates by the *general Words* of the Act; for then there would be a *Fraction* and Diviſion *of Eſtates* which the Law will not ſuffer; Per Walmſley J. 1. Rep. 87. in Corbet's Caſe.

15. Ceſty que Uſe enters (the Feoffees in Truſt being ſeiſed) and *makes Feoffment*, this is a good Feoffment by Authority of the Statute 1 R. 3. which gives Power to Ceſty que Uſe to enter and make Feoffment *without Diſſeiſin*; Per Tanfield Ch. B. Palm. 355, 356. Hill. 20 Jac. B. R. in Ld. Sheffield's Caſe.

See Tit. Bargain and Sale.

(X. a) Statute of 27 *H.* 8. *cap.* 10. *And what is executed thereby.*

The Word (*Perſon*) excludes all Corporations. Ld. Bacon's Readings on the Statute of Uſes, 334, 335. — *This Word (*ſeiſed*) excludes Chattles and Rights. It likewiſe excludes Contingent Uſes, becauſe the Seiſin cannot be but to a Fee-Simple of a Uſe; and when that is limited, the Seiſin of the Feoffee is ſpent. Ld. Bacon's Readings on the Statute of Uſes, 335.

27 *H.* 3. *cap.* 10. ENacts that, *Where any Perſon or Perſons ſtand or be* * *ſeiſed, or at any Time hereafter ſhall happen to be ſeiſed of or in any Honours, Caſtles, Manors, Lands, Tenements, Rents, Services, Reverſions, Remainders, or other* † *Hereditaments, to the Uſe, Confidence, or Truſt, of any other Perſon or Perſons, or of any Body Politick, by Reaſon of any Bargain, Sale, Feoffment, Fine, Recovery, Covenant, Contract, Agreement, Will, or otherwiſe by any Manner or Means whatſoever it be, in every ſuch Caſe, all and every ſuch Perſon and Perſons, that have or ſhall have any ſuch Uſe or Truſt in Fee-Simple, Tail, for Life, or Years, or otherwiſe, or any Uſe, Confidence, or Truſt in* ‡ *Remainder or Reverter, ſhall from henceforth* ‖ *ſtand and be ſeiſed.*

† This Word (*Hereditament*) is to be underſtood of thoſe Things whereof an Inheritance is in Eſſe; For if I grant a Rent-Charge de Novo for Life to a Uſe, this is good enough; yet there is no Inheritance in being of this Rent. It likewiſe excludes Annuities and Uſes themſelves; ſo that a Uſe cannot be to a Uſe. Ld. Bacon's Readings on the Statute of Uſes. 335.

‡ The Statute having ſpoken before of Uſes in Fee-Simple, in Tail, for Life or Years, addeth, or otherwiſe (*in Remainder or Reverter*) whereby it is manifeſt, that the firſt Words are to be underſtood of Uſes in Poſſeſſion. Ld. Bacon's Readings on the Statute of Uſes, 337.

‖ It was the Opinion of diverſe Juſtices, that by theſe Words Ceſty que Uſe, is immediately and actually ſeiſed and in Poſſeſſion of the Land, ſo as he may have an Aſſiſe or Treſpaſs before Entry, againſt any Stranger who enters without Title. Cro. E. 46. pl. 2. in a Note there. Paſch. 28 Eliz. C. B. Anon.

And

And be deemed and adjudg'd in lawful Seiſin, Eſtate and Poſſeſſion of and in the ſame Honours &c. to all Intents &c. of and in ſuch like Eſtate as they had or ſhall have in the Uſe &c. of and in the ſame,

The Words (*lawful Seiſin, State and Poſſeſſion*) [intend] not a Poſſeſſion in Law only, but a Seiſin in Tail; not a Title to enter into the Land, but an actual Eſtate. Ld. Bacon's Readings on the Statute of Uſes, 338.

And the Eſtate, Title, Right and Poſſeſſion of ſuch Perſon or Perſons as were or hereafter ſhall be ſeiſed of any Lands, Tenements, or Hereditaments, to the Uſe, Confidence, or Truſt, of any ſuch Perſon or Perſons, or of any Body Politick, be from henceforth clearly deem'd and adjudg'd to be in him, or them that have, or hereafter ſhall have any ſuch Uſe, Confidence, or Truſt, after ſuch Quality, Manner, Form and Condition as they had before in or to the Uſe, Confidence, or Truſt that was in them.

Lord Ch. J. Vaughan ſays, The *Intent of this Statute*, which was to bring together the Poſſeſſion and the Uſe, when the Uſe was to one or more Perſons, and the Poſſeſſion in one or more other ſeparate Perſons, was ſoon after the Statute *wholly declin'd*, on what good Conſtruction or Inference he knew not; For now the Uſe (by the Name of Truſt) which were one and the ſame before the Statute, remains ſeparately in ſome Perſons, and the Poſſeſſion ſeparately in others, as it did before the Statute, and are *not brought together but by Decree in Chancery*, or the *voluntary Conveyance* of the Poſſeſſor of the Land to Ceſty que Truſt; So as now the *principal Uſe of this Statute*, eſpecially on Fines levied to Uſes, is not to bring together a Poſſeſſion and Uſe, but to introduce a general Form of Conveyance, by which the Conuſors of the Fine, (who are as Donors in the Caſe) may execute their Intents and Purpoſes at Pleaſure, either by transferring their Eſtate to Strangers, or by enlarging, diminiſhing, or altering them to and amongſt themſelves at their Pleaſure, without obſerving that Rigour and Strictneſs of Law for the Poſſeſſion of the Conuſee as was requiſite before the Statute. Vaugh. 50. in the Caſe of Dixon v. Harriſon.

Notwithſtanding this Statute, there are 3 *Ways of creating an Uſe or a Truſt, which ſtill remains* as at Common Law, *and is a Creature of the Courts of Equity*, and ſubject only to their Controul and Direction. 1ſt. Where a Man ſeiſed in Fee raiſes a *Term for Years*, and limits it in Truſt for A. For this the Statute cannot execute, the Termor not being ſeiſed. 2dly. Where Lands are limited *to the Uſe of A. in Truſt, to permit B. to receive the Rents* and Profits; for the Statute can only execute the firſt Uſe. 3dly. Where Lands are limited to *Truſtees to receive and pay over the Rents* and Profits to ſuch and ſuch Perſons; For here the Lands muſt remain in them to anſwer theſe Purpoſes; and theſe Points were agreed to; Trin. 1700. Abr. Equ. Caſes 383. Simpſon v. Turner.

S. 2. Where diverſe Perſons ſhall be jointly ſeiſed to the Uſe or Truſt of any of them, thoſe which ſhall have ſuch Uſe or Truſt, ſhall be adjudged to have only ſuch Eſtate, Poſſeſſion, and Seiſin of the Lands &c. as they had in the Uſe or Truſt, ſaving to all Perſons other than thoſe which be ſeiſed to any Uſe or Truſt, all Right &c.

S. 3. Alſo ſaving to all thoſe Perſons which ſhall be ſeiſed to any Uſe, all ſuch former Rights as they might have had to their own proper Uſe.

The *Huſband* being *ſeiſed in Fee made a Leaſe to O. and S.* but it was *in ſecret Confidence for the Preferment of his Wife*; and *afterwards he made a Feoffment to O. and others* of the ſame Land *to other Uſes*. It was decreed, by the Advice of Wray, Anderſon, and Manwood, That the Term was not extinguiſh'd by this Feoffment, by Reaſon of the Proviſo; and becauſe O. had this Leaſe to his own Uſe, it is not extinguiſh'd by the Feoffment which he took to the Uſe of another. Mo. 196. pl. 345. Trin. 27 Eliz. in the Court of Wards, Cheyney's Caſe.——2 And. 192. pl. 9. S. C ſays the Leaſe was made really in Truſt to the Uſe of the Wife, and Education of their Sons and Daughters, notwithſtanding that diverſe Covenants were therein contain'd, and a Rent was reſerv'd; and ſays that the Feoffment made afterwards was to the Uſe of the Husband himſelf, and his ſaid Wife for their Lives, with Remainders over; and that the ſame was held accordingly.

S. 4. 5. Where any be ſeiſed to any Uſe or Intent that another ſhall have a yearly Rent out of the ſame Lands, Ceſty que Uſe of the Rent ſhall be deem'd in the Poſſeſſion thereof of like Eſtate as he or ſhe had that Uſe.

A. in Conſideration of natural Love and Affection, covenanted to ſtand ſeiſed *to the Uſe of himſelf for Life*, Remainder *to B. his Son in Tail*, and *to the Intent that B. ſhould have a Rent* iſſuing *out of the Lands, during the Life of A.* The Son dies, and his Executors brought Debt for the Arrears of the Rent. It was reſolv'd and adjudg'd, that by theſe Words of the Statute B. in this Caſe had a good Rent, as well upon Covenant as by a Feoffment, or Bargain and Sale. Jo. 179. pl. 1. Trin. 4 Car. B. R. Riveſts v. Godſon.

2. It was agreed, that if *Ceſty que Uſe deviſes that his Feoffees* ſhall *make Eſtate* in Fee or in Tail *to J. S.* and dies, the Uſe changes before the Eſtate executed. D. 96. pl. 41. Mich. 1 Mar. in Bainton's Caſe.

D. 149. b. pl. 82. Trin. 3 & 4 P. & M. Bridgll v. Wolſtock, S. P. exactly; and by the Opinion of all the Court without Argument, the Widow could only have a Moiety, by Reaſon of the Jointenancy made before Marriage; and cites other Caſes upon like Points held accordingly, and then cites Paſch. 8 Eliz. C. B. between **Morgan and Wharton**; and that Weſton's Opinion was, that the Statute veſted the Poſſeſſion to the Uſe as a Purchaſe made to the Baron and Feme during the Coverture; which the other 3 Juſtices denied, by reaſon of the Words of the Statute, viz. Form, Quality, Condition, &c.

3. A. *covenanted that all* Perſons who ſhould be *Feoffees* of certain Lands, *ſhould be ſeiſed* thereof *to the Uſe of A. for Life*, and after his Deceaſe *to B. his Son, and M. and the Heirs of their Bodies*, Remainder *to the right Heirs of A.* and *afterwards made a Feoffment to the Uſes in the ſaid Indenture*, Afterwards *B. married the ſaid M.* then *A. died. B. after the* 27 *H.* 8. *alien'd all* the Lands, *and died.* M. enter'd into the whole. Weſton and Bendlows held her Entry lawful into all, but 3 Juſtices contra; For the Poſſeſſion ſhall be in the ſame Degree as the Uſe, and the Uſe was in Husband and Wife by ſeveral Moieties before the Marriage, and therefore ſhe may lawfully enter into a Moiety only. Mo. 92. pl. 228. Trin. 10 Eliz. Symonds's Caſe.

4. *A. Tenant in Tail*, Remainder *to his Siſters* (who were *his Heirs at Law*) *in Fee.* A. made a Deed in this manner, viz. *I the ſaid A. have given, granted, and confirm'd for* 100 *l.* without the Words (Bargain'd and Sold) *Habendum to the Feoffee, with Warranty againſt A. and his Heirs*, and a *Letter of Attorney was to make Livery and Seiſin*; ſo that *the Deed* began like a Deed-poll, viz. To all Chriſtian People &c. but it *was indented and inroll'd* within a Month, and 4 *Months after the Inrollment the Attorney made Livery* and Seiſin; *A. died without Iſſue.* The Siſters entred, and the Feoffee ouſted them: They brought Treſpaſs. It was clearly agreed by the Court, That by the Words Give for Money, Grant, or Confirm for Money &c. if the Conſideration be for Money, and the Deed is inroll'd within 6 Months, that the Lands ſhall paſs both by the Statute of Uſes and by the Statute of Inrollments, as well as upon the Words Bargain and Sale. 3 Le. 16. pl. 39. Mich. 14 Eliz. B. R. Anon.

5. Leaſe *to A. for Life, Remainder to the right Heirs of A. for* 20 *Years* after his Deceaſe; this Term is not in A. but is in *Abeyance* till after his Death, and then it commences in his right Heir, as Purchaſor by this Name. D. 310. pl. 78. Paſch. 14 Eliz. in Cranmer's Caſe.

S. C. cited Mo. 614. in pl. 842. — G. Law of Uſes &c. 198. cites S. C. adjudg'd that A.'s Grant was void; For he had nothing but a Truſt, which he could not aſſign over; For a Truſt cannot be aſſign'd over, becauſe it lies in Privity; and tho' A. may repoſe a Truſt and Confidence in the Leſſee, yet his Aſſignee, that is no Party to the Agreement, cannot do it, becauſe not Privy, (i. e.) not Conuſant of, nor Party to that Agreement, whereby by the Contract between the Parties, a Truſt was repos'd in the Tenant of the Land; For tho' he might be willing to ſtand intruſted for the Benefit of his Friend, it does not thereby follow that he would for every Body's Advantage. But it ſeems to him in this Caſe, that if A. had aſſign'd over the Land itſelf, it would be good by 1 R. 3. but the Words he us'd were not ſufficient to paſs the Land itſelf, for he had no Intereſt therein; For 27 H. 8. executes no Poſſeſſion to a Uſe, but where ſome Body is ſeiſed to the Uſe of another for Years, Life &c. So that the Tenant muſt have a Freehold in the Land, elſe the Statute executes no Poſſeſſion to the Uſe; but if a Fine be levied to the Uſe of one for Years, then it is executed; for the Conuſee of the Fine is ſeiſed.

6. A. poſſeſs'd of a *Leaſe for Years, grants all his Eſtate and Intereſt* to B. and C. and their Aſſigns, *to the Uſe of the ſaid A. and M. his Wife for their Lives, and of the longer Liver of them.* Afterwards A. granted to J. S. all ſuch Intereſt as he then had in the ſaid Lands in Leaſe, and died. The Queſtion was, Whether this Grant by A. gave all the Term of B. or C. or not? And being put by the Lord Chancellor, it was anſwer'd by all the Juſtices and Chief Baron, that the Grant of A. was void, and not within the Statutes of Ceſty que Uſe &c. D. 369. a. pl. 50. Paſch. 22 Eliz. Anon.

7. Feoff-

7. Feoffment in Fee *Sub Conditione, ea Intentione, that his Wife ſhould have the Land for her Life*, Remainder to his younger Son in Fee. The Feoffee died without making any Eſtate. The Heir of the Feoffor entred. It was reſolv'd that it was not a Condition, but an Eſtate which was executed preſently, according to the Intent. 4 Le. 2. pl. 3. Mich. 23 Eliz. Anon.

8. A. ſeiſed of Land in Fee, has Iſſue 2 Sons B. and C. and after the 1 R. 3. and before the 27 H. 8. deviſed to the Uſe of his youngeſt Son C. certain Lands in Tail, Remainder to his firſt Son B. on Condition *not to alien or diſcontinue, but for Jointure* to his Wife or Wives, and only for Life or Lives of ſuch Wife or Wives. Deviſee *levies a Fine* to a Stranger, and by Deed declares the Uſe to himſelf and his Wife, and to the Heirs Male of his own Body, Remainder to the Heirs of his Father; and avers that this Fine was for Jointure of his Wife. The Juſtices were clear, that the levying the Fine is a Breach of the Condition, but they doubted what Perſon ſhould take Benefit of it; for when *Ceſty que Uſe before* 27 *H.* 8. made the Deviſe conditional, and now by that Statute he has the Poſſeſſion in ſuch Quality as he had the Uſe, they * thought that the Condition is transferr'd into a Limitation, and ſo the Breach ſhall enure to determine the Eſtate by Ceſſer; and ſo he in the next Remainder ſhall enter, otherwiſe the Condition is gone by Confuſion of it in the Poſſeſſion; Yet at laſt they adjudged the Caſe with the Heir of B. (B. being dead) by Reaſon that the *Statute* of 27 *gives the Poſſeſſion in Quality and Condition with the Uſe, and* alſo *gives to Ceſty que Uſe ſuch Benefit and Advantage as the Feoffees had*; ſo that Quacunque via data the Heir of B. was enabled to take the Benefit of the Breach, be this a Condition or a Limitation. Mo. 212. 213. pl. 353. Mich. 27 & 28 Eliz. Rudhall v. Milward.

Le. 298. S. C.—Sav. 76. S. C.

* It was agreed that it was a Condition and not a Limitation. Sav. 78. S. C.

9. A. ſeiſed in Fee, made an *Indenture purporting a Feoffment* to B. and C. *with Warranty*, and *another Indenture bearing Date the ſame Day* with the firſt, was made between the Feoffees and the Feoffor, whereby *reciting that whereas A. the Day, Hour, and Inſtant of theſe Preſents, by Indenture hath given* &c. *to B. and C. the ſaid Lands, Habendum to them, their Heirs and Aſſigns* for ever, they the ſaid *B. and C. granted* by the ſame Deed, *that immediately after the ſaid B. and C. their Heirs and Aſſigns, have peaceably taken* &c. *the Profits* of the Lands *during the Term of* 101 *Years*, then *it ſhould be lawful for A. his Heirs and Aſſigns, to re-enter and have the ſaid Lands as in their firſt Right and Title*, the ſaid Feoffment and Livery of Seiſin thereof made at one Inſtant notwithſtanding. *The Indenture had ſeveral Labels, and* were *laid one on the other*, and the *Labels fix'd and conjoin'd both together in one Seal*, viz. *the Original with the Seal of A. and the Counterpart with the Seals of B. and C. and deliver'd accordingly. B. and C. and their Aſſigns, enjoy'd* the ſaid Lands *peaceably* without Interruption *during the ſaid Term.* It was reſolv'd by the Juſtices in this Caſe, that the Intent upon the Livery was, that A. ſhould re-have the Lands after the 101 Years quiet Poſſeſſion of the Feoffees, and that the Uſe did immediately ariſe out of the Poſſeſſion of the Feoffees to the Heirs of the Feoffor, as ſoon as the Lands had been enjoyed for 101 Years, and that by the Statute of 27 H. 8. the Heir of the Feoffor might enter. And decreed accordingly. Mo. 722. pl. 1009. Mich. 33 & 34 Eliz. in the Court of Wards, Boydell v. Walthall.

10. *Reverſion of a Leaſe for Life is granted for Life Cum poſt Mortem* of the Tenant for Life *acciderit*; this ſhall not refer to the Commencement of the future Time as to the Eſtate, but to the having the Land in Poſſeſſion. Cro. E. 323. pl. 14. Paſch. 36 Eliz. B. R. Milbourne v. Daſhborn.

11. If A. for good Conſideration *covenants to ſtand ſeiſed* to the Uſe of *himſelf in Tail*, and after to the Uſe of *B. in Tail*, and after of *C. and his Heirs*, now by 27 H. 8. A. is ſeiſed in Tail, with Remainder in Tail, Remainder

mainder in Fee, according to the ſeveral Limitations of the Uſes; and yet here, as to his Eſtate Tail, no other Perſon was ſeiſed to his Uſe, and none to this Reſpect ſeiſed to the other Uſe, as the Words of the Statute are. And 338. in Caſe of Dillan v. Freine, alias Chudleigh's Caſe.

S. C. cited D. 186. a. Marg. pl 1. ——S. C. cited Arg. 2 And. 126. in Corbet's Caſe.

12. A. *granted a Rent to B. and C.* (without more Words) *to the Uſe of his Wife for Life*; if this had been before the Statute 27 H. 8. B. and C. have Eſtate in the Rent during their Lives, to the Uſe of the Wife; but if after the Statute, or before, *B. and C. die in the Life of the Wife*, the Rent is determined, and ſhall not be continued by the Statute, or otherwiſe; For ſhe has not in this Caſe other or greater Eſtate in the Rent than B. and C. had; and yet the Words of the Statute are, that *Ceſty que Uſe ſhall be ſeiſed of ſuch Eſtate as he had in the Uſe*; and the laſt Part of this Branch of the Statute is, that *he ſhall have the Eſtate* of him that is ſeiſed *in the ſame Form, Manner, Quality and Condition as he had in the Uſe.* In which Caſe neither of thoſe two Branches of the Statute aforeſaid in Words, will make the Wife to have ſuch Eſtate in the Rent as ſhe had in the Uſe; but if the *Rent or Land had been granted to B. and C. during the Life of the Wife to the Uſe of the Wife*, then by this Statute ſhe ſhall have it during her Life; For the *Uſes and Eſtate agree* together. So in the principal Caſe the Uſe and Eſtate agree, becauſe there was not greater Eſtate in the Uſe than the Eſtate of B. and C. in the Rent, which is during the Life of the Wife conditionally, if B. and C. ſo long ſhall live; and if not, then the Uſe to ceaſe. 2 And. 130. pl. 74. Mich. 41 & 42 Eliz. Crawley's Caſe.

13. There are many Uſes which are not executed by 27 H. 8. as *tortious* Uſes, *fraudulent* Uſes, *Uſes upon Uſes*, *troubleſome* Uſes; As to ſtand ſeiſed to the Uſe of A. on Tueſday, and of B. on Wedneſday. So of Uſes of *Perpetual Freeholds*; Per Warburton J. Mo. 632. Paſch. 43 Eliz. C. B. in Caſe of Mildmay v. Mildmay.

Becauſe it cannot be executed to a *bare Poſſibility of a Uſe*,

14. 27 *H.* 8. of Uſes does not execute *Uſes* that are *in Abeyance.* Arg. Godb. 319. in Caſe of Sheffield v. Radcliffe.

neither can it be limited againſt the known Rules of the Common Law. Arg. 4 Mod. 155. cites 1 Rep. 130. Chudleigh's Caſe.

* S. C. cited Comb. 375. in Caſe of South v. Allen.—— S. C. cited per Rokeby J. 5 Mod. 63. in Caſe of Buſh v. Allen.—— S. P. admitted by the Attorney-General. Mo. 758. pl. 1049. in Caſe of Forſter v. Brown.

15. The Caſe was; A Man poſſeſs'd of a Term for Years of a Rectory, *deviſed the Profits* thereof to his Wife *for ſo many Years as ſhe ſhould live*; *and after* he *deviſed the Profits to* 20 *of his poor Kindred, and that after the Death of his Wife the Rectory ſhould be let by the Advice of his Overſeers, and the Rent diſtributed to his ſaid poor Kindred, and made the Wife his Executrix.* Reſolved by all the Juſtices in the Exchequer-Chamber, that altho' a * Deviſe of the Profits is a Deviſe of the Land itſelf, if there be no other Circumſtance in the Caſe, yet becauſe in this Caſe the Deviſor has declared, that the poor Kindred ſhould not have the Property of the Term, and he appoints a Leaſe to be made for Rent, and the Rent to be diſtributed amongſt them, the Executors ſhould have the Term upon the Confidence to make the Leaſe, and diſtribute the Rent; and that the poor Kindred had only a Truſt, and no Intereſt in the Term. Mo. 753. pl. 1040. Mich. 2 Jac. Griffith v. Smith.

——S. P. by Ld. Keeper. Chan. Caſes, 240. Mich. 26 Car. 2 in Caſe of Cary v. Appleton.——S. P. Chan. Prec. 123. pl. 106. Mich. 1700. in Caſe of Foſter v. Foſter.

They ſhall be both in by the Statute, becauſe *they could not take jointly*,

16. If a Man *enfeoffs A. to the Uſe of A. and B.* they are Jointenants; for both come in by the Statute. 13 Rep. 55. Mich. 7 Jac. in the Court of Wards, Samme's Caſe.

they taking by ſeveral Titles. Ld. Bacon's Readings on the Statute of Uſes, 353.

One cannot be in by the Statute, and one by the Common Law, but both ſhall be in by the Statute. Arg. Vent. 390 in the Caſe of Potter v. North.——See Tit. Jointenants, (L) pl. 5.

17. In

17. In all Caſes where a Uſe may be *raiſed by the Common Law*, and that it ſhall be *perform'd by Order in Chancery*, the Uſe ſhall be executed by 27 *H.* 8. of Uſes. Arg. 2 Brownl. 291. Hill. 7 Jac. C. B. in the Caſe of Smallman v. Powis.

The Statute never intended to execute any Uſe but that which *might lawfully be compell'd to be executed before* the Statute, which cannot be of an *Eſtate Tail*; for the Chancery could not compel him at Common Law to execute the Eſtate, and ſo the Statute doth not execute it at this Day. Cro. J. 401. pl. 9 Paſch. 14 Jac. B. R. in Caſe of Cooper v. Franklin and Walter.

18. A. makes Feoffment to the Uſe of *the Heirs Male of his Body begotten.* Adjudged an Eſtate Tail executed in himſelf; for by *Implication* of Law he has an Eſtate for Life, and therefore the Eſtate limited to the Heirs of his Body is an Execution in him; per Coke Ch. J. Roll Rep. 240. cites the Caſe of Fenwick v. Mitford.

19. Where *the Party ſeiſed* to the Uſe, *and* the *Ceſty que Uſe, is one Perſon*, he never takes by the Statute, except there be a direct Impoſſibility or Impertinency for the Uſe to take Effect by the Common Law. Ld. Bacon's Readings on the Statute of Uſes, 352.

20. If I *give* Land *to J. S. to the Uſe of himſelf and his Heirs*, and *if J. D. pay a Sum of Money, then to the Uſe of J. D. and his Heirs*, J. S. is in of an Eſtate for Life, or for Years, by way of Abridgment of Eſtate in Courſe of Poſſeſſion, and J. D. in of the Fee-ſimple by the Statute. Ld. Bacon's Readings on the Statute of Uſes, 352.

21. If I *enfeoff J. S. to the Uſe of himſelf in Tail*, and *then to* the Uſe of *J. D. in Fee*, the Eſtate Tail is executed by this Statute; becauſe an Eſtate *Tail cannot be re-occupied out of a Fee-ſimple, being a new Eſtate*, and *not like a particular Eſtate for Life or Years, which are but Portions of the abſolute Fee.* Ld. Bacon's Readings on the Statute of Uſes, 352.

22. And *therefore if* I *bargain and ſell my Land to J. S. after my Death, without Iſſue*, it doth not leave an Eſtate Tail in me, nor veſts any preſent Fee in the Bargainee, but is an Uſe Expectant. Ld. Bacon's Readings on the Statute of Uſes, 352.

23. *So* if I *enfeoff J. S. to the Uſe of J. D. for Life*, and *then* to the Uſe *of himſelf and his Heirs*, he is in of the Fee-ſimple merely in Courſe of Poſſeſſion, and as of a Reverſion, and not of a Remainder. Ld. Bacon's Readings on the Statute of Uſes, 352.

Contra if I enfeoff J. S. *to the Uſe of J. D for Life*, then to the Uſe *of himſelf for Life*, the Remainder to the Uſe *of J. N. in Fee.* Now the Law will not admit Fraction of Eſtates; but J. S. is in with the reſt by the Statute. Ld. Bacon's Readings on the Statute of Uſes, 353.

24. If I *enfeoff a Biſhop and his Heirs to the Uſe of himſelf and his Succeſſors*, he is in by the Statute in the Right of his See. Ld. Bacon's Readings on the Statute of Uſes, 353.

25. And as I cannot raiſe a preſent Uſe to one out of his own Seiſin, ſo if I limit a contingent or *future Uſe to one, being at the Time of Limitation not ſeiſed, but after becomes at the Time of the Execution of the contingent Uſe*, there is the ſame Reaſon, and the ſame Law, and upon the ſame Difference which are put before. Ld. Bacon's Readings on the Statute of Uſes, 353.

26. As if I *covenant with my Son* that *after his Marriage I will ſtand ſeiſed of* Land *to the Uſe of himſelf and his Heirs*, and *before Marriage I enfeoff him to the Uſe of himſelf and his Heirs*, and then *he marries*, he is in by the Common Law, and not by the Statute; like Law of a *Bargain and Sale.* Ld. Bacon's Readings on the Statute of Uſes, 353.

But if I had let to him *for Life only*, then *he ſhould have been in for Life only, by the Common Law, and of the Fee-ſimple by Statute.* Ld. Bacon's Readings on the Statute of Uſes, 353.

27. If *I have an Eigne Right*, and be *inſeoff'd to the Uſe of J. S. for Life*, then to the Uſe *of myſelf for Life*, then to the Uſe *of J. D. in Fee, and J. S. dies*; if I be in by the Common Law I cannot *waive my Eſtate*, having agreed to the Feoffment; but if I am in by the Statute, yet I am not remitted, becauſe I come in by my own Act. But I may waive my Uſe, and bring an Action preſently; for my Right is ſaved unto me by one of the Savings in the Statute. Ld. Bacon's Readings on the Statute of Uſes, 354.

28. If a *Diſſeiſin* were committed *to an Uſe*, it is in him by the Common Law upon Agreement; ſo if one *enters as Occupant to the Uſe of another*, it is in him till Diſagreement; *for wherever Ceſty que Uſe has Remedy for the Poſſeſſion by Courſe of Common Law*, there *the Statute never works*. Ld. Bacon's Readings on the Statute of Uſes, 354.

29. If a *Feme infeoffs a Man (Cauſa Matrimonii prælocuti,)* ſhe hath Remedy for the Land again by Courſe of Law; and therefore, in thoſe Special Caſes, the Statute works not; and yet the Words of the Statute are general, (where any Perſon ſtands ſeiſed by Force of any Fine, Recovery, Feoffment, Bargain and Sale, Agreement, or otherwiſe) but yet the Feme is to be reſtrain'd for the Reaſon aforeſaid. Ld. Bacon's Readings on the Statute of Uſes, 354.

S. P. Arg. Cart. 8. in Caſe of Taylor v. Shaw.—S. P. Gilb. Treat. of Ten. 170.

30. The Statute 27 H. 8. cap. 10. of Uſes, toucheth not *Copyholds*; becauſe the Tranſmutation of Poſſeſſion by the ſole Operation of the Statute, without Allowance of the Lord, would tend to the Lord's Prejudice. Cro. C. 44. Mich. 2 Car. C. B. in Caſe of Rowden v. Maliſter.

For then a Tenant would be introduced without the Lord's Conſent.

An Eſtate *for Years* cannot be ſeiſed or poſſeſs'd at this Day to any Uſe; for it has only Poſſeſſion, whereas the Statute of Uſes, 27 *H.* 8. 10. *requires Seiſin.* Jenk. 195. pl. 1.——But if one bargains and ſells Land for Years, this is executed by the Statute, if *the Bargainor had a Freehold*; for only an Uſe paſs'd at the Common Law, and ſo had ſtood ſeiſed to an Uſe, and whatever Intereſt the Ceſty que Uſe has in the Uſe it is executed by the Statute, if any body be ſeiſed to the Uſe. G. Law of Uſes &c. 199.

31. A *Truſt is nothing in Law*; and Uſes being aboliſh'd, and join'd to the Poſſeſſions, a Truſt of a *Leaſe for Years* cannot be ſaid to be an Uſe; for if ſo, the 27 *H.* 8. of transferring Uſes into Poſſeſſion, would be to no Purpoſe; for this Statute requires a Seiſin to the Uſe, but there is only a Poſſeſſion in a Leſſee for Years. By the Judges of both Benches. Jenk. 244. pl. 30.

Mod. 223. pl. 12. Boſcowen & Herle v. Cooke, S. C. accordingly.

32. J. S. granted a *Rent-charge to B. and C. in Truſt for M.* in Diſcharge of a Jointure, which M. being then a Widow, had on the Premiſſes, Habend' to B. and C. their Heirs, Executors &c. in Truſt for M. for Life. Per tot. Cur. This Rent-charge is executed by the Statute of Uſes, by the expreſs Words thereof, which executes ſuch Rents granted for Life upon Truſt. 2 Mod. 138. Mich. 28 Car. 2. C. B. Cook & al'. v. Herle.

As where the ſaid Grant *contain'd a Covenant for Payment* to B. and C. to the Uſe of M. tho' M. may diſtrain, becauſe it is an Incident to the Eſtate transferr'd, yet ſhe cannot bring Covenant, becauſe that is collateral. Mod. 223. Boſcawen & Herle v. Cook.—And 2 Mod. 138. S. C.

33. When the Statute transfers an Eſtate, it *transfers together with it* ſuch *Remedies* only as are by Law *Incident* to that Eſtate, and *not Collateral* ones. Mod. 223. Mich. 28 Car. 2. C. B. Boſcawen & Herle v. Cook.—2 Mod. 138. Cook v. Herle.

34. To know how an *Uſe is turn'd into a Right to an Uſe*, it muſt be conſider'd How it was before the Statute, and was *thus*; *Before the Statute* the Feoffees had the Eſtate, and the Ceſty que Uſe had the Uſe, and this depended upon the Eſtate of the Feoffees; for the Feoffees had the Eſtate upon Confidence and Truſt that the Ceſty que Uſe ſhould take the Profits,

Profits, which was a Collateral Intereſt annex'd in Privity to the Eſtate of the Feoffees. *If the Eſtate of the Feoffees was deveſted, the Uſe conſequently was turn'd into an equitable Right, and the Ceſty que Uſe could not have the Uſe any longer than the Eſtate had its Being*; ſo that ſuch *Acts, which diſplace* and deveſt *the Eſtates out of the Feoffees*, do by Conſequence *turn the Uſe into a Right.* Arg. Pollex. 97. in the Caſe of Carpenter v. Smith.

35. If Land be *deviſed to A. in Fee, in Truſt that B. may take the Profits*, it is an Uſe. Arg. Skin. 209. admitted in Caſe of Durdant v. Burchet.

36. Deviſe of Land to B. and C. *for Payment of Debts, and after in Truſt for the Uſe of A. and his Heirs Male, but* declar'd his Will to be that *A. ſhould have no Benefit* of this Deviſe, *unleſs* A.'s Father ſhould ſettle on A. ſo much, and in Default thereof devis'd the ſaid Eſtate to the Truſtees; or in Caſe A.'s Father ſhould make ſuch Settlement, yet if A. ſhould die without Iſſue, in ſuch Caſe likewiſe he gave the ſaid Eſtate to his Truſtees, diſcharg'd of the Truſt for A. Per Lord Chancellor, This is no *Truſt*, but an Eſtate veſted at Law, and well executed by the Statute of Uſes; for the Truſt here ariſes out of the Eſtate; and in ſuch Caſe the Deviſee might, by the Statute 1 *R.* 3. have made Leaſes. Vern. 79. 82. pl. 73. Mich. 1682. Popham v. Bamfield.

37. Lands were *given by Will to Truſtees and their Heirs, in Truſt for A. the Defendant's Wife, and her Heirs*, and that the Truſtees ſhould *from Time to Time pay and diſpoſe of the Rents and Profits to the ſaid A. or to ſuch Perſon* or Perſons *as ſhe*, by any Writing under her Hand, as well during Coverture as being Sole, *ſhould order* or appoint the ſame, *without the intermeddling of her Husband*, whom he will'd ſhould have no Benefit or Diſpoſal thereof; *and as to the Inheritance* of the Premiſſes *in Truſt for ſuch Perſon* or Perſons, and for ſuch Eſtate and Eſtates *as the ſaid A. by any Writing* purporting her Will, or other Writing under her Hand, *ſhould appoint*; *and for Want of ſuch Appointment, in Truſt for her and her Heirs.* The Queſtion was, whether this was an Uſe executed by the Statute, or a bare Truſt for the Wife: And the Court held it to be a Truſt only, and not an Uſe executed by the Statute. Vern. 415. pl. 393. Mich. 1686. Nevil v. Saunders.

38. *But* a Deviſe *of all the Rents and Profits* of Lands to A. the Wife of J. S. *during her natural Life, to be paid by his Executors into her own Hands, without the intermeddling of her Husband*; and after her Deceaſe to and amongſt J. B. M. B. and R. B. &c. Holt Ch. J. ſeem'd ſtrongly to incline that the Executors were Truſtees for the Wife; but Rokeby and Eyre J. e contra, and Judgment accordingly. 1 Salk. 228. pl. 7. Trin. 7 W. & M. in B. R. South v. Alleine.

Comb. 375. Trin. 8 W. 3. B. R. S. C. ſays that Holt Ch. J. (at firſt) held this a Deviſe to the Executors by Implication of Law, or elſe the Will cannot be perform'd; and the other Juſtices agreed with him, but afterwards Holt ſaid the Deviſe of the Rents and Profits is a Deviſe of the Land to A. and then the ſubſequent Words (to be paid &c.) are void, and cannot exclude the Husband; and that the Man was miſtaken in the Law. But all the other Judges retain'd the contrary Opinion, and ſaid that a Deviſe of the Rents and Profits it not always a Deviſe of the Land; for which they relied on Mo. 753. 754. Griffith v. Smith; and it was adjudg'd againſt the Opinion of the Chief Juſtice.——5 Mod. 63. Mich. 7 W. 3. Buſh v. Allen, S. C. Holt Ch. J. thought this a Deviſe to the Executors for her Life, upon Truſt to pay the Profits to her; and that this is fully to perform the Will, the Intent whereof was wholly to exclude the Husband; Et adornatur. But at another Day Holt thought it a Deviſe to her; For a Deviſe of the Rents and Profits, is a Deviſe of the Land itſelf, and if this ſhould be conſtrued a Deviſe to her, then the laſt Words contradict the former; and ſo the Executors will have a Deviſe by Implication, againſt an expreſs Deviſe before. But Rokeby J. replied, that then the Husband ſhall intermeddle, where the Deviſor intended to exclude him; and ſaid he relied on the Caſe of Griffith and Smith. Mo. 753. But Holt replied, that in that Caſe the Intereſt remain'd in the Executors, and not in the Deviſees. Eyre J. thought the ſubſequent Words made it a Deviſe to the Executors in Truſt for the Wife. Judgment was given according to the Opinion of the Juſtices. Holt diſſentiente. ——Ibid. 101. S. C. and Judgment according to the Opinion of the other Juſtices.——See pl. 15. 48.

S. P. For otherwiſe there would be an *Uſe upon an Uſe.* Per Cur. Carth. 273. in Caſe of Tipping v. Coſin.

39. A. conveys to Truſtees and their Heirs, *in Truſt to permit A. to receive the Profits* during Life &c. This cannot create ſuch an Eſtate in A. as will be executed by the Statute of Uſes; For if a Man is ſeiſed in Fee of an Eſtate, and makes a Declaration thereof in Truſt for J. S. this is no Colour to make an Eſtate for Life in J. S. Arg. 3 Mod. 146. 147. in Caſe of the King v. Lenthall.

Wherever the *Eſtate is in one, and the Profit and Benefit in another*, it is executed by the Statute of Uſes.

40. Where the *Limitation of the Uſe is different from the Eſtate of the Land*; As where a Feoffment is made to the Uſe of the Feoffee for Life, Remainder to J. S. the Feoffee is in by the Statute; Per Holt Ch. J. Cumb. 313. Hill. 6 W. 3. B. R. in Caſe of Tipping v. Coſins. Skin. 209. admitted Arg. in Caſe of Durdant v. Burchet.

Ch. Prec. 342. S. C. cited.——Ibid. 345. 346. Ewer v. Howard.

41. Where the *laſt Fee-ſimple of the Uſe* is *limited to him who has the Eſtate of the Land*, he is in by the Common Law, as in the Caſe Inſt. 22. b. where a Feoffment is to the Uſe of the Feoffor in Tail, and after to the Uſe of the Feoffee in Fee; Per Holt Ch. J. Cumb. 313. Tipping v. Coſins.

42. Where A. makes a *Feoffment to B. and C. and their Heirs, to the Uſe of them and their Heirs in Truſt for J. S.* this Truſt is executed by the Statute; Per Wright Serjeant. Arg. Cumb. 313. Tipping v. Coſins.

* D. 277. Cro. J. 217. Noy 135. Jo. 377. Cro. Car.

43. Ceſty que Uſe *is in meerly by Operation of Law, and not in the Per.* Reſolv'd, and for Authorities the Caſes in the Margin *were cited. Carth. 316. Trin. 6 W. & M. B. R. Reynell v. Long.

Stockton v. Hampton. 2 Roll. Abr. 31.

Lutw. 814. 824. S. C. and all the Court were of Opinion that the Uſe was executed in A. and obſerv'd that if it ſhould not be ſo immediately during his Life, the Remainder limited to the Uſe of the right Heirs of his Body cannot take Effect by way of Uſe executed, which it muſt neceſſarily do; For there is no Colour to make it a Truſt for the Heirs of the Body of A.——S. C. cited 2 Vent. 312. in the Margin of the Caſe of Burchet v. Durdant.——S. C. cited Abr. Equity Caſes 383. pl. 4. in Caſe of Jones v. Lord Say and Seal.

44. J. S. ſeiſed of Lands in Fee, *deviſed* them *to Truſtees and their Heirs*, to the Uſes, Intents and Purpoſes herein after mention'd, viz. to the Intent and Purpoſe *to permit A. to receive the Rents and Profits for his Life, and after* that the Truſtees *ſhould ſtand ſeiſed of the Premiſſes to the Uſe of the Heirs of the Body of A.* Holt Ch. J. pronounc'd the Judgment of the Court, and ſaid that this would have been a plain Truſt at Common Law; and *what at Common Law was a Truſt of a Freehold*, or Inheritance, *is executed by the Statute*, which mentions the Word Truſt as well as Uſe; and the Caſe in 2 Vent. 312. **Burchet and Durdant**, is not Law; and that the Change of Expreſſion in the principal Caſe, by uſing the Word *Permit* in the firſt Clauſe, which are Words of Truſt, and afterwards making Mention of a Uſe, is immaterial, in regard Truſts at Common Law and Uſes are equally executed by the Statute. Salk. 679. pl. 6. Hill. 1 Ann. B. R. Broughton v. Langley.

45. The laſt Limitation in a Deed of Settlement was *to the Truſtees and their Heirs in Truſt for A.* (the Grantor) *and his Heirs.* It was inſiſted that this, upon the Determination of the intermediate Eſtates, will be executed to A. in Poſſeſſion as abſolutely as if it had been ſaid *To the Uſe of A. and his Heirs*; For the Statute makes *no Difference* between an *Uſe* and a *Truſt*, but mentions them both promiſcuouſly. Arg. And this upon reading the Deeds ſeem'd to be given up as a clear Point. Ch. Prec. 345. Trin. 1712. in Caſe of Eure v Howard.

1 Rep. 126. a. in Chudleigh's

46. *To the Execution of a Uſe* 4 *Things are neceſſary.* 1ſt. There ought to be *a Perſon ſeiſed.* 2dly. Ceſty que Uſe *in Rerum Natura.* 3dly. A

Uſe

Uſe in Eſſe *in Poſſeſſion, Reverſion or Remainder.* 4thly. That the *Eſtate of the Feoffees may veſt in Ceſty que Uſe.* G. Law of Uſes &c. 80. Caſe, cites Pl. C. 351. b. 10 Eliz.

Delamere's Caſe, S. P. So that a *Right of* an Uſe, *or a Future or Contingent Uſe*, are excluded till they come in Eſſe. And D. 58. a. [pl. 5. Trin.] 36 H. 8. that it was held [The Book is Semble] that if Ceſty que Uſe in Tail, with diverſe Uſes in Remainder, makes Feoffment, and dies, and the Statute of 27 H. 8. is made, now the Iſſue in Tail has Right of an Uſe in Eſſe, but no Execution of it till Entry by the Feoffees; and that with this accords the Caſes in D. 88. b. [pl. 109. Trin] 7 E. 6. **Stephen Davis's** Caſe; and D. 330. [329. b. pl. 17. Mich.] 15 & 16 Eliz. **Dame Baskervill's** Caſe, that if Ceſty que Uſe in Poſſeſſion had made a Feoffment before the Statute, no Right of an Uſe neither in Poſſeſſion nor in Remainder, ſhall be executed by the Statute of 27 H. 8. till Regreſs of the Feoffees.—And. 330. S. P. in S. C. by the Name of Dillam v. Fraine.—Poll. 96. in Caſe of Carpenter v. Smith, S. P. and cites the Same Caſes.

Where there is *no Seiſin to the Uſe*, there can be *no Uſe*. And. 334. in Caſe of Dillan v. Freine, alias Chudleigh's Caſe.—And as there muſt be one that is ſeiſed to the Uſe, ſo there *muſt be one that hath the Uſe*. Ibid. 336.

To the Execution of a Uſe into Poſſeſſion by the Statute, it is requiſite that there muſt be a *compleat Poſſeſſion*; for the Feoffee muſt make an actual Entry; becauſe the Intent of the Statute was not to help out a Poſſeſſion already good. So it ſeems, if a Reverſion be granted to one to the Uſe of another, that this is not executed before Attornment, for the Reverſion paſſes not till then: But if a Man hath a Reverſion granted to him by Fine, and before Attornment he bargains and ſells it to another, the Reverſion is executed by the Statute in the Bargainee; for as, in the firſt Caſe, the Grantee had no Reverſion for want of Attornment, and it conſequently could not be executed, ſo in the laſt Caſe the Conuſee had a Reverſion before Attornment, which he paſs'd the Uſe of to another, and then the Statute executes the Poſſeſſion to the Uſe, but in the ſame Plight as the Uſe was, and conſequently ſtill, till Attornment, there wants a Privity of Diſtraining &c. Gilb Law of Uſes &c. 231, 232.

The Statute is to be underſtood of Ceſty que Uſe that has an *Uſe in Eſſe, in Oppoſition to* him that has only *a Reverſion or Remainder of an Uſe*. G. Law of Uſes &c. 28.

47. A Conveyance was to ſuch Uſes as ſhall be by Will directed. The Uſe declar'd by the Will was, *that the Truſtees ſhall convey to the Uſe of A. till B. comes of Age, or be married, and after ſuch Age or Marriage, one Moiety to A. for Life; and if B. ſhall die during his Minority, then all the Eſtate to A. but if B. ſhall attain ſuch Age, or marry, then one Moiety in Poſſeſſion, and the Reverſion of the other to B. and his Heirs.* The Queſtion was, whether this be an Uſe executed by the Statute; and it was ſent to the Judges for their Opinion. MS. Tab. Tit. Uſes, Feb. 9. 1727. Rich v. Beaumond.

48. Where *Lands* were *deviſed to Truſtees and their Heirs*, in Truſt *to pay* ſeveral Legacies and *Annuities, and* to pay *the Surplus of the Rents* and Profits *to a married Woman*, during her Life, *for her ſeparate Uſe*, or *as ſhe ſhould direct, and after* her Death the Truſtees to ſtand ſeiſed to the Uſe of the *Heirs of her Body*, with Remainders over, the Queſtion was, Whether this Deviſe to pay the Surplus of the Rents and Profits to the Wife, was ſuch a Uſe or Truſt as was executed by the 27 H. 8. For if it was, then it was urg'd, that ſhe being Tenant for Life, the Limitation after to the Heirs of her Body, being coupled with it, gave her an Eſtate-tail, according to **Shelley's Caſe**, 1 Rep. But if it did not, then the eldeſt Son was to take as a Purchaſor. And it was held by the Court, that ſhe had only a Truſt for Life, and conſequently the Heirs of her Body muſt take by Purchaſe; and the rather in this Caſe, becauſe it was limited to the *Heirs of her Body ſeverally and ſucceſſively, as they ſhould be in Seniority* of Age and Priority of Birth, *and the Heirs of their reſpective Bodies iſſuing*. And a Difference was taken between this Caſe and that of **Broughton and Langley**, 2 Salk. For there it was *to permit A. to receive* the Rents and Profits for Life, but here it is a Truſt in the *Truſtees to pay over the* Rents and Profits to ſuch and ſuch Perſons; and therefore the Eſtate muſt remain in them to anſwer theſe Truſts, otherwiſe ſhe muſt be the Truſtee, contrary to the expreſs Words of the Will. Mich. 1728. decreed and affirm'd in the Houſe of Lords. Abr. Equ. Caſes 384. Jones v. Lord Say and Seal.

(Y. a) *Reſulting* Uſes.

If a Man at this Day *infeoffs a Stranger without any Conſideration*, the Feoffee is ſeiſed to

1. WHEN a Man makes a *Feoffment without Conſideration, and expreſſes no Uſe*, the Feoffment is intended by the Law to be to the Uſe of the Feoffor and his Heirs; and therefore Brooke ſays it ſeems to him, that he in Reverſion and in the Remainder ſhall not have Subpœna, but Formedon, and the Feme Cui in Vita. Br. Feoffments al Uſes, pl. 32. cites 5 E. 4. 7.

the Uſe of the Feoffor and his Heirs; for in this Caſe the Law makes not any Conſideration, becauſe the Feoffee ſhall not hold of the Feoffor &c. but of him of whom the Feoffor held, and this by the Statute of Quia Emptores &c. Perk. S. 533.——D. 146. b. pl. 71. S. P. Arg. in Caſe of Villers v. Beaumont. ——But before the Statute of *Quia Emptores terrarum*, if a Man had made a Deed of Feoffment *without any Conſideration* or Cauſe, the Feoffee ſhould have had this to his own Uſe, becauſe there was *Nurture between* Feoffor and Feoffee. D. 146. b. pl. 71. Paſch. 3 & 4 P. & M. in Caſe of Villers v. Beaumont.——Perk. S. 534. S. P.

2. It was moved upon Evidence, if A. *recovers by Common Recovery againſt B.* and *B. infeoffs A.* afterwards, that A. ſhall be ſeiſed to B.'s Uſe; for A. ſhall be adjudged in by the Recovery, and not by the Feoffment, which Shelley and Fitzherbert J. in a manner affirm'd. D. 18. pl. 105. Trin. 28 H. 8. Anon.

Arg. Litt. Rep. 255. cites Chudleigh's Caſe. —Jenk. 276. pl. 98. S. C.

3. That which *cannot veſt in him to whom it is limited*, ſhall return to the Feoffor; As if I make a Feoffment in Fee to the Uſe of myſelf for Life, and after to the Uſe of my ſecond Wife, all the Fee is now in me, and when I take a 2d Wife, then the Feoffees ſhall be ſeiſed to the Uſe of ſuch Wife in Remainder for her Life; per Manwood J. 2 Le. 19. pl. 25. in Brent's Caſe.

4. A. ſuffers a *Common Recovery to B. to the Intent that B. ſhall make Eſtate* to A. for Life, Remainders over. Agreed that after the Recovery B. ſhall be ſeiſed to his own Uſe; for if he ſhould be ſeiſed to the Uſe of A. then he cannot make Eſtate to A. &c. But per Southcote and Wray J. he ought to make it in *convenient time*, otherwiſe an Uſe ſhall be raiſed in A. D. 166. pl. 9. Marg. cites Paſch. 17 Eliz. Humfreſton's Caſe.

S. P. But if B. takes, he is in by the firſt Feoffor. Roll Rep. 161. in Caſe of Warren v. Smith, Arg. cites 17 E. 3. 59. 21 E. 3. 46.——Arg. 2 Roll Rep. 68. in Caſe of Treſwallen v. Penhules, cites 19 H. 6. 34. 2 E. 4. 3. S. P.

5. If I *infeoff A. on Condition to infeoff B. who refuſes*, now A. ſhall be ſeiſed to my Uſe; but if it were to give in Tail, 'tis otherwiſe; per Dyer. Le. 266. pl. 355. 19 Eliz. in Bracebridge's Caſe.

——Feoffment on Condition *to give the Land in Tail to a Stranger*, who refuſes, there the Feoffor may re-enter; but a Feoffment on Condition to infeoff a Stranger, or *to grant a Rent-charge*, if the Stranger refuſes, there the Feoffor ſhall not re-enter; for his Intent was not that the Land ſhould revert &c. Per Dyer. 2 Le. 222. pl. 281. Paſch. 16 Eliz. C. B. in Caſe of Bawell v. Lucas.

If he ſurrenders to the Uſe of *himſelf for Life, Remainder to his Wife for Life, Remainder to his Son for Life*,

6. *Copyholder in Fee ſurrenders* to ſuch Uſes as the Lord ſhall appoint; the Lord limits the Uſe to J. S. for Life. Reſolv'd that the Uſe of the Fee ſhall reſult to the firſt Copyholder. Litt. Rep. 26. Arg. cites Paſch. 35 Eliz. C. B. Rot. 334. Wroth's Caſe.

the Reverſion in Fee continues in the Surrenderor. Arg. cites it adjudged Hill. 36 El. Rot. 2650. and the Record was produced. But Haughton J. thought it was a Surrender of the Inheritance. But Doderidge J. contra; but thought if he had accepted an *Eſtate back for his own Life only*, it might be a Queſtion. The Court directed a Special Verdict. Roll Rep. 256. in caſe of Southcot v. Adams.

Poph. 70. Mich. 36 & 37 Eliz.

7. Where a Feoffment is made to ſeveral Uſes for Life, for Years, and in Tail, but *no Uſe is limited of the Fee after the Eſtates for Life, for Years,*

Years, and in Tail, this Fee was left in the Feoffor. 1 Rep. 120. Chudleigh's Caſe. B. R. Dillon v. Fraine, S. C.——

And. 309. S. C.——Jenk. 276. pl. 98. S. C.

8. Feoffment *by A. on Condition to convey to A. for Life, Remainder to the eldeſt Son of A. in Fee.* No Uſe reſults to A. for Life, Remainder to the eldeſt Son in Fee; for if ſo, then the Eſtate would veſt by the Statute of Uſes, and ſo then the Feoffee could not make Eſtate to A. for Life, Remainder to the eldeſt Son in Fee. Jenk. 253. pl. 44. 40 Eliz. Julius Winnington's Caſe. 2 Rep. 59. a. Mich. 40 & 41 Eliz. B. R. S. C.

9. I make a *Feoffment to the Uſe of my Wife that ſhall be, or* to *ſuch Perſons as I ſhall maintain*, tho' I *limit no particular Eſtate* at all; yet the Uſe is good, and ſhall in the Interim return to the Feoffor. Ld. Bacon's Readings on the Statute of Uſes, 350.

10. If I once *limit the whole Fee-ſimple of the Uſe* out of Land, *and Part thereof to a Perſon uncertain*, it ſhall never return to the Feoffor by way of Fraction of the Uſe. Ld. Bacon's Readings on the Statute of Uſes, 350.

11. If the *King gives Lands* by his Letters *to J. S. and his Heirs, to the Uſe of J. S. for Life*, the King has the Inheritance of the Uſe by Implication of the Patent, and no Office needs; for Implication out of Matter of Record amounts ever to Matter of Record. Ld. Bacon on the Statute of Uſes, 355.

12. *Feoffment to the Uſe of a laſt Will*, the Eſtate paſſes now to the Feoffee, but 'tis to the Uſe of the Feoffor; Per Doderidge J. Roll Rep. 253. Mich. 13 Jac. B. R. in Caſe of Simpſon v. Southwood.

13. There is is a Difference between a *Feoffment in Fee to Uſes*, and a *Covenant to ſtand ſeiſed* to Uſes. If Feoffment in Fee be, and Uſe is limited to a *Perſon incapable, Remainder over*, nothing returns to the Feoffor; but otherwiſe 'tis in Covenant to ſtand ſeiſed as in Paget's Caſe put in the Rector of Chedington's Caſe. The ſame in Caſe of Refuſal *by Tenant for Life, Remainder over.* Arg. Litt. R. 262. Paſch. 5 Car. C. B. in Beck's Caſe. Arg. Le. 197. in Ld. Paget's Caſe. —— 1 Rep. 154. in the Rector of Chedington's Caſe, cites it as ſaid per Manwood Ch. B. in Paget's Caſe. —— 2 Lev. 77. S. C. and S. P. cited in Caſe of Pibus v. Mitford, Arg.—— Same Difference taken by Holt Ch. J. between a *Covenant to ſtand ſeiſed*, and a *Feoffment to Uſe*; for till the Contingency happens, or the Time comes for the future Uſe's riſing, it ſhall return again to the Feoffor. 12 Mod. 39 in Caſe of Davis v. Speed.

14. Feoffment of Lands to J. S. *in Fee until he ſhould make a Leaſe to A. B. for 21 Years* to begin at the Feaſt of &c. If J. S. does not make a Leaſe accordingly, the Uſe ſhall be to the Feoffor; for here is only a mere Matter of Truſt, and the Intent is not that the Feoffee ſhall have any thing by the Non-Performance of the Truſt; Per Roll Ch. J. and Ask J. Sty. 205. Hill. 1049. Watts v. Dixey.

15. A. ſeiſed in Fee conveys it in Truſt with Power to make a Leaſe for 21 Years. A. made a Leaſe for 21 Years to B. and C. in Truſt for himſelf for Life, and after for his Wife for Life, and that after the Deceaſe of A. and his Wife, the Truſtees during the Reſidue of the ſaid Term, ſhould permit ſuch Perſon &c. as the ſaid A. ſhould nominate, and for want of ſuch Nomination, or *after the Death of ſuch Nominee, the Heir of A. ſhould take &c. the Rents* thereof. A. nominated J. S. to take the Rents during the Reſidue of the ſaid Term. J. S. the *Nominee died.* It was agreed that ſuch *Limitation to the Heir of the Perſon limiting* is a void Limitation; and the Eſtate in Intereſt did again revert to A. who made the Limitation, and the Remainder of the Term, upon the Deceaſe of J. S. belongs to the Executors of J. S. Chan. Caſes, 8. Hill. 13 & 14 Car. 2. Goring v. Bickerſtaff & al'.

16. *Feoff-*

Raym. 207. S. C. adjudg'd that the two Cloſes deſcended. —— Lev. 287. S. C. accordingly.

16. *Feoffment of a Manor* by A. to divers Uſes, *excepting two Cloſes for the Life of the Feoffor only.* It was agreed by all that no Uſe was limited of thoſe two Cloſes; for the Uſes were limited of the Manor Exceptis præ-exceptis, which excluded the two Acres. For tho' there were not ſufficient Words to except them, yet there was enough to declare the Intention of the Feoffor to be ſo. Vent. 106. Mich. 22 Car. 2 B. R. Wilſon v. Armorer.

See Tit. Truſt (F) pl 7. and the Notes.

17. A Feoffment is made *by a Father to a Son generally*, no Uſe riſes back to the Father unleſs it be expreſs'd. Arg. 2. Chan. Caſes, 232. Trin. 29 Car. 2. in Caſe of Elliot v. Elliot.

18. In Caſe of a Truſt at Common Law, *if a Man was ſeiſed Ex parte Materna, and made a Feoffment without any Conſideration*, the *Truſt reſulted* to the Feoffor, and was of the ſame Quality with the Eſtate; *but* if the *Feoffee had re-infeoffed the Ceſty que Truſt*, the Nature of the Eſtate was alter'd, and the Land Ex parte Materna, ſhould not deſcend to the Heir Ex parte paterna; for he could not infeoff the Ceſty que Truſt to him and his Heirs Ex parte Materna, becauſe there was no ſuch Limitation of the Inheritance in him; Reſolved per Cur. Carth. 141. Trin. 2 W. & M. B. R. in Caſe of Rice v. Langford.

19. If a *Feoffment* in Fee is made *to the Uſe of A. and the Heirs of his Body* begotten, the Remainder in Fee *to the Right Heirs of T. S. who is then living*, there in ſuch Caſe the Fee-Simple is not in Abeyance, nor in the Feoffee; but the Uſe of the Fee ſhall reſult to the Feoffor, and remain in him until the Contingency (viz.) the Death of T. S. ſhall happen; Per Holt Ch. J. Carth. 262, 263. Hill. 4 M. & M. in B. R. in Caſe of Davis v. Speed.

20. If a Feoffment were made to the *Uſe of the Heirs of the Body of the Feoffor from and after the Deceaſe of J. S.* There no Eſtate for Life would reſult till after the Deceaſe of J. S. cited by Holt Ch. J. Cumb. 313. Hill. 6 W. & M. B. R. in Caſe of Tipping v. Coſing, as ſaid by Hale, in the Caſe of Pybus v. Mitford.

2 Freem. Rep. 231. pl. 302. Mich. 1698. S. C. ſays that my Ld. Chancellor having conſulted the Judges, ſaid they were of Opinion that the Limitation to the Son was void,

21. A. ſeiſed in Fee by Deed and Fine, conveys *to Truſtees for* 70 *Years, if A. ſo long live, Remainder to Truſtees for* 3000 *Years*, and *from and after the Death of A.* then *to B.* Whether the Remainder to B. is good? The Objection was, that an Eſtate of *Freehold was to commence in futuro*; For the firſt Freehold is limited to B. which is not to ariſe till the Expiration of both the Terms, and after the Death of A. and no Eſtate for Life is limited to A. unleſs it be ſuppoſed to reſult back to him. To prove the Remainder void, it was inſiſted that here *the Conveyance working by Way of Tranſmutation of Poſſeſſion* no Eſtate for Life can reſult nor ariſe by Implication of Law as there may in a Covenant to ſtand ſeiſed or in a Will, but it muſt be *by expreſs Limitation.* The Court took Time to conſider of it. 2 Vern. 370. pl. 334. Mich. 1699. Penhay v. Hurrel.

there being no Eſtate for Life veſted in the Father; but if it had been in Caſe of a Covenant to ſtand ſeiſed, it might have been otherwiſe. ——— And ibid. 235. pl. 307. Mich. 1699. S. C. ſays it was agreed that in Caſe of a Covenant to ſtand ſeiſed, what was not limited out of the Covenantor, did continue to him; and therefore, if a Man covenanted to ſtand ſeiſed to the Uſe of the Heirs of his Body, it ſhould be an Eſtate-Tail, becauſe the old Eſtate for Life continued in him; And my Lord Coke's Opinion in the Caſe of **Finwick and Mitford**, is, that it will ſo do in Caſe of a Feoffment to Uſes, which Opinion, as was ſaid by Judge Powell, my Lord Chief Juſt. Hale did ſeem to be of in the Caſe of **Pybus v. Mitford**; And my Ld. Coke, when he came to be Ch. Juſt. continued the ſame Opinion, as appears 1 Roll Rep. 239. 317. And it was ſaid that this differs from the Caſe of **Davis and Smith** [**Speed**] in the Houſe of Lords, becauſe there it appear'd the Eſtate moved from the Wife, and ſo the Husband ſhould not take an Eſtate by Implication; but here it was A.'s own Eſtate, and ſo the Judge and the Ld. Chancellor were of Opinion, that the Uſe ſhould reſult, according to my Ld. Coke's Opinion, and the rather, becauſe contingent Uſes are not favour'd in Law, but where it may be Remainders ſhall Veſt. But it was ſaid the **Earl of Bedford**'s Caſe ſeems contrary;

trary; and the Ch. Juſtices were of another Opinion; and therefore the Ld. Chancellor deſired the Opinion of all the Judges, it being a Point never yet ſettled by any ſolemn Reſolution. And ibid. 252. pl. 326. Trin. 1702. S. C. That Ld. Keeper, after Conſideration had, and a Caſe being ſtated, gave his Opinion, that A. had an Eſtate for Life by Implication, and ſo the Remainders all good, there being a Freehold to ſupport them; and he went upon the Caſe of Pybus and Mitford, in Mod. Rep. 159. and brought the Book into Court, where it ſeems to be the Opinion of the Ld. Coke and Hale, that as well in a Fine or Feoffment, as in a Covenant to ſtand ſeiſed, ſo much of the Uſe as a Man did not depart with, remain'd in him; and ſo he ſaid is 1 Inſt. 22. and gave Judgment accordingly.

22. Powel J. doubted, whether there could be a reſulting Uſe on a *Leaſe and Releaſe*, unleſs where particular Uſes are limited. 2 Salk. 678. pl. 5. Mich. 1 Ann. B. R. Shortridge v. Lamplugh. 7 Mod. 76. S. C. and per Holt and Powell, if a Particular Uſe was limited on the Releaſe, the Reſt would reſult back. Ibid. 77.

23. A reſulting Uſe *is always from the old Eſtate, and Parcel of the old Uſe.* 2 Salk. 679. pl. 7. Hill. 1 Ann. B. R. Adams v. Tertenants of Savage.

24. If a *Feoffment* be made, or a *Fine be levied, or Recovery* be ſuffer'd *without Conſideration and no Uſes are expreſſed*, it is to the Uſe of the Feoffor and his Heirs. But if any Uſes be expreſſed, it ſhall be to thoſe Uſes, tho' no Conſideration be had; and herein is the Difference between raiſing Uſes by Fine, Feoffment, or other Conveyance, operating by Tranſmutation of Poſſeſſion, and Uſes raiſed by Covenant; for upon the firſt, if no Uſes were expreſſed, it is Equity that aſſigns the Feoffor to have the Uſe; for by the Law, the Feoffor has parted with all his Intereſt; but where he expreſſes Uſes, there can be no Equity in giving him the Uſe againſt his own Will; and there can be no Preſumption that the Conveyance was to the Uſe of the Feoffor againſt his own Declaration; but in Caſe of a Covenant, it is Equity that muſt give a Uſe; for the Perſon can have no Right by Law; therefore in ſuch Caſe there can be no Uſe without a Conſideration; for there is no Equity there ſhould. G. Law of Uſes, &c. 222, 223.

25. A Truſt is limited thus, *if ſuch a Marriage takes Effect, after M's Age* of 16 (ſhe being the Daughter of H.) *and ſhe ſhall have Iſſue Male of the Body of S. then to both for Life.* He *marries her at twelve Years of Age. She lives till near ſeventeen, and dies without Iſſue.* He ſhall have no Truſt for Life; becauſe ſhe having no Iſſue Male, there was a Failure of the precedent Qualification to enable him. It ſeems, ſhe living till after ſixteen, fulfils the firſt Words well enough &c. [viz.] if the Marriage ſhould take Effect after her Age of ſixteen. After the Death of S. and M. the Daughter of H. without Iſſue, the Truſt was limited over to others; but decreed that till the Daughter of S.'s [H.'s] Death, he in Remainder could not take, but that the Heir ſhould have the Truſt till that happen'd; For ſo much of a Truſt as is not diſpoſed of muſt be to the Heir. G. Law of Uſes &c. 223, 224. See 2 Vern. 338. pl. 332. Mich. 1685. The Duke of Southampton v. Cranmer & al' Executors of Wood. —— See Show. Parl. Caſes, 83. &c. Sir Cæſar Wood, alias, Cranmer v. the Duke of Southampton.

(Z. a) *Covenant to ſtand ſeiſed. Good.* In Reſpect of the Eſtate of the Covenantor, or the Manner of the Covenant.

This is only a Tranſlation of Mo. 32. pl. 105. Trin. 3 Eliz. Anon —— Dal. 35. pl. 28. Anon. S. C.

1. *Tenant in Tail* by Indenture on Conſideration of Marriage, *covenants* with another that A. and B. ſhall *be ſeiſed to his Uſe for Term of his Life*, and after his Deceaſe to the Uſe of *his Son and Heir apparent*. By this Covenant there is no Uſe *changed*, unleſs only during the Life of Tenant in Tail; Per tot. Cur. Het. 110. Trin. 4 Car. C. B. Bromfield's Caſe.

Noy 46. accordingly, S. C. by the Name of Heigham v. Bedingfield. —— S C. cited G. Law of Uſes &c. 111. ſays, That ſince he had only the Power of an Eſtate for Life, by the Statute de Donis, which he hath not paſs'd out of himſelf, it is ſtill in him as it was before; and the Remainder is void in its Creation, and therefore there can be no Execution of it, for the Execution muſt be immediate by the Statute of Uſes; and therefore a Fine afterwards levied cannot help it.

2. *Tenant in Tail covenants to ſtand ſeiſed to the Uſe of himſelf for Life*, and after to the Uſe *of his eldeſt Son and his Heirs*; and *after covenants with a Stranger to levy a Fine to the Uſe of the Stranger and his Heirs*; He *levies a Fine* accordingly, *and dies*. It was reſolv'd that the Son ſhould not have the Land by the firſt Covenant; for when Tenant in Tail covenanted to ſtand ſeiſed to the Uſe of himſelf for Life, that is as much as he could lawfully do; and the Limitation over is void, and he remain'd ſeiſed as before. And the Juſtices and Counſel of the Court reſolv'd accordingly. Cro. E. 895. pl. 15. Trin. 44 Eliz. in the Court of Wards, Bedingfield's Caſe.

3. Covenant to ſtand ſeiſed *of as much as ſhall be worth 20 l. per Ann.* is meerly void. Agreed; and ſaid that ſo it was lately adjudg'd. Het. 147. Mich. 5 Car. C. B. Riſe's Caſe.

4. A. ſeiſed in Fee, *in Conſideration of the Marriage of B. his Son, and a Marriage Portion, covenanted to levy a Fine to B. and that B. ſhould ſtand ſeiſed to the Uſe of A. the Father and his Heirs, till the Marriage had, and after to B.'s own Uſe in Tail, with diverſe Remainders over.* And A. covenanted in the ſame Deed, that he was ſeiſed in Fee, and ſo ſhould be till the Uſe veſted in B. the Son. It was reſolv'd by Powell and Rooksby J. the only Judges then in Court, that A. could not covenant that the Son ſhould ſtand ſeiſed of Lands whereof the Father is ſeiſed; and the ſubſequent Covenant was intended againſt Incumbrances only, as is uſual in ſuch Caſes, and not to raiſe any Uſe. 3 Lev. 306. 307. Trin. 3 W. & M. in C. B. Barrington v. Crane.

* The Covenant is good, and *paſſes a baſe Fee to A.* Per Holt Ch. J. Comyns's Rep. 121. pl. 84. in S.C.

5. If *Tenant in Tail covenants to ſtand ſeiſed * to the Uſe of A. and his Heirs, or* to the Uſe *of A. for Life, † Remainder to B. in Fee.* The Covenant is not void, but puts the Eſtate out of the Covenantor. Per Holt Ch. J. in delivering the Opinion of the Court. 2 Salk. 620. Trin. 1 Ann. in Caſe of Machil v. Clark.

† S. P. And the Remainder is *good, tho'* the *Tenant in Tail dies during the Life of A. until* it is *avoided by the Iſſue.* Comyns's Rep. 121. Per Holt Ch. J. in S. C.

7 Mod. 26. S.C. & P. becauſe it is to commence at a Time when the *Right of the Eſtate* out of which it would iſſue, *is in another Perſon* by a Title paramount the Conveyance, viz. Per Formam Doni.

6. *But* if Tenant in Tail covenants to ſtand ſeiſed to the Uſe of A. and his Heirs *after his Death*, it is void. 2 Salk. 620. Per Holt Ch. J. in Caſe of Machil v. Clark.

But if *Tenant in Fee* does, it is good; and there being *no Tranſmutation of the Poſſeſſion*, the Eſtate remains in himſelf in the mean Time. 2 Lev. 77. in Caſe of Pibus v. Mitford, cites 1 Rep. 154. b.—Per Hale Ch. J. Raym. 230. in Caſe of Pibus v. Mitford.

7. Tenant in Tail covenanted to ſtand ſeiſed *to the Uſe of himſelf for Life*, Remainder *to J. S. and his Heirs*, it is void; For the Remainder is to take Effect after his Death, when by his Death the Title of the Iſſue commences; and the Covenant, as to the Eſtate for Life to himſelf, is void in this Caſe, becauſe here is *no Tranſmutation of Poſſeſſion. Such a Covenant is in any Caſe good only in reſpect of the Remainders*; and ſince the Remainders are void, the Covenant and the firſt Eſtate are likewiſe void. 2 Salk. 619. 620. Trin. 1 Ann. B. R. Machil v. Clark. 7 Mod. 18 to 28. S. C. accordingly. ——11 Mod. 19. S. C. adjudg'd.—— Comyns's Rep. 119. pl. 84. S. C.

8. A Covenant was to ſtand ſeiſed in *Conſideration of Love* &c. *to his Wife*, and after to T. and his Heirs, (T. was Siſter's Son to the Covenantor, and his Heir at Law) but the Deed was without the general Conſideration (viz.) to continue the Eſtate in his Name and Family; nor is it expreſs'd in the Deed that T. is of the Blood of the Covenantor; and therefore Raymond doubted whether the Conſideration is not too ſtreight to *extend to* T. If the general Conſideration had been expreſs'd in the Deed, it might be averr'd that T. was of the Blood of the Covenantor, but here the *Averment* muſt be, not only that he is of the Blood of the Covenantor, but alſo that the Conſideration was for the Advancement of his Family, which he doubted cannot conſiſt without the ſpecial Conſideration mention'd in the Deed, which is confin'd to the Wife, and to which T. is a Stranger. The other 3 Judges deliver'd themſelves to the ſame Effect. But per tot. Cur. The Caſe deſerves further Conſideration. Gib. 299. Trin. 5 Geo. 2. B. R. Goodtitle v. Pettoe.

(A. b) Covenant to ſtand ſeiſed. In what Caſes there ſhall be a *Particular Eſtate by Implication*. And in what Caſes Uſes by Implication are excluded. See Tit. Remainder (C. 2) and (N)

1. A Made a *Feoffment to the Uſe of himſelf for Life, and after his Death and the Death of M. his Wife, to B. his Son in Tail.* And it was held in this Caſe, that no implied Uſe did ariſe to M. and therefore the Eſtate to B. contingent. Arg. Pollex. 94. cites the Caſe of Weale v. Lower. See Pollex. 58. S. C. where Pollexfen himſelf argued the Caſe, and endeavour'd to maintain that an Uſe did ariſe by Implication of Law to A. yet himſelf cites it held as above.

2. Covenant to ſtand ſeiſed *to the Uſe of the Heirs Male of his Body, omitting himſelf*; Per 3 Juſtices, but Twiſden J. contra, it is good, and he himſelf takes by Implication; and ſo Judgment was given for the Defendant. Vent. 372. Trin. 26 Car. 2. B. R. Pibus v. Mitford. Raym. 228. S. C. argued, Et adjornatur; and adds that Judgment was given for the Defendant.——2 Lev. 75. S. C. adjudg'd accordingly.——Mod. 121. pl. 27. S. C. being the Opinion of Hale Ch. J.——Mod. 159. pl. 2. S. C. ſays Judgment was given for the Defendant on the Point here.—— If a Man covenants to ſtand ſeiſed *to the Uſe of the Heirs of his Body*, this is all one as if the Limitation had been to himſelf and the Heirs of his own Body, and not as if he had covenanted to ſtand ſeiſed to the Uſe of the *Heirs of the Body of J. D.* For there the Covenantor would have had a Fee-ſimple in the mean Time; Per Hale Ch J. Mod. 98. pl. 3. Mich. 25 Car. 2. B. R. Anon. [but ſeems to be in the Caſe of Pybus v. Mitford.] Adjornatur.—Becauſe no Deſcent may be to the Heir after his Death, the Law raiſes an Eſtate to him by Implication, and he does not remain ſeiſed in Fee during the Life; but *his Eſtate is immediately put into an Eſtate Tail*, according to Pybus and Mitford's Caſe; Per Holt Ch. J. Skin. 352. in Caſe of Davis v. Speed.

The

The Court doubted of this Caſe and this Point. 2 Mod. 211. Paſch. 29 Car. 2. C. B. in Caſe of Southcott v. Stowell.——Gilb. Law of Uſes &c. 19. cites S. C. and ſays the Reaſon is, becauſe Anceſtor and Heir are * Correlatives, and ſo whoever repreſents one as to my Eſtate veſted in him after my Death, I repreſent him during my Life as to that Eſtate; and conſequently giving an Eſtate, already in me to my Heir, is not departing with it; for 'tis a Diſpoſition in other Words to myſelf, and ſo all things remain in Statu quo.

* Per Hale Ch. J. Mod. 98. pl. 3.

3. Covenant to ſtand ſeiſed *to the Uſes in the Indenture, and to no other*; this cannot exclude Uſes by Implication, but only expreſs Uſes. 2 Lev. 76. Arg. in Caſe of Pybus v. Mitford.

(B. b) *What paſſes* by Covenant to ſtand ſeiſed, *and who ſhall take thereby* according to the Limitation.

Cro. C. 329. pl. 7. S. C. by the Name of Smith v. Riſley.

1. A. Covenants to ſtand ſeiſed to the Uſe of B. his *Brother*, for natural Love, and upon Conſidence *to levy Portions for his* (A.'s) *Children*; this ſettles a good Fee in the Brother, ſubject to this Truſt in Equity. Jo. 419. pl. 7. Hill. 14 Car. B. R. agreed in the Caſe of German v. Ryſley.

2. Where by Covenant to ſtand ſeiſed the *Eſtate is limited in Fee upon a Truſt*, as Payment of Portions, and after the Portions paid, to a Son of the Covenantor in Tail, Remainder over, when this *becomes impoſſible* by the Act of God before the Day of Performance of it, the *Eſtate continues abſolute* in the Truſtee, if he be of the Blood, as a Brother, and ſo call'd, and ſo able to take, which a Stranger is not. Jo. 119. pl. 7. Hill. 14 Car. B. R. in Caſe of German v. Ryſley.

Mod. 226. Trin. 28 Car. 2. S. C. ſays that North, Windham, and Atkins were of Opinion that C. ſhould have the Eſtate not by Purchaſe but by Deſcent from B.'s Son; For after the Death of the Father, both the Eſtates in Tail were veſted in him, and he was capable of the Remainder by Purchaſe, and being once well veſted in a Purchaſor, the Eſtate ſhall afterwards run in Courſe of Deſcent. But Scroggs doubted. Adjornatur. —— Ibid. 237. Paſch. 29 Car. 2. S. C. adjudg'd accordingly, and Scroggs agreed to the Judgment.——Freem. Rep. 216. pl. 224. Mich. 1676. S. C. Adjornatur.——And ibid. 225. pl. 232. Paſch. 1677. S. C. adjudg'd accordidgly.

3. A. ſeiſed in Fee has Iſſue two Sons B. and C.—A. covenants to ſtand ſeiſed *to the Uſe of B. and the Heirs Male of his Body* on M. his Wife to be begotten; and for Want of ſuch, *to the Heirs Male of the Covenantor*, and for Want of ſuch Iſſue, *to his own right Heirs for ever*. B. had Iſſue of M. a *Son and a Daughter*; A. dies, and then the Son *dies*; the Daughter ſhall not take as Heir general, but the Uncle, viz. C. ſhall take *Per formam Doni*, and not by Purchaſe but by Deſcent. 2 Mod. 207. 211. Paſch. 29 Car. 2. C. B. Southcot v. Stowel.

(C. b) *Power*

(C. b) *Power to direct future Limitations* by Covenant to ſtand ſeiſed; where good.

1. FEme covenants to *ſtand ſeiſed to the Uſe of herſelf in Tail, Remainder to ſuch as ſhe by Will or Writing under her Hand ſhould appoint*; and for Want of ſuch Appointment to the Uſe of the Plaintiff her Kinſman in Fee. Whether the Remainder to ſuch Uſes as he ſhould appoint, be not a void Remainder, being on a Covenant to ſtand ſeiſed, there was a Trial at Law, and a general Verdict for the Plaintiff, [who it ſeems was Heir at Law;] and Lord Chancellor decreed accordingly; Quære tamen. 2 Vern. 7. pl. 4. Trin. 1686. Warwick v. Gerrard.

2. A. covenants with B. and C. *in Conſideration of Love and Affection to his Wife*, and for ſome *Proviſion and Livelihood for her*, in Caſe ſhe ſurviv'd him, and *for the following Uſes*, to ſtand ſeiſed to the Uſe of *himſelf for Life*, Remainder *to his Wife for Life*, Remainder to the *Heirs of his Body* on her begotten; and in Default of ſuch Heirs to the Uſe of *ſuch Perſon as the Wife ſhould appoint*; and for *Want of ſuch Appointment to* T. the Leſſor of the Plaintiff (who was the Siſter's Son, and Heir at Law of the Covenantor) and his Heirs. A. died without Iſſue, and the Wife afterwards convey'd the Lands to J. S. the Defendant. Per Raymond Ch. J. The Conſideration ſeems to be reſtrain'd to the Covenantor himſelf and his Wife; and therefore if the Uſe had been *to the Wife and her Heirs*, it had been good; For it could not be ſaid that the Heirs of the Wife were *Strangers to the Conſideration*; For ſhe bore all her Heirs in herſelf, and that had ſerv'd only to limit the Uſe to her in Fee: But here it is a Power to the Wife to appoint the Uſe, and tho' that *Appointment had been made in Favour of one of Covenantor's Blood*, it would not have alter'd the Caſe; For the Power was void in the Creation within the Rule of **Mildmay's Caſe**, which was never diſputed. But *if the Power had been to appoint the Uſe in Favour of any of the Covenantor's Relations, in Conſideration to continue the Eſtate in the Family of the Covenantor*, that might be good, and it might be *averr'd* after the Appointment, that he to whom the Uſe was appointed, was of the Blood of the Covenantor. Now if the Power was void in its Creation, the Uſe veſted immediately in T. as if no ſuch Power had been, provided that T. be a fit Perſon to take the Uſe. Gibb. 299. Trin. 5 Geo. 2. B. R. Goodtitle v. Thornton.

(D. b) The *Difference between* a *Feoffment* to Uſes &c. *and* a *Covenant to ſtand ſeiſed*, as to the Uſes ariſing, or Powers *reſerved*.

See (Z) and (Y. a) pl. 13.

1. IF a Man raiſes Uſes *upon a Fine, Feoffment, or Recovery, he may reſerve* to himſelf *a Power of making Leaſes*; *but* he can *not* do it *on a Covenant to ſtand ſeiſed; or on a Bargain and Sale*; for upon a Fine, Feoffment, or Recovery, a Uſe may be raiſed without a Conſideration, and therefore will ariſe to thoſe Leſſees without Conſideration; and the former Eſtates, which were raiſed without Conſideration, may be defeated without it. But in a Bargain and Sale, and Covenant to ſtand ſeiſed, no

Uſes will riſe without Conſideration, therefore not to the Leſſees; for where *the Perſons are altogether uncertain, and the Terms unknown*, there can be no Conſideration; and for which Reaſon the former Eſtates raiſed upon good Conſideration, cannot by ſuch Leſſees be defeated. G. Law of Uſes and Truſts, 46.

2. There is a Difference between a Covenant to ſtand ſeiſed and a Feoffment; for if a Man *covenants to ſtand ſeiſed to the Uſe of A. a Stranger for Years* &c. the Remainder *to B. his Son in Tail*, this is void as to A. for want of a Conſideration, and *the Uſe veſts immediately in B.* and a void Uſe is as if no Uſe be limited; and if no Uſe be limited, B. muſt take immediately, and not by way of Remainder, or elſe he cannot take at all; for a Remainder ex Vi Termini, ſuppoſes a particular Eſtate, and B. muſt not be excluded; becauſe Uſes being Creatures of Equity, the Party's Intent muſt be made good as far as poſſible, where there is a juſt and good Ground for any Part of the Conveyance. But if he makes a *Feoffment* in Fee to a Stranger's Uſe, the Remainder to B. in Tail, this is good to B. becauſe there *wants no Conſideration*. Gilb. Law of Uſes &c. 113, 114.

(E. b) *Actions* by or againſt Ceſty que Uſe.

1. IF *Ceſty que Uſe makes a Leaſe for Life*, yet the Reverſion remains in the *Feoffees*, and not in the Leſſor; and they *ſhall have* Action of *Waſte*, notwithſtanding that there be no Privity, and the *Statute of* 1 R. 3. *was made for the Advantage of the Leſſee or Feoffee, and not* in the Advantage of the *Ceſty que Uſe, nor of the Feoffors*. Br. Feoffments al Uſes, pl. 23. cites 5 H. 7. 5. Per tot. Cur. except Davers.

2. Ceſty que Uſe *could not have Action, Avowry*, nor ſuch like; *but* this ſhould be *in the Names of the Feoffors*. Br. Feoffments al Uſes, pl. 39. cites 15 H. 7. 2.

By the Common Law the *Feoffees of Truſt might have*

3. Ceſty que Uſe *by the Occupation* of the Land, *was a Treſpaſſor* at the Common Law, and could not juſtify it. Br. Feoffments al Uſes, pl 39. cites 15 H. 7. 2.

Treſpaſs againſt Ceſty que Uſe; by all the Juſtices of C. B. Br. Feoffments al Uſes, pl. 13. cites 15 H. 7. 2.——— S. P. For the Land was as much the Feoffee's as if no Uſe had been of it; ſo that if they had ouſted him, and ſued him for Perception of Profits, he had no Defence at Common Law, but muſt have applied to Equity; but this was remedied by 1 *R.* 3. 1. Arg. Pl. C. 349. b. in Caſe of Delamere v. Bernard.——— S. P. by Anderſon Ch. J. 1 Rep. 140 in Chudleigh's Caſe.———And. 320. in S. C. Arg. cites 15 H. 7. 4. S. P.——— S. P. in Manſell's Caſe, Pl. C. 3. cites 5 H. 7. and the Marg. cites it as 5 H. 7. fol. 5. and that he was only Tenant at Sufferance to the Feoffees, in caſe they permitted him to enter and take the Profits; and that he was not able to anſwer to a Præcipe quod reddat, becauſe he had no Eſtate of Franktenement; but every ſuch Writ muſt be brought againſt the Feoffees, for the Land is theirs. And if one had recover'd the Land againſt the Ceſty que Uſe, and had enter'd, or by an Hab. fac. Seiſinam had Execution, and the Feoffees been ouſted, they might have Aſſiſe; but when they had recover'd, they ſhould be ſeiſed again to the firſt Uſe.

The Feoffees recover'd againſt the Ceſty que Uſe; for he could not preſent without their Agreement; per Frowick Ch. J. Ibid. 47. Mich. 18 H. 7.

4. It was ſaid per Frowick Serj. to have been lately adjudg'd, That where *Advowſon appendant* became void, and Ceſty que Uſe ſuffer'd his Tenant at Sufferance to preſent, and was *diſturb'd*, he cannot maintain a *Quare Impedit*. Quod nota; no more in the ſame Caſe than a Stranger, and not like to a Leaſe at Will; for the Tenant at Will has his Poſſeſſion by an Act done by the Feoffee, and ſo has not the Tenant at Sufferance &c. Kelw. 42. b. pl. 7. Paſch. 17 H. 7.

5. Ceſty

5. Ceſty que Uſe ſhall be *impannell'd in a Jury*, and if he loſe Iſſues, they are leviable of the Lands in the Poſſeſſion of his Feoffees. Quod fuit conceſſum. But it was ſaid that this commenced by Sufferance, for the Advantage of the King. Kelw. 42. b. pl. 7. Paſch. 17 H. 7.

6. Ceſty que Uſe ſhall not have *Treſpaſs* before an actual Entry; for that is grounded on a Poſſeſſion; per Glanvill. Owen 87. Mich. 41 & 42 Eliz. C. B. in Caſe of Green v. Wiſeman.

Noy 73. S. C. ſays he may have *Aſſiſe*, but not Treſpaſs, without actual Poſſeſſion, and ſo not *Ejectment*.——S. C. cited D. 51. b. Marg. pl. 17.—He is immediately and actually ſeiſed, and in Poſſeſſion of the Land, ſo as he may have Aſſiſe or Treſpaſs before Entry againſt any Stranger, who enters without Title; and this by the Words of the Statute 27 H. 8. viz. That *Ceſty que Uſe ſhall ſtand and be ſeiſed* &c. and this was the Opinion of ſeveral Juſtices. Cro. E. 46. Paſch. 28 Eliz. C. B. Anon.

(F. b) Pleadings.

1. *Feoffees* in Uſe *ſhall plead ſuch Pleas as Ceſty que Uſe will miniſter* to them; by the Juſtices. Brooke ſays, Quære of Delays. Br. Conſcience, pl. 27. cites 7 E. 4. 29.

2. He who *pleads a Grant* &c. *by Ceſty que Uſe, ſhall ſay* that Ceſty que Uſe at the Time &c. was *of full Age, ſound Memory*, and *out of Priſon* &c. *at the Time* &c. as in the Statute 1 *Ric.* 3. Br. Feoffments al Uſes, pl. 42. cites 4 H. 7. 8.

Ibid. pl. 65. cites 16 H. 7. 2.—— S. P. per Rede Serj. But Keble Serj. contra; For it ſhall be intended a good Feoffment, till the other ſhews Objection. And Brooke ſays, it ſeems the Law is againſt Rede. Br. Feoffments al Uſes, pl. 24. cites 6 H. 7. 6.

In *Writ of Entry* in Nature of Aſſiſe, the *Tenant ſaid that J. G. was ſeiſed in Fee, and infeoff'd P. who gave in Tail to the Tenant*, and gave Colour to the Plaintiff. And the *Plaintiff ſaid that before this, this ſame J. G. was ſeiſed in Fee to the Uſe of W. which W. infeoff'd the Plaintiff, who was ſeiſed till J. G. entr'd and diſſeiſed him, and gave as in the Bar.* And ſo ſee that he pleaded the Feoffment of Ceſty que Uſe, and *did not ſay that he was of full Age, ſound Mind, out of Priſon*, and the like. Br. Feoffments al Uſes, pl. 5. cites 27 H. 8. 12.

3. If a Man *pleads Grant* &c. *of Ceſty que Uſe, he ſhall ſay that the Feoffees were ſeiſed to the ſame Uſe at the Time* &c. *and ſo ſeiſed did demiſe*, infeoff &c. Br. Feoffments al Uſes, pl. 42. cites 4 H. 7. 8.

So where a Man *juſtifies by Command of Ceſty que Uſe*, he *ſhall ſay that the Feoffees were ſeiſed to this Uſe at the Time of the Command.* Br. Pleadings, pl. 166. cites 10 H. 7. 26.

4. If a Man pleads *that A. B. and others were ſeiſed to his Uſe in Fee*, this is good Pleading, *without ſhewing the Commencement of the Uſe.* Br. Pleadings, pl. 170. cites 13 H. 7. 18.

S. P. Br. Feoffment al Uſes, pl. 16. cites 21 H. 7. 6.—— S. P. G. Law of Uſes &c. 276.——S. P. As to ſay that A. was ſeiſed in Fee, and infeoff'd J. N. and W. to the Uſe of T. P. Br. Pleadings, pl. 160. cites 36 H. 8.——S P. For it was granted that if a Man diſſeiſe R. to the Uſe of B. he ſhall not ſhew this Diſſeiſin, in ſhewing how he came to his Eſtate. Br. Feoffments al Uſes, pl. 10. cites 14 H. 8. 4.

Contra where he ſays *that they were ſeiſed to the Uſe of him and his Heirs of his Body*, becauſe this is a particular Eſtate. Br. Pleadings, pl. 170. cites 13 H. 7. 18.

5. If a Man has Land in Uſe, and *ſells the Land* to another, the Sale changes the Uſe, and the Buyer may enter, and make a Feoffment, if the Sale be perfect. Quære, if he *pleads that he bought the Land for 20 l. by which he enter'd and made Feoffment.* Quære if this be good, and the *Money not paid, nor any Day of Payment alleg'd.* But it ſeems to me, that it ſhall be intended in the Law a good and perfect Sale and Buying, when

S. C. cited G. Law of Uſes &c. 82. and ſays the Pleading is good; for Buying

implies Payment of the Money, and if he did not buy, the Plaintiff might reply as here.

when a Man pleads that he bought; For if it be not a perfect Bargain, then he did not buy, and then it is a good *Replication* for the Plaintiff to ſay *That he did not buy, prout* &c. And per Fineux, It is a good Buying, becauſe the Defendant has enter'd, and the other may have Action of Debt. Br. Feoffments al Uſes, pl. 15. cites 21 H. 7. 6.

Br. Pleadings, pl. 46. cites S. C.—Br. Maintenance de Brief, pl. 17. cites S. C.

6. In *Debt* the Plaintiff counted *upon a Leaſe for Years* made *by his Father*, rendring Rent. The *Defendant ſaid, that the Father and others were ſeiſed in Fee to the Uſe of the Father, abſque hoc that the Reverſion deſcended to the Plaintiff.* And a good Plea to the Count; For the *Plaintiff ought to have counted ſpecially* that they were ſeiſed to the Uſe &c. and that the Father leaſed, and becauſe not, the Writ and Count ſhall abate; per Rede Ch. J. & Kingſmill J. For per Rede, the Defendant may ſay that the Father had nothing at the Time of the Demiſe, and then the Plaintiff cannot maintain the Declaration by the Uſe, but it is a *Departure*; for he ought to have ſhewn it at firſt. Br. Count, pl. 49. cites 21 H. 7. 25.

7. The *Tenant* of the Land *cannot plead a Releaſe made by Ceſty que Uſe* to the Feoffee, without ſhewing the Releaſe. Br. Monſtrans, pl. 61. cites 14 H. 8. 4.

G. Law of Uſes &c. 81. cites S. C. ſays Ceſty que Uſe may plead this Feoffment, and ſay that the Plaintiff diſſeiſed him without laying any actual Entry; for the Statute executes the Poſſeſſion in him.

8. In Ejectment the *Defendant pleaded a Feoffment* made *to J. S. who by Force thereof was ſeis'd and leas'd to him, and that* one *G. entred and leas'd to the Plaintiff*, but did *not ſay that he enter'd upon J. S.* Owen J. ſaid he ought to have alleg'd a Diſſeiſin, but Anderſon held that *Ceſty que Uſe has Poſſeſſion* of the Land *before Agreement or Entry*; but if he diſagree, then it ſhall be out of him preſently, but not before he diſagrees. And the Caſe being mov'd in another Term, Walmſley ſaid that he might be diſſeiſed before his Entry or Agreement, and the Pleading ſhall be that he did enter and did diſſeiſe him; and to this Glanville J. agreed. Ow. 86. 87. Mich. 41 & 42 Eliz. C. B. Green v. Wiſeman.

Mo. 871. pl. 1211. S. C. accordingly.—Brownl. 241. S. C. and becauſe it was in the Declaration it was adjudg'd good.

9. In Waſte the Writ ſets forth a Feoffment to ſuch Perſons to ſeveral Uſes. After Verdict Exception was taken to the Writ, becauſe it does *not ſay the Feoffment was to them and their Heirs*, without which there could be no Inheritance in Ceſty que Uſe, and ſo no Diſheriſon as the Action of Waſte imports; but the Plaintiff had Judgment, becauſe all the Forms of the Writs had been ſo ſince the making the Statute; and the Declaration laid the Seiſin in Fee, as it muſt, and yet the Plaintiff might have had a general Writ, and declar'd ſpecially. Hob. 84. pl. 112. Trin. 12 Jac. Skeat v. Oxenbridge.

(G. b) Equity.

1. SUbpœna commenc'd in Time of E. 3. but it was always againſt the Feoffee in Truſt himſelf, and was never allow'd againſt his Heir till H. 6. and in this Point was the Law chang'd by Forteſcue Ch. J. Per Vaviſor. Kelw. 42. b. Paſch. 17 H. 7.

2. If the Feoffee made *Feoffment over*, the Feoffor had no Remedy; ſo if he *died* the Heir of the Feoffee was (as Forteſcue Ch. J. thought) ſeis'd to his own Uſe; for the Confidence was perſonal only, and the *Feoffee's Feoffee was ſeiſed to his own Uſe* till H. 4th's Time, but if the 2d Feoffee had

had Notice of the Uſe, Chancery will reform it now, and the Heir of the Feoffee in Truſt was ſeiſed to his own Uſe till the Beginning of E. 4th's Time, and then commenc'd the Subpœna againſt the Heir and the Feoffee of the Feoffee; Per Frowike Ch. J. Kelw. 46. b. 18 H. 7.

3. A Man had 4 *Feoffees ſeiſed to his Uſe*, and *ſold his Land to H.* and *ſaid to two that his Will is, that they* 4 *make Feoffment to H.* which *two notified his Will to the other two, and they refuſed to make Feoffment*, by which *the firſt two made Feoffment to H. of that which to them belong'd*; and after the *Feoffor ſold the Land to J. and requir'd the Feoffees, who refus'd, to make Eſtate to J. who made it accordingly, and H. the firſt Vendee brought Subpœna againſt the two firſt Feoffees who refus'd*, and the Matter adjourn'd into the Exchequer Chamber; and becauſe *the two Feoffees did not ſay to the other two that their Feoffor commanded them to infeoff H. but ſaid that his Will was that they infeoff H.* which they are not bound to do *without Commandment*, therefore the Defendants *went quit* of this Subpœna; which Brook ſays is *wonderful* to him. Br. Conſcience, pl. 5. cites 37 H. 6. 36.

And it was ſaid that the *Feoffees* are not *bound to obey the Meſſage of Ceſty que Uſe ſent by his Servant to the Feoffees to make Eſtate to another*, but *ought to have Speciality proving his Will thereof.* Ibid.——Cary's Rep. 13. 14. cites S. C.

4. Where a Man *wills that his Feoffees ſhall make Eſtate to J. for Life, the Remainder to H.* and *J. refuſes to take Eſtate*, H. ſhall have Subpœna againſt the Feoffees to make them execute Eſtate to him after the Death of J. Per Jenny, quod Finch conceſſit. Br. Conſcience, pl. 5. cites 37 H. 6. 36.

Cary's Rep. 14. cites S. C.

5. If a Man is *bound to F. to the Uſe of C.* there *C. may have Subpœna againſt F. to bring Action to the Uſe of C.* Per Moyle and Davers. Br. Conſcience, pl. 9. cites 2 E. 4. 2.

Ceſty que Uſe ſhall have Subpœna againſt his Feoffees in Uſe *to compel them to maintain Action in their Names.* Br. Conſcience, pl. 27. cites 7 E. 4. 29.

6. If my *Feoffee in Uſe* be *diſſeiſed*, I ſhall have Subpœna to bring Aſſiſe; Per Moyle and Davers. Br. Conſcience, pl. 9. cites 2 E. 4. 2.

Cary's Rep. 14. cites 2 E. 4. 7.

That if the *Feoffee* be *diſſeiſed*, the Feoffor ſhall compel him to *ſue an Aſſiſe.*

7. If 200 *Marks are deliver'd to A. to keep and deliver to his Executors or Adminiſtrators after his Death, to diſpoſe for his Soul*, and *A. delivers the 200 Marks to keep and re-deliver to A. when he ſhall require*, and he who firſt deliver'd makes Executors, and dies, there the *Executors or Adminiſtrators ſhall have Subpœna* againſt A. to ſue the Bond againſt B. to have Delivery of the Money, becauſe the Bond was made to the Uſe of the Owner who firſt deliver'd the 200 Marks. Br. Conſcience, pl. 10. cites 4 E. 4. 37.

Br. Obligation, pl. 49. cites S. C.—Br. Prohibition, pl. 11. cites S. C.

8. Where a Man *makes Feoffment, and declares his Will for Years, and dies, leaving a Son and a Daughter by one Venter, and a Daughter by another Venter*, and the *eldeſt Son dies before the Will perform'd*, the *Siſter of the whole Blood ſhall have Subpœna to have Execution* of the Eſtate of the Feoffees. Br. Conſcience, pl. 11. cites 5 E. 4. 7.

Br. Deſcent, pl. 36. cites S. C.

9. If a Man *infeoffs A. to his Uſe, and declares his Will, and* after *A. ſells to R. and infeoffs him*, yet *if A. gives Notice of the Intent of the firſt Feoffment to R. he ſhall be compell'd by Subpœna to perform the Will.* Br. Feoffments al Uſes, pl. 32. cites 5 E. 4. 7.

Br. Conſcience, pl. 11. cites 5 E. 4. 7. S. C.

10. If *Tenant in Borough Engliſh infeoffs two to his Uſe and his Heirs*, the *youngeſt Son ſhall have Subpœna, and not the eldeſt.* Br. Feoffments al Uſes, pl. 32. cites 5 E. 4. 7.

11. If a Man makes *Feoffment of Truſt of the Land to him deſcended of the Part of the Mother, and dies without Iſſue*, the *Heir of the Part of the Mother ſhall have Subpœna.* Br. Feoffments al Uſes, pl. 32. cites 5 E. 4. 7.

But if Tenant in Tail, the Remainder over, makes Feoffment of Truſt without declaring his Will, and dies without Iſſue, he in *Remainder ſhall have Subpœna.* Brook makes a Quære, and ſays it ſeems to him that he in Reverſion and in Remainder ſhall not have Subpœna but Formedon, for the Reaſon mention'd in pl. 13. Br. Feoffments al Uſes, pl. 32. cites 5 E. 4. 7.

12. If *Tenant in Tail makes Feoffment to his Uſe, and dies without Iſſue,* no Will declar'd, he in *Reverſion ſhall have Subpœna.* Br. Feoffments al Uſes, pl. 32. cites 5 E. 4. 7.

13. If *Baron and Feme are ſeiſed in Jure Uxoris,* and the *Baron makes Feoffment without declaring his Will,* the Feme ſhall not have Subpœna. Brooke ſays the Reaſon ſeems to be inaſmuch as when a Man makes *Feoffment without Conſideration, and expreſſing any Uſe,* the Feoffment is intended by the Law to be to the Uſe of the Feoffor and his Heirs, therefore *it ſeems the Feme* ſhall have *Cui in Vita.* Br. Feoffments al Uſes, pl. 32. cites 5 E. 4. 7.

A Man ſhall compel his Feoffees of Truſt to bring Action of Treſpaſs.

14. If a *Man gives Goods to his Uſe, and another takes them,* the *Donee is bound in Conſcience to maintain Action of Treſpaſs thereof, but not Appeal of Robbery*; per Chocke & Littleton, The Reaſon ſeems to be inaſmuch as the Plaintiff *ſhall not be compell'd to wage Battel,* if the Defendant tenders Battel. Br. Conſcience, pl. 27. cites 7 E. 4. 29.

Br. Conſcience, pl. 17. cites 11 E. 4. 8.

15. It was moved, that if a *Man has Notice that W. is infeoff'd to my Uſe, or has Goods given to him to my Uſe,* and *M. knowing it, buys the Land or Goods,* Subpœna lies againſt both; for there is a Purchaſe; but contra of a Releaſe. But by the Reporter all is one; for it is Conſcience in the one Caſe or the other. Br. Conſcience, pl. 17. cites 11 E. 4. 8.

16. *If the Feoffor releaſes to the Treſpaſſor,* Ceſty que Uſe *ſhall not have Subpœna againſt the Treſpaſſor,* tho' he had Notice of the Uſe. Br. Conſcience, pl. 17. cites 11 E. 4. 8.

17. Subpœna brought by Ceſty que Uſe *againſt three Feoffees of a Truſt, to execute an Eſtate to Ceſty que Uſe.* The *one ſaid, that the Feoffor infeoff'd him and the other two, and the two took Livery, and he was not at it, nor ever agreed to it, and the Land is held of him, ſo that he cannot infeoff the Plaintiff for extinguiſhing his Seigniory*; and a good Anſwer by the beſt Opinion. But Quære if a Man may diſclaim in Chancery. Br. Conſcience, pl. 18. cites 16 E. 4. 4.

18. Subpœna. The Chancellor enjoin'd the Defendant, Feoffee of Truſt, *to make Eſtate to the Plaintiff Ceſty que Uſe, upon Pain of* 100 *l.* If he does not do it, Scire facias ſhall not iſſue thereof; for *it is only in Terrorem.* Br. Conſcience, pl. 29. cites 10 H. 7. 4.

19. *Contra* of *Fine aſſeſs'd by the Chancellor.* Br. Conſcience, pl. 29. cites 10 H. 7. 4.

20. If *I give Money* to one to *purchaſe* Lands therewith to him and his Heirs, and *to permit me to take the Profits* thereof *during my Life,* and he with-holds the Profits, he ſhall be compell'd by Subpœna. Cary's Rep. 14. cites Crompton, fol. 48. b.

21. A Deviſe was to the Father *for Life, Remainder* to the firſt &c. Son in *Tail, Remainder to Truſtees for their Lives, to ſupport the Contingent Remainders.* The Court declared, that this is a good Term to ſupport the Remainders, notwithſtanding the ſame is limited to the Truſtees, and inſerted after the Limitation to the firſt &c. Sons, (it being in the Caſe of a Will.) 2 Chan. Rep. 169. 31 Car. 2. Green v. Rooke.

22. By a Marriage-Agreement *the Land was to be charged with the Payment of Portions for younger Children, and Maintenance to begin from the Death of the Husband*; but in the Settlement the Limitation was *to the firſt &c. Son in Tail Male,* Remainder *to Truſtees for* 500 *Years, to raiſe*

Portions

Portions &c. The Maſter of the Rolls ſaid, He would not deſtroy this Settlement, but would ſet it right; and that he did not regard the placing of the Term, but would help the Miſtake, which would otherwiſe prevent the Agreement of the Parties from taking Effect; For that the younger Children are as much Purchaſors of their Portions as the eldeſt Son is of his Eſtate Tail limited to him. 2 Wms.'s Rep. 151. Trin. 1723. Uvedale v. Halſpenny.

For more of Uſes in General, ſee **Bargain and Sale, Covenant, Eſtate, Fines, Grants, Recovery Common, Remainder, Remitter, Truſt, Voucher,** and other Proper Titles.

* Uſury.

* Hawk. Pl. C. 245. cap. 82. S. 1, 2. ſays, It ſeems that Uſury, in a ſtrict Senſe, is a Contract upon the Loan of Money to give the Lender a certain Profit for the Uſe of it, upon all Events,

[A] [*In General.*]

1. **In Italy they have Houſes of Free Loan to the Poor. Sir Edward Sand's his Book, intituled, A Relation of the Religions uſed in the Weſt Parts of the World, circa Principium.**

whether the Borrower makes any Advantage of it, or the Lender ſuffer any Prejudice for the Want of it, or whether it be repaid on the Day appointed or not. And in a larger Senſe, it ſeems that all undue Advantages taken by a Lender againſt a Borrower come under the Notion of Uſury, whether there were any Contract in relation thereto, or not; as where one in Poſſeſſion of Land, made over to him for the Security of a certain Debt, retains his Poſſeſſion after he hath received all that is due from the Profits of the Land.

2. In Statuto Walliæ in Magna Charta, 2 Part, fol. 6. the Sheriff ought to inquire in his Tourn of Uſurers.

3. **Among the Petitions in Parliament, 18 E. 1. fol. 1. there is ſuch Petition.** Willielmus de Clernam queritur de Uſurariis modo coram Ordinariis, & perquirat ſecundum legem terræ.

4. 2 E. 1. **Rot. Clauſarum Memb.** 2. Rex Majori & Vicecometibus London, Quia &c. Vobis Mandamus, quod publice proclamari faciatis in Civitate prædicta, quod omnes Mercatores Uſurarii infra 20 Dies, a datu præſentium recedant a Civitate prædicta, & Regnum exeant ſuper Forisfacturam Corporum & Bonorum quorumcunque.

5. 5 E. 1. **Rot. Patentium. Memb.** 27. **in Dorſo, That** no Chriſtian ought to take Uſury. Hawk. Pl. C. 245. cap. 82. S. 4. S. P.

That it was anciently held abſolutely unlawful for a Chriſtian to take any kind of Uſury, and that whoſoever was guilty of it, was liable to be puniſh'd by the Cenſures of the Church in his Life-time; and that if after Death any one was found to be an Uſurer while living, all his Chattels were forfeited to the King, and his Lands eſcheated to the Lord of the Fee.

6. **Mirror of Juſtices, 17. b. cap. 1. Sect. 17. one of the Articles** inquirable in a Leet, **was of** Chriſtian Uſurers, and of all their Goods.

7. See

7. See the same Article Capite Itin. in Magna Charta, fol. 151. Article 16.

8. Hill. 16 E. 3. B. R. Rot. 28. Johannes Hoperd is found Guilty by a Jury Pro Usura capienda 11 s. 8 d. pro 20 s. præstandis & sic de similibus.

Fol. 801. Prynne Abr. of Cotton's Records 33. N°. 32. and page 35. No. 53.

9. 15. E. 3. 6. It is accorded and asserted that the King and his Heirs shall have the Cognizance of the Usurers dead, and that the Ordinaries of Holy Church have the Cognizance of Usurers alive, as to them appertaineth to make Compulsion by the Censures of Holy Church for the Sin to make Restitution of the Usuries taken against the Laws of Holy Church. (But this Statute was repeal'd afterwards in the said Year.) See Rot. Parl. 6. R. 2. n°. 50.

Prynne's Abr. of Cotton's Records No. 433. 71. the Petition is, That every one being attainted to be a Broker of Usury or Exchange, do forfeit all his Goods. The Answer was, The same Default shall be punish'd by the Law of Holy Church.

10. 5 H. 4. Rot. Parliamenti, N. 68. Pray the Commons that as in the City of London and elsewhere throughout the Realm, the horrible, and damnable Sin of Usury, customably used under the Name of *Chevance Colours, and by Strangers named Brokers, who have not whereof to live unless † by such their Gain, in many Forms very subtilly contrived, it is manifestly and openly by their Mediation perpetrated, whereby several of all Estates as well spiritual as Temporal, have been impoverish'd, and their Beasts and Lands lost. That it please to ordain that no Alien nor Denizen be Broker of Usury for the Time to come, and that it be inquired every Year, and he who is attaint of being a Broker forfeit to the King all his Goods.

Answer,

Be this Matter govern'd and ruled according to the Law of Holy Church, during the Life of such Usurers.

* Ibid 339. in 14 R. 2. No. 24. says, that Usury was then term'd (Schefes.)

† Orig. is (Per loorde gaine dicell en Plusours fourmes tressotiliment controve.)

2 Roll. Rep. 239. Mich. 20 Jac. B. R. S. C. accordingly.

11. A Promise was to pay so much, and the Interest *inde debendum* at Michaelmas next. It was argued, whether the Payment of Interest was lawful or not. The Judges compounded the Matter between the Parties to avoid making a Precedent. Palm. 291. to 294. Trin. 20 Jac. B. R. Sanderson v. Warner. But see Divis. B. pl. 3.

[B] Usury. At Common Law.

Win. 114. Mich. 22 Jac. C. B. Arg. in Case of

1. ALL the Goods of an Usurer, who died an Usurer, were forfeit to the King.

Gibson v. Ferrer, cites Glanvil, lib. 9. cap. 14. S. P. but says, that is to be intended of such as live by the common Oppression of the People.

Skene Regiam Majestatem, 61. 1. The Law of Scotland is accordingly.

The Lands of such Usurers ought to escheat to the Lord of whom they were held, and should not descend to their Heirs.

Skene Regiam Majestatem, 61. 5. The Law of Scotland is accordingly.

See Tit. Actions (T) pl. 14.

A Man could not at Common Law maintain an Action upon an Usurious Contract. 26 E. 3. 71. admitted.

Use of Money at this Day is no good Consideration, because against Law Natural; Agreed by Doderidge

Doderidge and Whitlock J. abſentibus aliis, but Noy. Arg. ſaid that Conſideration of Uſe, if it does not exceed 10 l. per Cent. is good to ground an Action. 2 Roll. Rep. 469. in Caſe of Oliver v. Oliver.

Hawk. Pl. C 245. S. 5, 6, 7. ſays, it ſeems to have been the Opinion of the Makers of ſome late Acts of Parliament, as 5 Ed. 6. 24. 13 Eliz. 8. Par. 5. and 21 Jac. 1. 17. Par. 5. That all Kinds of Uſury are contrary to good Conſcience. And agreeably hereto, it ſeems formerly to have been the general Opinion, That no Action could be maintain'd on any Promiſe to pay any Kind of Uſe for the Forbearance of Money, becauſe that all ſuch Contracts were thought to be unlawful, and conſequently void. But it ſeems to be generally agreed at this Day, that the taking of reaſonable Intereſt for the Uſe of Money is in itſelf lawful, and conſequently that a Covenant or Promiſe to pay it in Conſideration of the Forbearance of a Debt, will maintain an Action; For why ſhould not one who has an Eſtate in Money, be as well allow'd to make a fair Profit of it, as another who has an Eſtate in Land? And what Reaſon can there be, that the Lender of Money ſhould not as well make an Advantage of it as the Borrower? Neither do the Paſſages in the Moſaical Law, which are generally urged againſt the Lawfulneſs of all Uſury, if fully conſider'd, ſo much prove the Unlawfulneſs as the Lawfulneſs of it; For if all Uſury were againſt the Moral Law, why ſhould it not be as much ſo in Reſpect of Foreigners, of whom the Jews were expreſsly allow'd to take it, as in Reſpect of thoſe in the ſame Nation, of whom alone they were forbidden to receive it? From whence it ſeems clearly to follow, That the Prohibition of it to that People was merely political, and conſequently doth not extend to any other Nation.

2. If A. ſurrenders a Copyhold to B. upon Condition that if he pays 80 l. to B. at a certain Day that the Surrender ſhall be void, and after it is agreed between them that A. ſhall not pay the Money, but ſhall forfeit it, and in Conſideration thereof, B. aſſumes to pay to A. at a certain Day 60 l. or 6 l. a Year from the ſaid Day, Pro Uſu & Intereſſe of the ſaid 60 l. till it be paid. An Action upon the Caſe lies upon this Promiſe; For it is a good Promiſe, and not againſt the Law; For this 60 l. ſhall be taken to be Intereſſe Damni and not Lucri, and is only limited as a Penalty for Non-Payment of 60 l. as a Nomine Pœnæ, or Obligation with Condition. Mich. 22 Jac. B. R. between *Oliver and Oliver* adjudg'd, it being moved in Arreſt of Judgment (ſcil.) that it appears to be for Uſe, and all Uſe is againſt the Common Law. Intratur. 21 Jac.

See Tit. Actions (T) pl. 16. S. C. —2 Roll. Rep. 469. S. C. adjudg'd by Doderidge and Whitlock J. abſentibus, aliis, and held that this was only in Nomine Pœnæ, and that it cannot be Uſe, becauſe no Money was lent, and if he had reſerved more than 20 l. for 100 l. it had been good, and that the Difference between Penalty and Uſe appears 26 E. 3. 71. And notwithſtanding the Words (Pro Uſu & Intereſſe) yet this was not Uſury, becauſe no Money was lent. And the Report ſays, that Noy of Counſel for the Plaintiff took the Diſtinction of Intereſſe Lucri, and Intereſſe Damni.—There is a great Difference between *Intereſſe Lucri*, and *Intereſſe Damni*; Per Jo. Powell J. And for this cites Grotius de Jure Belli & Pacis, lib. 2. cap. 12. par. 20 and 21. Lutw. 274. Trin. 13 W. 3. in Caſe of Yeoman v. Barſtow.

3. If A. be indebted to B. 10 l. and A. in Conſideration that B. gives him Day for a Year next enſuing for the Payment of it, promiſes to be bound by his Obligation to the ſaid B. for Payment of the ſaid 10 l. with the Intereſt thereof at the End of the Year aforeſaid. An Action * upon the Caſe lies upon this Promiſe, alleging that A. did not pay the 10 l. nor became bound to pay the ſaid 10 l. with Intereſt thereof at the End of the ſaid Year. For this Intereſt is only Damage for the Money by Way of Penalty. Hill. 3 Car. B. R. between *Beſt and Valence* adjudg'd, this Matter of the Intereſt being moved by my ſelf in Arreſt of Judgment after Verdict for the Plaintiff, and intire Damages given.

* Fol. 802.

4. If it be agreed by Indenture between A. and B. that certain Monies ſhall remain in the Hands of B. Solvendo Proinde to A. Intereſt after the Rate of 8 l. for 100 l. &c. An Action of Covenant lies upon this Indenture for Non-Payment of the Intereſt Money. Mich. 8 Car. B. R. between *Croſſe and Northey*, adjudg'd upon Demurrer. Intratur. P. 8. Rot. I my ſelf being of the Plaintiff's Counſel.

See Tit. Condition (N. c) pl. 14. S. C.—And Tit. Covenant (C) pl. 7.

5. *Jewiſh Uſury* was an Offence at *Common Law*, being 40 l. per Cent. and more; but no other; Per Hale Ch. B. Hard. 420. Trin. 17 Car. 2.

[C] *What* ſhall be ſaid Uſury.

Hawk. Pl. C. 225. Cap. 82. S. 3. ſays, it has been reſolv'd, that an Agreement to pay double the Sum borrow'd, or other Penalty on the Non-Payment of the principal Debt at a certain Day, is not Uſurious, becauſe it is in the Power of the Borrower wholly to diſcharge himſelf, by repaying the Principal, according to the Bargain.

1. IF a Man obliges himſelf in nine Marks to pay at a certain Day, and that if he does not pay at the Day, he obliges himſelf by the ſame Deed to pay to him 17 Marks. This is not Uſury, but it is only a Pain. 26 E. 3. 71.

If Money be *lent to be repaid* with Uſe at above 10l. in the Hundred at ſuch a Day, if 3 Men or one Man ſo long live, the Bargain is void by the Statute; Per Tanfield Ch. B. Lane 103. ſaid it had been ſo adjudged.

2. It is the *Intent* that makes the Uſury; For if there be *a Wager* between 2 *to have* 40*l.* *for* 20*l.* *if A. be alive ſuch a Day*, that is not any Uſury; For the Bargain was Bona Fide, and not for Loan; But if the Intent hereby was to have a *Shift*, it is otherwiſe. Cro. E. 643. Per Anderſon, Walmſley, and Owen (Glanvill abſente.) Mich. 40 & 41 Eliz. C. B. in Caſe of Button v. Downham.

Hawk. Pl. C. 247. cap. 82. S. 13. cites S. C. ſays the Reaſon is becauſe by the latter Computation the Intereſt would exceed the Rate allow'd by the Statute.

3. The 6 *Months* upon the Statute of Uſury ſhall be accounted half a Year, *according to the Almanack*, and not according to 28 Days in the Month. Nota Per Popham, which none gainſaid. Noy 37. Anon.

S. C. cited Hawk. Pl. C. 248. cap. 82. S. 22. ſays, That a *Contract reſerving* to the Lender a *greater Advantage than is allow'd by the Statute*, is equally within the Meaning of it, whether the whole be reſerv'd by way of Intereſt, or in Part only, under that Name, and in Part by way of Rent for a Houſe let at a Rate plainly exceeding the known Value.

4. The Agreement on borrowing Money was to pay the *full legal Intereſt*, *and to take a Houſe at an extraordinary Rent*; and held Uſury without ſhewing in Certainty what the Bargain was. Cro. J. 440. pl. 13. Mich. 15 Jac. B. R. Bedo v. Sanderſon.

5. Where a *Bond or Mortgage is forfeited*, it is no Uſury to take more than legal Intereſt. Jenk. 248. pl. 39.

6. If A. promiſe B. 100 l. for legal Intereſt at the End of the Year, and B. *pays the Intereſt*, *but never received the Principal*, this is not Uſury but Breach of Promiſe. Jenk. 248. pl. 39. 283. pl. 13.

7. *A. ſold an Office to B.* for 950 l. B. paid 500 l. and on A.'s reſigning B. and C. gave Bond to A. for 450 l. Afterwards A. came to Agreement with B. that B. ſhould pay A. 80*l.* *yearly*, *till the* 450 *l.* *and every Part of it was paid.* This was adjudg'd in C. B. not to be uſurious; but Jefferies C. on the Circumſtances of the Caſe vacated the Securities, but gave no Relief for 300 l. overpaid. Vern. 352. pl. 348. Mich. 1685. Oddy v. Torlas.

Skin. 322. pl. 1. S. C. & S. P. accordingly Per Cur.

8. If A. owes B. 100 l. B. demands his Money. A. ſays he has not the Money, but would pay it if B. can procure it to be lent by another Perſon. Whereupon B. having preſent Occaſion for his Money, contracts with C. that *if C. will lend A.* 100 *l.* *B. will give C.* 10 *l.* Upon which C. lends the Money, and the Debt is paid to B. This is a good and lawful Contract between B. and C. for B. has *Benefit* by it; Per Holt Ch. J. Carth. 251. Mich. 4 W. & M. in B. R. in Caſe of Bartlett v. Viner.

9. If

9. If a Man has great *Occaſion for Guineas*, and can make great Advantage by them, and for this Purpoſe *gives* to another *more* Money *for them than the Value of them amounts to*, this is no Uſury. Per Powell J. and alſo by Blencowe J. as the Reporter ſays he thinks. Lutw. 273. Trin. 13 W. 3. in Caſe of Yeoman v. Barſtow.

10. Where there is *no Loan* there can be no Uſury; Per Powel J. Lutw. 273. Trin. 13 W. 3. Yeoman v. Barſtow. S P. By Whitlock J. 2 Roll. Rep. 469. in Caſe of Oliver v. Oliver.

11. If there be *a juſt Debt due*, and a *Bond* is given *for Payment* thereof with unlawful Intereſt, it is Uſury. 6 Mod. 303. Mich. 3 Ann. B. R. Villars v. Cary.

(D) By *Statute*. See (I)

1. 37 *H.* 8. *cap.* 9. *S.* 1. ENacts, That *all Statutes heretofore made concerning Uſury ſhall be void.*

S. 2. *No Perſon ſhall ſell his Merchandizes to any Perſon, and within* 3 *Months after buy the ſame, or any Part thereof, upon a leſſer Price, knowing them to be the ſame.*

S. 3. *No Perſon by way of any corrupt Bargain, Loan, Exchange, Chevi-ſance, Shift, or Intereſt of any Wares, or other Things, or by any other deceitful Way, ſhall take in Gains for the forbearing of one Year for his Money, or other thing that ſhall be due for the ſame Wares or other Things above* 10 *l. in the* 100 *l.* If before the new Statute one had lent Money for 10 l. in the 100 l. to continue ſo for 10 Years, it is not Uſury now after this Statute to pay or receive the ſaid 10 l. according to the Agreement, whether the ſame be with Writing or without; For tho' the Statute be general, yet it ſhall have reaſonable Conſtructions. Agreed by all the Juſtices of C. B. Dal. 12. pl. 17. Paſch. 7 E. 6. Anon.

S. 4. *If any Perſon do ſell or lay to Mortgage any Lands or Hereditaments, upon Condition of Payment or Non-payment of Money at or before any Day, the Perſon to whom ſuch Lands ſhall be ſold, or laid to Mortgage, ſhall not have in Gains above* 10 *l. in the* 100 *l. for one Year.* See (E)

S. 5. *If any Perſon ſhall do any thing contrary to this Statute, he ſhall forfeit the treble Value of the Wares and other things ſold, and the treble Value of the Profits of the Lands taken by Mortgage, and alſo ſhall ſuffer Impriſonment and make Fine and Ranſom at the King's Will, the Moiety of which Forfeiture of the treble Value ſhall be to the King, and the other Moiety to him that will ſue for the ſame in any the King's Courts of Record.*

S. 6. *Provided that this Act ſhall not extend to any lawful Obligation with a Condition, nor to any Statute, or Recognizance for Payment of a leſs Sum, ſo that ſuch Obligation &c. be made for a true Debt, or Performance of true Covenants, upon any juſt *Intent between the Parties, other than in Caſes of Uſury, corrupt Bargains, Shift, or Cheviſance, nor to any Recovery, Fine, Feoffment, Releaſe, Confirmation, or Grant, other than ſuch as ſhall be on Condition, extending to Uſury, Intereſt &c.* * See (M) pl. 11.

2. 13 *Eliz. cap.* 8. *S.* 3. Enacts, That *all Bonds, Contracts, and Aſſurances, collateral or other, for Payment of Money lent, or Covenant to be perform'd upon any Uſury in any thing againſt the Act* 37 *H.* 8. *cap.* 9. *upon which there ſhall be taken upon the Rate of* 10 *l. for the* 100 *l. for one Year, ſhall be void.* Counter-bonds, mention'd in this Statute, are intended for Payment of

* Nota the author takes no notice of 5 & 6 E. 6. c. 20. which repeals 37 H. 8. & provides against any in Grant. But 5 & 13 El. c. 7. revives 37 H. 8. & repeals 5 & 6 E. 6.

S. 5. *All*

Money to him that lent the Money, and not between him that borrows and the Surety; per Walmſley J. Noy 73. in Caſe of Dowman v. Butler.

S. 5. All Uſury, Loan &c. mentioned in the ſaid Statute, whereupon is not reſerved above 10 *l. for the* 100 *l. ſhall be puniſh'd in Form following, viz. ſuch Offender ſhall forfeit ſo much as ſhall be reſerved by way of Uſury, above the Principal, to be recover'd as by the ſaid Statute.*

It was agreed, That if there be a Communication and an *Agreement after the Forfeiture* of a Recognizance, and the 2*d Deſeaſance is for more than* 10 *l. in the Hundred, according to the principal Debt*, yet it is not within the 13 Eliz. cap. 11. of Uſury, but it had been otherwiſe before the Forfeiture. And by Glanvil and Walmſley, Anderſon being abſent, That altho' that the 2*d Deſeazance bears Date the ſame Day of the Payment of the firſt Deſeazance*, yet it is not within the Statute; for it is not for the Forbearance of the firſt Principal, but of that Penalty; alſo when the Conuſor perceives that he was not able to ſave the Forfeiture, it was adjudged that the firſt Contract was not uſurious. Noy 2. Hollingworth v. Parkehurſt.——S. C. cited Hawk. Pl. C. 248. cap. 82. S. 23. ſays, That a 2d Bond, made after the Forfeiture of a former, and condition'd for the Receipt of Intereſt, according to the Penalty of the forfeited Bond, is as much within the Statute as if it had been made before the Forfeiture; for if ſuch a Practice ſhould be allow'd, nothing could be more eaſy than to elude the Statute; and tho' the whole Penalty be due in Strictneſs to the Obligee, yet the true principal Debt is in Conſcience no greater after the Forfeiture of the Bond than it was before.

S. 7. The Statute 37 *H.* 8. 9. *ſhall be conſtrued largely and ſtrongly againſt the Party offending, by way of Device, directly or indirectly.*

S. 8. *This Statute ſhall not extend to any Allowances for the finding of Orphans, according to the Cuſtoms of the City of London, or any other City.*

S. 9. *If any Perſon offend contrary to the ſaid Statute, ſuch Offender may alſo be puniſh'd according to the Eccleſiaſtical Laws; and all offending in Uſury, Shifts, or Cheviſance againſt this Act, and not taking but only after the Rate of Ten in the Hundred for a Year, ſhall be only puniſh'd by the Forfeitures appointed by this Act, againſt ſuch as ſhall not receive above* 10 *l. in the* 100 *l.*

3. 21 *Jac.* 1. *cap.* 17. *S.* 2. *None ſhall upon any Contract, directly or indirectly, take for the Loan of any Money, or other Commodities, above the Rate of* 8 *l. for* 100 *l. for one whole Year, in Pain to forfeit the treble Value of the Money, or other Things lent.*

S. 5. *This Law ſhall not be conſtrued to allow the Practice of Uſury in Point of Religion or Conſcience.*

A *Mortgage* was made at 8 *l. per Cent. before the making this Statute* reducing Intereſt to 6 l. per Cent. The Mortgagor *continued paying Intereſt of* 8 *l. per Cent. for* 15 *Years after* this Statute, and then the Mortgagee enter'd. The Mortgagor brought a *Bill to redeem*. The Queſtion was Whether the 2 l. per Cent. received for the 15 Years, ſhould not be allow'd in Diſcharge of ſo much Principal. The Court denied Relief as to the Money paid by the Plaintiff; but decreed 6 l. per Cent. only, to be allow'd from the Defendant's Entry on the Eſtate. 2 Vern. 42. pl. 37. Paſch. 1688. Walker v. Penry.——On a Re-hearing the Decree was confirm'd, as to the 2 l. per Cent. Ibid. 78. pl. 73.—Lord C. Jefferies having been of Opinion, that the Statute had *no Retroſpect* beyond 1660. but look'd forwards to Contracts and Agreements then after to be made, and not to any Contracts and Agreements before that Time, and having decreed Account to be taken accordingly, as above, now upon the Bill of Review, Ld. Commiſſioner Trevor, becauſe there was a Decree already made in it, would not reverſe it, But Ld. Commiſſioners Rawlinſon and Hutchins, on reading the Act of Parliament, held the Act had a Retroſpect, and makes it unlawful to take more than 6 l. per Cent. upon any Contract, whether made before or after the Act of Parliament; but that Part of the Statute, which adds Penalties, relates only to Contracts and Agreements then after to be made. 2 Vern. 145, 146. pl. 141. Trin. 1690. Walter & al' v. Penry & al'——Abr. Equ. Caſes, 288. (D) pl. 1. cites 2 Vern. 145. S. C. That Rawlinſon and Hutchins, Lds. Commiſſioners, held the Decree ſhould be reverſed, againſt Ld. Trevor. But that it ſeems to be now ſettled, that the Statute of 12 Annæ, cap. 16. which reduces the Intereſt of Money to 5 l. per Cent. has not a Retroſpect to any Debts contracted before; but that they ſhall carry Intereſt according to the Intereſt allow'd, or Agreement made at the Time of the Debt contracted.——And Serj. Hawkins, from the Expoſitions made of former Statutes, ſays, That a Contract made before the Statute is no way within the Meaning of it, and therefore it is ſtill lawful to receive 6 l per Cent. in reſpect of any ſuch Contract. Hawk. Pl. C. 246. cap. 82. S. 10.

4. 12 *Car.* 2. *cap.* 13. *S.* 2. *None ſhall take, directly or indirectly, for the Loan of Money, or other Commodities, above the Value of* 6 l. *for the Forbearance of* 100 l. *for a Year, and ſo after that Rate, and all Bonds, Contracts &c. whereupon more ſhall be reſerved, ſhall be void. They that receive more, ſhall forfeit the treble Value of the Money or other Things lent.*

5. 12 *Ann. Stat.* 2. *cap.* 16. Enacts, That *no Perſon upon any Contract, which ſhall be made after the 29th of Septemb.* 1714, *ſhall take for Loan of any Money, Wares &c. above the Value of* 5 *l. for the Forbearance of* 100 *l. for a Year; and all Bonds and Aſſurances for Payment of any Money to be lent upon Uſury, whereupon there ſhall be reſerved or taken above Five in the Hundred, ſhall be void; and every Perſon which ſhall receive, by means of any corrupt Bargain, Loan, Exchange, Chevizance, Shift, or Intereſt of any Wares, other Thing, or by any deceitful way, for the forbearing or giving Day of Payment for one Year, for their Money or other Thing, above* 5 *l. for* 100 *l. for a a Year &c. ſhall forfeit the treble Value of the Monies and other Things lent.*

Hawk. Pl. C. 246. cap. 82. S. 10. ſays, That the Expoſitions made of the former Statutes are very applicable to this, which is penn'd almoſt in the very ſame Words.

For further Explanation of the above Statutes, ſee the following Letters.

(E) Uſury. What, *in reſpect of the Communication, or Agreement.*

See (F)

1. WHERE a Man *for* 100 *l. ſells his Land, upon Condition* that *if the Vendor or his Heirs repay the Sum before the Feaſt of Eaſter*, or ſuch like, then next following, that *then he may re-enter*, this is no Uſury; for he may repay the next Day, or any time before Eaſter, and therefore he has no Gain certain to receive any Profits of the Land. Br. Uſury, pl. 1. cites 29 H. 8.

Contra if the *Condition* be, That *if the ſaid Vendor repay ſuch a Day, a Year or two Years after*, this is Uſury; for he is ſure to have the Land, and the Rents and Profits this Year, or thoſe two Years. Ibid.

So where *Defeaſance or Statute is made for the Repayment before ſuch a Feaſt.* Ibid.——*Contra* if it be of Payment at *ſuch a Feaſt, which is a Year or two Years after*, this is Uſury. Contra in the other Caſe, for the Cauſe aforeſaid. Ibid.

So upon ſuch Mortgage, if the *Vendee leaſes the Land to the Vendor for Years, rendring Rent*, there, if there be a *Condition* in the Leaſe *that if the Vendor repay the Sum before ſuch a Day*, that *then the Leaſe ſhall be void*, this is no Uſury. *Contra if it be to repay ſuch a Day certain, a Year or more after.* Br. Uſury, pl. 2. cites 31 H. 8.

2. B. *deliver'd Wares of the Value of* 100 *l.* and no more, and *took a Bond*, with a Condition to *redeliver the Wares to* B. *within a Month, or to pay* 120 *l. at the End of a Year.* The Obligation was adjudged void by the Statute of Uſury. Arg. Mo. 397. pl. 520. in Caſe of Reynolds v. Clayton, cites it as adjudged in B. R. Becher's Caſe.

So where A. agrees *to deliver Wares of the Value of* 20 l. to B. and that B. ſhould pay for the ſame within 6 Months 34 l. and Bond was given for the Payment, it ſeems this was Uſury. Cro. E. 104. pl. 12. Trin. 13 Eliz. B. R. Peterſon's Caſe.

3. If A. comes to borrow Money, and B. ſays he will not lend Money, but *he will ſell Corn* &c. and give Day for Payment at ſuch a Rate, which *Rate* exceeds 10 l. in the 100, 'tis Uſury. Mo. 398. pl. 520. cites it as **Wicks's Caſe** of Glouceſterſhire, in the Exchequer.

4. A. *asks to borrow of B.* upon Intereſt. *B. refuſes to lend* for Intereſt; *but ſays that for Annuity or Rent he will*; and ſo it was agreed, and a Rent granted for 23 Years, amounting to more than the Statute allows Intereſt &c. Agreed not to be Uſury within the Statute. And. 121. pl. 169. Paſch. 26 Eliz. Finch's Caſe.

Cro. E 27. **Tanfield v. Finch.** *But* if 12 l. per Cent. be offer'd, and the other ſays he will not meddle in ſuch manner, becauſe of the Danger of the Law, otherwiſe that he would accept it; but if he will aſſure him an annual Rent, then he will lend him; this may make it Uſury. Quære.—— And. 121. S. P. in Finch's Caſe; but the Book ſays Quære. But ſays, it ſeems that if one agrees to take 12 l. in the 100, and, *to defraud the Law*, they agree that a Rent of a greater Value ſhall be aſſured, that this is within the Statute.——If the Original Contract was to have a Rent-charge, that is not Uſury, but a good Bargain and Pennyworth. But if the Party had come to borrow Money, and then ſuch a Contract had enſued for Security, then that is Uſury. Agreed per Cur. Noy 151. Symonds v. Cockerill.

S. P. accordingly. Cro. J. 26. pl. 2. S. C.

5. If one gives the *Profits of his Lands*, worth 10 l. for Interest for a Year of 100 l. tho' he *receives Part* of the Profits *daily*, this is not Usury above 10 l. for the 100; per Popham, Gawdy, and Yelverton; but Fenner e contra. Mo. 644. pl. 890. in Worley's Case.

As if I *lend* to one 100 *l. for 2 Years, to pay for the Loan thereof* 30 *l. and if he pay the Principal at the Year's End, he shall pay nothing for Interest.* This is not Usury; For the Party hath his Election, and may pay it at the Year's End, and so discharge himself. Ibid. ——Per Holt Ch. J. it is not Usury, but only in Nature of a *Nomine Pœnæ*. Cumb. 133. Trin. 1 W. & M. in B. R. in Case of Garrett v. Foot.

6. If I secure both Principal and Interest, if it be *at the Will* of the Party who is to pay it, it is no Usury; Per Dodderidge J. Cro. J. 509. pl. 20. Mich. 16 Jac. B. R. in Case of Roberts v. Tremaine.

Jo. 303. pl. 9. Whichcott v. Gryfell, S. C. but S. P. does not appear as to the Payment Half yearly.

7. One *mortgages Land* for 100 l. and *takes Bond for the Interest of* 8 l. *a Year, payable Half-yearly*. The Question was whether that makes the Bargain usurious against the Statute, because, as it was insisted, the Use ought not to be paid until the End of the Year, and contracting to have Half of it [Half] yearly, is not warrantable by the Statute? But the Court held that it is not any usurious Contract, contrary to the Statutes, because the 100 l. is lent for a Year, and the Reservation is not of more than what is permitted by the Statutes; and the reserving it Half-yearly is allowable; for he doth not receive any Interest for more or less Time than his Money is forborn. It was adjudg'd for the Plaintiff, and affirm'd in Error. Cro. C. 283. pl. 26. Mich. 8 Car. B. R. Gryfill v. Whitchcott.

8. If a Man contracts *for more Interest than the Statute allows if the Plaintiff requires it*; tho' the Plaintiff *never does require it*, yet it is within the Statute of Usury. Vent. 254. Hill. 25 & 26 Car. 2. B. R. in Case of Hedgeborough v. Rosenden.

As if a Mortgage be for 100 l. with a Proviso to be void on Payment of 106 l. at the End of one Year, and no Covenant for the Mortgagor to take the Profits till Default in Payment; so that in Strictness the Mortgagee is intitled both to the Interest and the Profits, yet if this was not expressed, the Agreement is not Usury. Ibid. ——Freem. Rep. 253. pl. 268. Pasch. 1678. Anon. seems to be S.C. where it was held, that if a Scrivener do, through Mistake, make the Money payable sooner than it ought to be, or reserves more Interest than ought to be, this will not make it void within the Statute; because there was no corrupt Agreement. ——S. P. Ibid. 264. pl. 286. Mich. 1679. Booth v. Cooke. ——S. P. 2 Vent. 107. Mich. 1 W. & M. in C. B. Buckler v. Millard.

9. If the *Agreement* of the Parties be *honest*, but is *made otherwise by the Mistake of a Scrivener*, yet it is not Usury. 2 Mod. 307. Pasch. 30 Car. 2. C. B. in Case of Ballard v. Oddey.

So where the Plaintiff *agreed* 23 *May*, 17 *Jac. to lend the Defendant* 120 *l. for a Year then next following, and to have* 12 *l. Interest therefore, on the* 24*th Day of May*, 18 *Jac.* whereupon the Defendant enter'd into a *Bond dated* 23 *May*, condition'd *for Payment of* 132 *l. on the* 24*th of May then next ensuing*; by which Words (next ensuing) the Payment of the Principal and Interest was to be the very next Day, but this was found to be done *by Mistake of the Scrivener*, and likewise that the Agreement was to make a Loan for a Year, and that the Security was for Payment at the Year's End. It was held per tot. Cur. not to be Usury within the Statute; For *here was no corrupt*, but a true and absolute, *Agreement*, and the Act of a Stranger shall not bring him within the Statute, especially it being found that he did not require the Money till after the Year. Wherefore it was adjudg'd for the Plaintiff. Cro. J. 677. pl. 14. Mich. 21 Jac. B R. Buckley v. Guilbank. ——2 Roll. Rep. 398. S. C. adjornatur. ——Ibid. 414. S. C. Adjornatur.

So if the Scrivener that make the Bond *reserves more than* 8 *l. per Cent.* This is not an Usurious Contract; Per Cur. Het. 11. Pasch. 3 Car. C. B. Anon.

Lutw. 464. Mich. 3 Jac. 2. Geang v. Swaine, says it was resolv'd that *the Statute ought to be pleaded*; For

10. The Defendant, *in Consideration of* 12 *l.* paid him by the Plaintiff, gave *Bond to pay* the Plaintiff 14 *l. if he liv'd* 6 *Months after* the Date of the Bond. It was objected, that it appears by the very Condition of this Bond that the Contract was usurious, it being to pay 14 l. for 12 l. in 6 Months after the Date of the Bond, tho' this might have made the Bond void, in case the Statute had been pleaded, yet that not being done, this Objection comes too late. 3 Salk. 391. pl. 7. cites Lutw. Grange's Case.

tho' it was Usury Prima facie upon View of the Condition, yet peradventure the Plaintiff might have rectified

rectified this by his Replication. Two of the Juſtices were of Opinion that the Bond was not uſurious, and the others ſaid nothing as to this Point. Judgment for the Plaintiff.

11. Bankrupt having *borrow'd* a great Sum of *Money* of the Defendant *for one Quarter of a Year he was to give* the Defendant 6 *l. for every* 100 *l.* that he borrow'd; *and ſome Silk being the Security, he was to give him one Pound more* for every 160 l. for that Quarter, *for the Uſe of his Warehouſe.* The Queſtion upon the Trial was, Whether this Contract made between the Bankrupt and the Defendant is an Uſurious Contract? And the Jury having found a Verdict for the Defendant, Serjeant Cheſhire mov'd for a new Trial; for he ſaid the Verdict was againſt Law. Holt Ch. J. ſaid he thought it was a wrong Verdict, and it was order'd to be mov'd again. Holt's Rep. 706. Le Blanc & al' v. Harriſon.

(F) Uſury. What. *By way of Annuity.*

See (E) pl. 4.

1. A. Gives 300 l. to B. to have *an Annuity of 50 l.* aſſur'd to him *for* 100 *Years, if A.* and his Wife and 4 of his Children *ſo long ſhall live.* Per Cur. This is not within the Statute of Uſury. So if there had not been any Condition. But Care is to be taken that there be no Communication of borrowing of any Money before. Held Per tot. Cur. 4 Le. 208. pl. 334. Mich. 29 Eliz. B. R. Fuller's Caſe.

2. A. on 17th July 1579. *lent* 100 *l.* to B. who thereupon granted to A. and his Heirs an *Annuity of 20 l. a Year, on Condition that if* the ſaid B. the *Grantor paid to A. at Chriſtmas* 1580 *the ſaid* 100 *l.* that then *the Annuity ſhould ceaſe.* Adjudg'd this is not within the Statute; for nothing was to be paid for Intereſt either within a Year and a Quarter after the Grant; and if the 100 l. had been paid on the Day, the Annuity was to ceaſe without paying any thing; ſo that it is only a plain Bargain, and a conditional Purchaſe of an Annuity. 5 Rep. 69. Mich. 33 & 34 Eliz. B. R. Burton's Caſe.

B. had a Leaſe of a Houſe for 40 Years at 5 l. Rent, and agrees with C. to aſſign this Term to him for 300 l. but C. not having the Money, D. by Agreement with C. paid the Money, and took the Aſſignment to himſelf, and then demis'd the Houſe to C. for 39 Years 3 Quarters, at 35 l. a Year, whereof 5 l. goes to the Landlord, and the 30 l. Reſidue to D.'s own Uſe. C. covenants to pay the Rent, and to repair &c. as uſual. D. covenants that *if C. pays* 300 *l. at* 4 *Year's End, the Rent ſhall ceaſe*, and that he will convey the Remainder of the Term to C. D. *not having any Security for Re-payment* of the 300 l. *nor* there being *any collateral Agreement* to pay it, but only C. may pay it at 4 Years End, if he will, Per Hale Ch. J. it is only a Purchaſe of Annuity determinable, if Grantor pleaſe, at 4 Years End. But otherwiſe it would be, had there been any Security or collateral Agreement to pay the Money. 2 Lev. 7. Paſch. 23 Car. 2. B. R. The King v. Drury.

3. *But* if it had been *agreed* between A. and B. *that notwithſtanding ſuch Power of Redemption the* 100 *l. ſhould not be* paid *at the Day*, and [ſo] that the *Clauſe of Redemption was inſerted to evade the Statute*, then this had been an uſurious Contract and Bargain within the Statute; For if in Truth the Contract be uſurious againſt the Statute, no Colours or Shadows of Words will ſerve, but that the Party may ſhew it, and he ſhall not be concluded or eſtopp'd by any Deed in any other Matter whatſoever; For the Statute gives Averment in ſuch Caſe. Reſolv'd Per Cur. 5 Rep. 69. b. Mich. 33 & 34 Eliz. B. R. in Burton's Caſe.

Hawk. Pl. C. 248. cap. 82. S. 19. ſays, It ſeems that the whole Contract is void; For the Conſtruction of Caſes of this Nature muſt be govern'd by the Circumſtances of the whole Matter, from which the Intention of the Parties will appear in the making of the Bargain, which, if it was in Truth uſurious, is void, however diſguiſed it may be by a ſpecious Aſſurance.

4. A. for 110 l *granted a Rent of* 20 *l. for* 8 *Years, and another of* 20 *l. a Year for* 2 *Years, if B. C. and D. ſhould ſo long live.* In Replevin the Defendant avow'd for this Rent, and the Plaintiff pleaded the Statute of Uſury, and ſet forth the Statute and a ſpecial uſurious Contract. Brownl. 180. Paſch. 6 Jac. **Cotterel v. Hartington,** [ſays, but not by whom] If it had been laid to be upon a Loan of Money, then it was Uſury, but if it be a Bargain for an Annuity, it is no Uſury; but [that] this was alleg'd to be upon a Lending.

Bulſt. 36. S. C. accordingly by Williams, Yelverton, and Fenner; and Judgment for the Plaintiff. — Hawk. Pl. C. 247. cap. 82. S. 15. ſays, That the *Grant of an Annuity for Lives not only exceeding the Rate allowed for Intereſt, but alſo* exceeding *the known Proportion for Contracts of this Kind,* in Conſideration of a certain Sum of Money, is not within the Meaning of the Statute, unleſs there were ſome underhand Bargain for the Security of the Re-payment of the Principal or Conſideration-money.

5. In Debt upon Bond, the Defendant *pleaded* the Statute of Uſury, and *how he came* to the Plaintiff *to borrow of him* 120 *l. according to the Rate of* 10 *l. per Cent. who refuſ'd to lend* the ſame, *but corruptly offer'd to deliver* 120 *l to him, if he would be bound to pay him* 20 *l. per Ann. during his and his Wife's, and his Son's Lives:* Whereupon he enter'd into the Bond. Reſolv'd that this being an abſolute Bargain, in Conſideration of the Payment of 20 l. per Annum during the Lives, and no longer, and *no Agreement to have the principal Money,* was out of the Statute of Uſury; *but if* there had been *any Proviſion for the Repayment of the Principal, altho' not expreſs'd within the Bond,* it had been an uſurious Agreement within the Statute. And Judgment for the Plaintiff. Cro. J. 252. pl. 7. Mich. 8 Jac. B. R. Fountain v. Grymes.

6. A. after the Statute 12 Car. 2. viz. 3 June 13 Car. 2. *agreed to lend B.* 100 *l.* and that for the Forbearance thereof for the Time underwritten, B. the Defendant *ſhould pay* to A. the Plaintiff 120 *l. as follows,* viz. 40 *l. upon the* 20*th Jan. and* 20*th July, by equal Portions annually next after* the 20th Day of the then Inſtant Month of July, *till the* 120 *l. be paid*; which exceeded the Rate of 6 l. per Cent. *And for further Security B. gave a Bond of* 200 *l. and confeſs'd a Judgment.* Twiſden J. ſaid that the Contract here was not uſurious, but is a Purchaſe of an Annuity for three Years. Sid. 182. pl. 1. Paſch. 16 Car. 2. B. R. Rowe v. Bellaſis.

(G) Upon a *Hazard.*

2 And. 15. pl. 8. S. C. All the Court held upon the 2 Statutes of 37 H. 8. and 13 Eliz. that the Bond was void, becauſe it appears to

1. IN Debt upon Obligation of 60 l. the Defendant pleaded the Statute, and *ſhew'd that it was agreed* between the Plaintiff and Defendant 14 *Decemb. that the Plaintiff ſhould lend* the Defendant 30 *l. to be repaid the* 1*ſt of June following, and* that the Plaintiff *ſhould have* 3 *l. for the Forbearance, if the Plaintiff's Son ſhould be then living*; and *if he died, then to repay but* 26 *l. of the principal* Money. The Court inclin'd that it was within the Statute of Uſury; whereupon the Plaintiff who had demurr'd, became Nonſuit. Mo. 397. pl. 520. Paſch. 37 Eliz. C. B. Reynolds v. Clayton.

be made by corrupt Means to have more than 10 l. per Cent. which the Statute of 37 H. 8. intended to puniſh. And by the Proviſo it appears that the Intent was, *if one was indebted* to another *truly without Loan and Intention of Uſury,* then in ſuch Caſe *Bonds and Conveyances of Land for ſecuring the true Debt, are out of the ſaid Statute*; but if there is a borrowing of Money, and a Communication for Intereſt, the Device to have beyond the Rate of 10 l. per Cent. is fraudulent, and within the ſaid Statute, otherwiſe the Statute would be vain; For he might as well have made the Condition, that if 20 Perſons, or any of them, ſhould be living at the Day &c. then he ſhould have 33 l. And of this Opinion were Popham Ch. J. of B. R. and Peryam Ch. B. —5 Rep. 70. Clayton's Caſe, S. C. reſolv'd that it was an uſurious Contract.

So

So where A. agreed with J. S. to give him 10 l. for the Forbearance of 20 l. for a Year, *if B. his Son were then alive.* It was held by 3 Juſtices (Glanvil abſente) to be Uſury, by reaſon of the corrupt Agreement. And it is the Intent makes it ſo or not ſo. Cro. E. 642. pl. 43. Mich. 40 & 41 Eliz. C. B. Burton v. Downham.——2 And 121. pl. 65. S. C.

The Obligor was bound in a *Bond* of 300 l. condition'd *to pay 22 l.* 10 *s.* Premium, *at the End of the firſt* 3 *Months* after the Date &c. *and* 6 *d. in the Pound at the End of* 6 *Months*, as a farther Premium, *together with the Principal* itſelf, *in Caſe the Obligor be then living; but if he dies within that Time*, then *the Principal to be loſt.* Adjudg'd this is an uſurious Contract, becauſe there was *a Poſſibility* that the Obligor might live ſo long; *and* there is *an expreſs Proviſion to have the Principal again.* 3 Salk. 390. pl. 3. Trin. 1 W. 3. B. R. Maſon v. Abdy.——Comb. 125. S. C. ſays the Court was ready to give Judgment for the Defendant, but that upon the Importunity of Counſel adjornatur——Carth. 67. S. C. adjudg'd upon a general Demurrer, that this was an uſurious Contract; and if ſuch a Contingency of the Death of a Man in full Health, ſhould prevent the Uſury, Contingencies might be extended to the Death of 2 or 3, or more, and ſo the Statute be of little Uſe.

2. A. deliver'd to B. 100 l. who by Indenture covenanted with A. *to pay to every one of A.'s Children which then were and ſhould be living at* 10 *Year's End*, 80 l. A. having then 5 Daughters; and for Aſſurance mortgag'd a Manor, and was bound in a Statute of 500 l. It is not Uſury, but a meer *caſual Bargain.* But if it were to pay 400 l. at 10 Year's End, *if any were living*, then it would be a greater Doubt; Or if it had been to pay 300 l. if any were living at one or two Years End, that had been Uſury, becauſe of the *Probability* that one would continue alive for ſo ſhort a Time; but in 10 Years are many Alterations. Cro. E. 741. pl. 15. Hill. 42 Eliz. C. B. Bedingfield v. Aſhley.

3. A. lends B. 150 l. for Re-payment of which *A. leas'd a Cloſe to M. for* 60 *Years, to begin at the End of* 2 *Years*, upon Condition that *if he paid the* 150 *l. at the End of the* 2 *Years, the Leaſe to be void*; and agreed that for the deferring and giving of Day of Payment for the 2 Years, A. *ſhould pay to M. for Intereſt* 22 *l.* 10 *s. quarterly, if M. ſhould ſo long live.* M. lent the 150 l. A. made the Leaſe, and granted by Fine to M. the Rent of 22 l. 10 s. to be paid quarterly, if M. ſo long liv'd. Reſolv'd that it was an uſurious Contract, for by Intendment M. might have lived above the 2 Years, and it was an *apparent Poſſibility* that ſhe ſhould receive that Conſideration, whereby ſhe is within the Statute; and alſo that *the Leaſe* taken *for the Payment of the principal* Money, *and not for any Part of the Uſury, is within the Statute*, becauſe it is for Security of Money lent upon Intereſt, and for the Securing of that which the Statute intended M. ſhould loſe. Cro. J. 507. pl. 20. Mich. 16 Jac. B. R. Roberts v. Tremaine. 2 Roll Rep. 47. Roberts v. Tremoile, S. C. The Court gave no Regard to the Proviſo for Redemption, that not being appointed till the End of two Years; ſo that A. was aſſur'd of the Uſury in the mean Time.

4. If I lend 100 l. to have 120 l. at the Year's End upon a Caſualty, if the *Caſualty goes to the Intereſt only, and not to the Principal*, it is Uſury; for the Party is ſure to have the Principal again, come what will; but if the *Intereſt and Principal are both in Hazard*, it is not then Uſury. Per Doderidge J. Cro. J. 508. pl. 20. Mich. 16 Jac. B.R. Roberts v. Trenayne. It was agreed, that if Principal and Intereſt be in Hazard upon a Contingency, it is no Uſury,

tho' the Intereſt do exceed the allow'd Rates of 6 l. per Cent. And when there is an *Hazard that the Plaintiff may have leſs than his Principal*, it is no Uſury. Show. 8. Paſch. 1 W. & M. Maſtin v. Abdee.

(H) Uſury. What. *Ex poſt Facto.*

If I *lend* 100 l. *without any Contract for Intereſt*, and terwards at the End of the Year he gives me 20 l. for the Loan thereof, the ſame is within the Statute; for my *Acceptance* makes the Offence without any Contract or Bargain; per Gent J. Le. 96. pl. 125. Mich. 29 Eliz. in the Exchequer, in Sir Woollaſton Dixy's Caſe.

1. NOTE, if one *contracts to have more than the Statute allows, but he takes nothing of the Intereſt contracted for*, he is not puniſhable by the Statute; *but if he takes any thing, if it be but a Shilling*, it is an Affirmance of the Contract, and he ſhall render for the whole Contract. Cro. Eliz. 20. pl. 5. Paſch. 25 Eliz. C. B. in Caſe of Pollard v. Scoly, cites Hill. 20 Eliz. B. R. Mallory v. Bird.

2. The Plaintiff *ſold* to the Defendant 2 *Oxen*, on the 22 June, for 26 l. 6 s. 8 d. *to be paid on the 1ſt of Novemb. following, at which Day the Defendant deſired longer time*; and thereupon the *Plaintiff gave him to the firſt of next May, paying* 3 *Quarters of Wheat for the Forbearance*; which was above the Value of 10 l. per Cent. according to the Statute of 13 Eliz. And this Matter was pleaded to avoid the Contract; but the Juſtices were of Opinion, that the Statute did not make the original Contract void, that being made Bona fide; but the ſubſequent Contract was void. Cro. Eliz. 20. pl. 5. Paſch. 25 Eliz. C. B. Pollard v. Scoly.

S. P. and reſolved by the whole Court, that this Taking the Uſe-Money within the Year, ſhall not avoid the Obligation, and is no Uſury within the Statute, becauſe it *was not uſuricus at the Beginning*. And Judgment for the Plaintiff. Bulſt. 17. Hill. 7 Jac. Anon. —— See pl. 5.

3. In Debt upon an Obligation, where the Statute of Uſury was pleaded, it was ſaid by Popham, upon the Evidence, That if a Man *lends* 100 *l. for a Year, and to have* 10 *l. for the Uſe* of it, if the *Obligor pays the* 10 *l.* 20 *Days before it be due*, that does not make the Obligation void, becauſe it was not corrupt. But *if* upon making the Obligation *it had been agreed, That the* 10 *l. ſhould have been paid within the Time*, that ſhould have been Uſury, becauſe he had not the 100 l. for the whole Year, when the 10 l. was to be paid within the Year; and Verdict was given accordingly. Noy 171. Trin. 42 Eliz. in Dalton's Caſe.

Noy 41. S. C. ſays the better Opinion now was, that this was not Uſury. Et adjornatur. —— Cro. J. 25. pl. 2. Paſch. 2 Jac. B. R. the S. C. and that Fenner and Yelverton held it Uſury; but that Popham, Gawdy, and Williams held e contra. And Judgment was given for the Defendant. Quod querens nil capiat &c. And Stephens ſaid, he was of Counſel in one **Snow's** Caſe, where it was adjudg'd accordingly. —— Mo. 644. pl. 890. Worley's Caſe, S. C. That Popham, Gawdy, and Yelverton held it no Uſury; but Fenner e contra. And the Reporter ſays that the Caſe, Trin. 2 Jac. was adjudged no Uſury.

4. The Plaintiff *lent* the Defendant 100 l. for a Year, *at the Intereſt of* 10 *l. per Ann. At the End of* 6 *Months he received* 5 *l. for half a Year.* Popham and Gawdy J. thought that this was not Uſury, becauſe he had no more than 10 l. Intereſt for his 100 l. But Fenner and Yelverton J. contra, becauſe the Intereſt ought not to be taken till the End of the Year; for if it is taken before, then the Borrower hath not the Profit of the whole principal Money for a Year, but only of 95 l. and no more. And Judgment was given by the Opinion of all the Juſtices of England againſt the Plaintiff. Yelv. 30. Hill. 43 Eliz. B. R. Barnes v. Worlich.

Noy 41. the ſame Point by Popham in S. C. —— S. P. Mo. 644. in Worley's Caſe. —

5. But if he had agreed to *take the* 5 *l. for the Forbearance inſtantly, when he lent it*, that had made the Aſſurance void; for then he had not lent the intire Sum for one Year, and the other had not had the Uſe of the Money according to the Intention of the Law; per Popham, Gawdy, & Williams. And Williams ſaid, He knew that upon this Difference

rence it hath been ſo reſolved of late Time. Cro. J. 26. pl. 2. Paſch. 2 Jac. B. R. in Caſe of Barnes v. Worlick.

Hawk. Pl. C. 247. cap. 82. S. 14. ſays, That the Receipt of the Intereſt before the Time when it is in Strictneſs due, being voluntarily paid by the Debtor for the greater Convenience of the Creditor, or for any other ſuch like Conſideration, without any manner of corrupt Practice, or any previous Agreement of this kind at the making of the firſt Contract, does not make the Party liable to the Forfeiture of the treble Value.

6. Where the firſt Contract is not uſurious, it ſhall never be made ſo by *Matter ex poſt Facto*; per Williams J. Bulſt. 17. Hill. 7 Jac. Anon.

7. A *Contract* was, That he, to whom the Money was lent, ſhould give ſuch a Sum for the Loan of the Money, and by this Agreement the Sum he *received* 10 *Days after*, the Loan was more than 10 l. per Annum for 100 l. This was adjudged per tot. Cur. to be an Uſurious Contract *ab Initio*. Bulſt. 20. Hill. 7 Jac. Anon.

The Meaning ſeems to be, that the Sum given, and the Intereſt reckon'd together, made more than 10 l. per Cent. a Year.

8. If a *Scrivener by Miſtake*, in wording the Bond, makes the Money payable the next Day, inſtead of the next Day 12 Month; as by making the Money payable on the 10th Day of May next enſuing, and the Bond is dated on the 9th of May, ſo that the next enſuing is to be conſtrued the next Day, unleſs ſomething be to alter the Conſtruction; tho' this is no Uſury, being conſider'd as aforeſaid, yet per Lea Ch. J. if the Obligee had *endeavour'd, by reaſon of this Miſpriſion, to take Advantage* of the Forfeiture for Non-payment on the next Day, peradventure this would have diſcover'd a corrupt Intention in him, and that he knew of the Miſpriſion at the Beginning, and would take Advantage of it; and this ſhould bring him within the Statute of Uſury. Cro. J. 678. pl. 14. Mich. 21 Jac. B. R. in Caſe of Buckley v. Guilbank.

9. Where there is *no Contract before or during the Continuance of the Money*, Payment of exceſſive *Intereſt* after may be no Uſury. But *Pawnbroker refuſing to deliver without more was paid*, forfeited 75 l. 2 Keb. 533. pl. 40. Trin. 21 Car. 2. B. R. The King v. Walker.

Sid. 421. pl. 9. Trin. 19 Car. 2. S. C. accordingly, that tho' the Information was not well laid, ſo as to give Judgment on the Statute to pay the treble Value, yet being found that by corrupt Contract he took ſo much, Judgment was given againſt him at Common Law, viz. Fine and Impriſonment.

(I) *Forfeiture of Treble Value*, in what Caſes. *And* in what Caſes the *Security* ſhall be forfeited, or *avoided*.

See (D)

1. BOND made *for more than legal Intereſt, but* at the Payment the *Obligee takes only legal Intereſt*. He ſhall not be puniſh'd for the Contract; but perhaps the Bond ſhall be void. 2 Le. 39. Arg. in Van Henbeck's Caſe.

Where A. *borrow'd of* B. 80 *l. and was bound in a Bond to pay him* 90 *l. at the End of the Year*; per Cur. Tho' the 90 *l. was tender'd, and B. did tell the ſame, yet if B. takes but* 80 *l. it is* not Uſury, within 5 El. to make a treble Forfeiture; but yet in that Caſe the Obligation itſelf is void. 4 Le. 43. pl. 117. Trin. 29 Eliz. C. B. Brown v. Fulsby.——The *Bond* is void preſently, and if he receives exceſſive Intereſt, he ſhall *forfeit the treble Value*; per Clerk J. 3 Le. 205. pl. 260. Trin. 30 Eliz. in the Exchequer, Body v. Taſſel.

2. A. *mortgaged to B.* on an uſurious Contract for 100 l. and before the Day of Payment *B. is ouſted by C.* B. brings Action againſt C.—C. cannot plead the Statute of Uſury; for he has *no Title*; for the Eſtate is void againſt the Mortgagor; per Periam J. Le. 307. pl. 427. Mich. 32 & 33 Eliz. C. B. in Caſe of Carter v. Claypole.

3. If

3. If a Judgment be given upon an uſurious Contract, and it is *Part of the Agreement to have a Judgment*, the Defendant may avoid ſuch Judgment by *Audita Querela*, or by Scire Facias brought on the ſame. Chan. Rep. 9. in the Earl of Oxford's Caſe, cites M. 3 Jac. B. R. Harning v. Caſtor.

Jenk. 254. in pl. 45. S. P.—— Roll's Rep. 41. pl. 8. Dodd v. Ellington.——Brownl. 191. S. C.

4. If *Fines are levied* upon an uſurious Contract, it may be avoided by Averment, by the Statute of 13 Eliz. cap. 8. 3 Rep. 80. a. in Fermor's Caſe.

Mod. 69. pl. 21. Anon. S. P. by Twiſden J and ſeems to be S. C. —3 Salk. 391. pl. 5. S. C. accordingly.—— In the Caſe of the King and Bell v. Kant, Trin. 16 Car. B. R. it was moved in Arreſt of Judgment, that an

5. Information upon the Statute 12 Car. 2. cap. 13. ſet forth that the *Defendant*, 16 *Novemb.* 20 Car. 2. *lent J. S.* 20 l. *till June next following, and* that *afterwards*, (viz.) *Ad finem termini prædict'* he *took* of the ſaid J. S. *corrupte & extorſive*, 30 *s. for the Loan* thereof, which is more than the Statute allows. The Jury found againſt the Defendant. And it was moved, that this corrupt Agreement ought to be within the Statute at the making the Contract, and not at the End of the Term, as laid in the Information. Twiſden J. took a Difference upon the 2 *Clauſes in the Statute*, That if the *Lender contracts for more*, ſo that the Agreement is corrupt at the Time of the Loan; all the *Aſſurance is void*; *But if he contracts for no more* than the Statute allows, *but will afterwards take more*, the *Aſſurance ſhall not be avoided, but the Party ſhall forfeit the treble Value*. But Judgment was ſtay'd till the other Side moved, becauſe the Court would adviſe. Raym. 196. Mich. 22 Car. 2. B. R. The King v. Allen.

Agreement corrupte to take Uſe for the Time paſt, is not within the Statute, which is for giving Day of Forbearance, which cannot be when the Time is paſt. But per Twiſden and Windham, The Statute is not for the Forbearing, but for the Forbearance, which may as well refer to Time paſt as future. But it ſeems to be the Opinion there of Hyde, That the ſaying Corrupte Agreatum will not avoid the Bond, eſpecially as the Information was grounded on the Receipt, and not on the Contract. [It ſeems obſcurely worded.]

In Debt upon Bond the Defendant pleaded, That *after the making the Bond the Defendant corruptè accepit* ſo much, viz. more than the Statute allows, and that ſo the Bond is void. But adjudged upon Demurrer, That the Plea is not good; For *the Bond* here was not for Payment of Money (upon or for Uſury) as the Words of the Statute are; but *for any thing appearing to the contrary*, it *was for Payment of a juſt Debt, and ſo* the Bond was *good when* it was *made*, and therefore an uſurious Contract after cannot now make it void; but it is a Forfeiture of the treble Value by the latter Clauſe of the Statute. Saund. 294. Trin. 21 Car. 2. Ferral v. Shaen.——3 Salk. 390. pl. 4 S. C. accordingly.

2 Mod 307. Paſch. 30 Car. 2. C. B Ballard v. Dody, it was ruled, That to avoid a Security, by reaſon of Uſury, the *Contract itſelf muſt be uſurious*; for if the Party takes afterwards more than is allow'd, that will not make it ſo.

6. A. (when Money was at 8 l. per Cent.) lends Money and takes Bond for the ſame, and then the Statute 12 Car. 2. is made, and he will *continue the Intereſt on that Bond*, the Bond ſhall not be avoided by ſuch Acceptance of Intereſt, but the Party ſhall forfeit the *treble Value* by the Statute; Per Twiſden J. Raym. 197. Mich. 22 Car. 2. B. R. in Caſe of the King v. Allen.

7. In *Debt* on an Obligation condition'd to pay by a certain Day; the Defendant *pleaded the Statute* 12 Car. 2. cap. 13. *and ſaid that the Contract was Uſurious*; but per Cur. [the Contract] being *made after the Bond forfeited to receive Intereſt according to the Penalty*, which was *double the Principal*, it doth not void the Obligation that was good at firſt, but only ſubjects the Taker to other Penalties; And Judgment for the Plaintiff, Niſi. 3 Keb. 142. pl. 13. Paſch. 25 Car. 2. B. R. Radley v. Manning.

8. A. lent B. 45 l. *on a Pledge of Jewels*, and it was agreed to pay 9 l. for it for a Year; *afterwards B. gave a Bond* for the ſame Money; Per Holt at Niſi Prius, It is a Queſtion if the Bond be void or not. Farr. 119.

119. Mich. 1 Ann. at Niſi Prius in Middleſex, the Queen v. Sewel, alias, Beaus.

9. If a Man *makes an Uſurious Contract*, and gives him unlawful Intereſt, *and agrees to give* him a *Bond for the Principal, and after*, by a ſubſequent Agreement, *gives* a *Bond for the Sum lent to J. S. to whom the Lender Owes ſo much*, in Satisfaction of his Debt. This Bond is not voidable by the Statute; Per Holt Ch. J. 7 Mod. 119. in Caſe of the Queen v. Sewel, alias, Beaus.

10. If a Man *lends Money at a legal Intereſt, and after a ſubſequent Agreement is made* for more Intereſt, which is Uſury; that will not avoid the firſt Contract; Per Holt Ch. J. Far. 119. in Caſe of the Queen v. Sewel, alias, Beaus.

11. It is not material, whether the Payment both of the Principal, and alſo of the Uſurious Intereſt be *ſecured by the ſame or by different Conveyances*; but all Writings whatſoever, for the Strengthning ſuch a Contract, are void. Hawk. Pl. C. 248. cap. 82. S. 21.

(K) Purged. As to Aſſignees.

1. W. was *indebted* in 100 l. *to A. upon an Uſurious Contract on a Bond*, and *A. being indebted to E. transferr'd the Debt to E.* and *W. became bound for the ſame Uſurious Debt to E. whoſe Debt was juſt, and he ignorant of the Uſury.* It was adjudg'd upon great Deliberation, that the Obligation made by W. to E. was not avoidable for the Uſurious Contract made between W. and A. becauſe it was given to A. for a true Debt, and he knew nothing of the Uſury, tho' the Ground between A. and W. was Uſurious Mo. 752. pl. 1035. Paſch. 1 Jac. Ellis v. Warnes.

Cro. J. 32. pl. 6. S. C. Trin. 2 Jac. B. R. adjudg'd by 2 Juſtices, Abſente Popham, for the Plaintiff. —— Yelv. S. C. adjudg'd accordingly by 3 Juſtices; For tho' the Statute of Uſury is to be taken ſtrictly, in Order to ſuppreſs Uſury, yet it muſt be between ſuch Parties who make the Corrupt agreement, and not to puniſh the Innocent as the Plaintiff is; but if no Debt had been due to E. the Plaintiff before, then clearly it had been Uſury in the Plaintiff. But Popham and Fenner doubted; for they thought the Plaintiff ſhould have traverſed the Defendant's Plea, but the Reporter ſays that cannot be; becauſe he cannot traverſe a thing which lies not in his Conuſance nor to which he is no Party. —— Brownl. 85. S. C. ſeems only a Tranſlation of Yelv.

(L) *Information* &c. Good or not.

1. IF the Informer ſets forth an Uſurious Contract *cum quodam Homine ignoto*, it is inſufficient. Arg. 2 Le. 39. pl. 52. in Martin Van Henbeck's Caſe cites 5 H. 7. 17, 18.

An Information upon the Statute of Uſury for a Contract with Perſons unknown was held ill (becauſe with Perſons unknown) that *not* being *allowable but in Caſe of* an *Indictment Pro morte Hominis ignoti.* Noy. 143. Naſie's Caſe.

2. Upon an Information on the Statute of Uſury, and Subpœna awarded out of C. B. againſt Defendant, and upon Iſſue join'd, and found for the Informer, it was alleg'd in Arreſt of Judgment, that the Court of C. B. is not to hold Plea by *Proceſs of Subpœna* but by *Original*, and it is

D. 346. b. pl. 9. Hill. 18 Eliz. S. C. and S. P. and another

Queſtion was, if the Defendant might plead by Attorney, as he did Ex Gratia Curiæ, and whether Not Guilty, be an apt Iſſue or not, in this Action? But at length Judgment was given againſt the Defendant by Reaſon of the Statute of Jeofails, which ſpeaks of miſconveying of Proceſs and miſjoining of Iſſues. ——— Bendl. 251. pl. 269. S. C. with the Pleadings, ſays the Proceſs would be well conſider'd before any more Precedents grow to this Order, that this Order of Proceſs is not provided for in the Statute of Jeoffails, for that is Proceſſes diſorderly awarded, and not miſconceived, as the Statute expreſſes, no more than if you would in the Ejectione firmæ award a Petit Cape, or in a real Suit a Diſtreſs or Attachment, theſe Diſorders were never meant to be remedied by the Statute. Alſo the Iſſue is not agreeable to the material Matter, that is, to be traverſed or put in Iſſue; For if it be an Iſſue not apt for the Information, then it may be there is no Iſſue join'd, and that is not remedied by the Statute. That it not appearing in the Declaration by Matter in Deed, by whom, or to whom, what the Money was that was lent, nor where nor when the lending was, which Matter, he thinks, is iſſuable; For if there were no lending, nor no Contract of letting or lending, then can there be no Uſury; that there are divers Statutes of Uſury, and he doth not ſhew which Statute; and that the Suit ought not to be commenced in the common Place by Subpœna.

is not aided by the Statute of Jeoffails; For it is not miſconveying of Proceſs, but a diſorderly Award of it, and that it is *not alleged* in the Information *by whom, or to whom, nor what Sum, or at what Place, nor when the Money was lent, nor againſt the Form of what Statute it is*; yet Judgment was given for the Plaintiff. And. 48. Mich. 16 & 17 Eliz. Topcliff v. Waller.

And. 49. pl. 123. Paſch. 17 Eliz. Emmot v. Fulwood in the Exchequer ſeems to be S. C. and the Juſtices of both Benches held, that thoſe Words ought to be expreſsly alleged and not by Implication, and cited 10 H. 7. 10. and for Default of thoſe Words the Judgment was reverſed.

3. An Information was exhibited and ſhew'd the Uſurious Contract in certain, whereby it appear'd that more than 10 l. was reſerved and received for the Loan of 100 l. and concluded Contra Formam Statuti, yet becauſe he did not expreſsly ſay, that it was *Per corruptam Accommodationem*, according to the Words of the Penal Statute, the Information was adjud'd inſufficient. Arg. 11 Rep. 58. a. in Dr. Forſter's Caſe, cites it as adjudg'd. Paſch. 20 Eliz. in the Exchequer.

The Defendant was *indicted for Uſurious lending* 20s. ea Intentione to receive 23 s. within a Month, *and that the Defendant did receive* 3 s. for the Loan of the 20 s. which per Curiam, is not good *without* ſaying Quod *corrupte agreatum fuit*; and for that Reaſon it was quaſh'd, being removed out of inferior Court. Keb. 629. pl. 111 Mich. 15 Car. 2. B. R. the King v. Gaſt or Garth.

Crooke J. took a *Diverſity* between an *Information* and a *Verdict*, that *in an Information the Agreement ought to be expreſsly alleged to be corrupt*, and cited 11 Rep. Dr. Foſter's Caſe and the Book of Entries, 333. But that it is otherwiſe in a Verdict, which is the finding of the Lay Gents. 2 Roll. Rep. 48. Mich. 16 Jac. B. R. in Caſe of Roberts v. Tremoil.

An Information upon the Statute of Uſury, for a *Contract with Perſons unknown, recipiendo ultra* 10 *l. in the Hundred*, was held ill becauſe an *Informer, who is not Party*, altho' the Contract was ultra 10 l. &c. per Cent. *ſhall not have any Benefit unleſs there was a Receipt of the Uſury according to the Contract*. And for that the Recipiendo is naught, becauſe there is *no Place nor Time put of the Receipt*, which is now traverſable in that Information. Noy. 143. Naſie's Caſe. S. P. Hawk. Pl. C. 248. cap. 82. S. 25.

4. The *Place where Defendant accepted* exceſſive Intereſt ought to be *ſhew'd* in the Information, but not the Place where the *Contract for the Loan* or forbearing was made; For in that Caſe it is not needful; Per Clerk J. and per Gent J. and Manwood Ch. B. the Place where the * *corrupt Bargain* was made muſt be certainly alleged. Le. 96. pl. 125. Mich. 29 Eliz. in the Exchequer, in Sir Woollaſton Dixy's Caſe.

5. The Information muſt *ſhew whoſe Money* it is; Per Manwood Ch. B. Le. 97. in Sir Woollaſton Dixy's Caſe.

6. If an Information be exhibited in the Excheqner againſt an Uſurer, and charges that he took more than 10 l. in the 100 l. without *ſhewing How much*, ſuch Information is utterly inſufficient; For the Informer ought to ſet forth the Quantity of the Intereſt received, and yet the ſame is not to be recover'd. Arg. 2 Le. 39. pl. 52. Trin. 30 Eliz. in the Exchequer in Martin Van Henbeck's Caſe.

7. An *Information* upon the Statute of Uſury, for an Uſurious Mortgage made, *charged the Defendant, that cepit ultra* 10 *l. in* 100 *l.* for the Forbearance for one Year, and that was *out of the Iſſues, Rents and Profits, which he took in Middleſex of Lands in Glamorganſhire in Wales mortgaged*

gaged to the Defendant. Manwood ſaid, in the principal Caſe, that the taking of the Iſſues and Profits ought to have been laid where the Land was. And ſuch was the Opinion of the whole Court. 3 Le. 238. pl. 327. Mich. 32 & 33 Eliz. in the Exchequer, Owen Morgan's Caſe.

8. In Debt upon the Statute 37 H. 8. of Uſury, the Writ [Count] was, that he *corruptive lent* 40 *l. againſt the Form of the Statute*, and that ſuch a Day he lent him 20 *l. &c. againſt the Form of the Statute*; but [*as to this*] *did not ſay corruptive.* After Verdict for the Plaintiff, it was objected, that he ought not to have Judgment for either of the Sums, it being clearly ill for the 20 l. for want of the Word (Corruptive). But all the Court held that being good for Part, he ſhall have Judgment for that Part; for being for ſeveral Sums it is in Nature of 2 ſeveral Actions. Cro. J. 104. pl. 40. Mich. 3 Jac. B. R. Woody's Caſe.

And it was held in this Caſe, that if the Defendant had demurr'd upon the Declaration, it had been good for the one, and the Plaintiff ſhould have had Judgment for that Part. Cro. J. 104 in S. C.

9. Information, for that the Defendant *Per viam corruptæ Barganiæ receiv'd* &c. After Verdict for the Plaintiff, it was mov'd in Arreſt of Judgment, becauſe he *did not ſet forth what the Bargain was*, but generally, Per Viam corruptæ &c. Sed non allocatur; for this is *the uſual Courſe of the Exchequer, and the Bargain is to be given in Evidence. But* it was agreed that *in Pleading to avoid a Bond* or Aſſurance, *it ought to be particularly ſet forth*, becauſe *the Party is privy* to his own Contract, but *the Informer is not*; and therefore it is ſufficient for him to ſhew it particularly in Evidence. Cro. J. 440. pl. 13. Mich. 15 Jac. in the Exchequer, Peter v. Sanderſon.

2 Hawk. Pl. C. 248. cap. 82. S. 24. ſays, That in pleading an uſurious Contract by way of Bar to an Action, you muſt ſet forth the whole Matter ſpecially, becauſe it lay within your own Privity; but that in an Information on the Statute for making ſuch a Contract, it is ſufficient to ſet forth the corrupt Bargain generally, becauſe Matters of this Kind are ſuppoſed to be privily tranſacted, and ſuch Information may be brought by a Stranger.

10. Information, *for that the Defendant by way of a corrupt Contract, cepit & ad Lucrum ſuum convertit* 40 *s. for deferring* the Day of *Payment of* 25 *l. from the* 29*th of July to the* 30*th of May*, (the Day on which he took the 40 s.) Contra formam Statuti. After a Verdict it was mov'd that it did *not appear that the* 25 *l. was Money lent, but it appears that the taking* the 40 s. *was after the Lending, and there is no corrupt Agreement laid, either before or at the Time of the Lending.* But adjudg'd againſt the Defendant; for tho' it be not well laid ſo as to give Judgment againſt the Defendant upon the Statute 12 Car. 2. cap. 13. to pay treble the Money lent, yet it is found that by a corrupt Agreement he took ſo much, and therefore gave Judgment againſt him at Common Law, viz. Fine and Impriſonment. Sid. 421. pl. 9. Trin. 21 Car. 2. B. R. The King v. Walker.

Vent. 38. Anon. ſeems to be S. C. ſays it was mov'd that the Time of Forbearance was paſt, and the Party might give what he pleas'd in Recompence for it, there being no precedent Agreement to inforce him to it. Sed non allocatur; For the Court ſaid they would expound the Statute ſtrictly; and if Liberty were allow'd in this Caſe, the Brokers might oppreſs the People exceedingly, by detaining the Pawn, unleſs the Party would give them what they pleaſe to demand for the Time after Failure of Payment.

11. *No Indictment will lie* on the Statute of Uſury; for the Method the Act preſcribes muſt be follow'd; therefore the Indictment muſt be quaſh'd. 11 Mod. 174. pl. 17. Paſch. 7 Ann. B. R. The Queen v. Dy.

(M) Plead-

See (N) pl. 3.

(M) Pleadings.

1. IN Debt Qui tam &c. the Plaintiff declar'd that the Defendant lent *him 85 l. for a Month, for the Loan whereof he was to have* 20 *Marks* of Intereſt and Uſury *at the End of the Month*, and that Defendant Habuit & Recepit the ſame Contra formam Statuti &c. The Defendant *pleaded Quod non recepit* &c. 20 *Marks ultra the ſaid* 85 *l.* It was found for the Plaintiff. It ſeems that this negative Plea was a Confeſſion that the Plaintiff ſhould lend and deliver the Money for Uſury; and then the Court ex Officio ought to give Judgment upon this Confeſſion. But no Judgment was given, tho' it long continued. D. 95. a. b. pl. 36. &c. Mich. 1 Mar. Whitton v. Marine.

2. A. agrees *to deliver Wares of the Value of* 20 l. to B. and that B. ſhould pay for the ſame within 6 Months 34 l. and Bond was given for the Payment. In Debt on the Bond by A. the Plea ſhould have been that the Bond was given for Payment of this Money. Cro. E. 104. pl. 12. Trin. 13 Eliz. B. R. Peterſon's Caſe.

3. In an Action of *Debt* brought *upon a Bond* the Defendant *pleads* the Statute of Uſury, and ſhews a *corrupt Agreement for Money lent in* the Year 32. *to be paid in* 33. and *afterwards in* 35 *a new Bond given for Part of the firſt Sum*; and it was pretended that this Bond was void. But it was adjudg'd that becauſe the firſt Bond was no Corruption, the latter ſhould not be. Brownl. 73. Trin. 20 Eliz. Rot. 145. Vaughan v. Chambers.

4. A *Bill upon a Recognizance*; the Defendant pleads the Statute of Uſury, and the ſame is inſufficient, ordered to put in ſuch a Plea as he will ſtand unto. Toth. 87. cites 25 Eliz. Walſh v. Marſhall.

5. The *Offence muſt be within the Year*; for if one make a corrupt Bargain for this Year, and 10 *Years after* he *takes exceſſive* Uſury, the ſame is not within the Statute to inform upon it; and in Truth there is no ſuch Offence without corrupt Bargain; Per Manwood Ch. B. Le. 97. pl. 125. Mich. 29 Eliz. in the Exchequer, in Sir Woollaſton Dixy's Caſe.

S. C. cited Arg. Vern. 114. Mich. 1682. in Caſe of Moore v. Hart.

6. In Debt on Bond the Defendant *pleaded the Statute* of Uſury *made* 6 *Feb.* 13 *Eliz.* (whereas *the Parliament began* 2 *Feb.* 13 *Eliz.*) The Plaintiff replied that it was not made for Uſury Contra formam Statuti Modo & Forma prædict'. Tho' both Parties agree that there is ſuch a Statute, yet the Court knowing that there is not, and ſo cannot be Contra formam Statuti, the Court held that no Judgment could be given for the Plaintiff; and it being in the Bar of the Defendant the Court held it clearly ill. Cro. E. 245. pl. 4. Mich. 33 & 34 Eliz. B. R. Love v. Wotton.

Goldsb. 128. pl. 20. Middleton v. Hall, S. C. adjudg'd accordingly, and ſaid that this Judgment cannot be ſaid any Aſſurance, but a Judgment upon the Aſſurance. ——Sid. 182. pl. 1.

7. Scire facias upon a Judgment of 240 l. The Defendant *pleaded that he borrowed of the Plaintiff* 100 *l. and contracted to give* 20 *l. for the Loan for a Year, and for the Payment of the* 120 *l. the Plaintiff would have the Defendant confeſs that Judgment, and pleaded the Statute of Uſury to avoid it.* It was objected that this was no Plea; for the Statute 13 Eliz. is, That all Bonds, Contracts, and Aſſurances collateral &c. ſhall be void; whereas this Judgment cannot be term'd an Aſſurance, nor be avoided by ſuch Surmiſe. And the whole Court was of that Opinion, that Judgments ſhall not be avoided upon Surmiſes; for if there had been any ſuch Matter, the Defendant might have pleaded it upon the Action brought, and not have ſuffer'd a Judgment; and tho' it may be a Practice to avoid the Statute, yet it is rather to be tolerated than to avoid Judgment on ſuch Suggeſtions; and Judgment for the Plaintiff. Cro. E. 588. Mich. 39 & 40 Eliz. B. R. Middleton v. Hill.

Paſch. 16 Car. 2. B. R. Rowe v. Bellaſis, upon a Plea in Scire facias upon a Judgment, the

the Defendant pleaded the Statute 12 Car. 2. which has the ſame Words with that of 13 Eliz. but upon the Authority of the Caſe of **Middleton v. Fall**, it was accordingly rul'd ill, and Judgment for the Plaintiff. ——Hawk. Pl. C. 248. cap 82. S. 20. ſays, That a Judgment ſuffer'd in Purſuance of an uſurious Contract, may be avoided by an Averment of the corrupt Agreement, as well as any Common Specialty or Parol Contract. But a Specialty cannot be avoided by Uſury appearing on Evidence, or on the Face of the Condition, but it muſt be pleaded.——See (Q) Taylor v. Bell, Bagnall & al'.

8. Upon a Demurrer in a Replevin for 20 l. and an Avowry &c. the Plaintiff *pleads in Bar* that the Defendant * had given 100 l. and for that he granted to him 20 l. per Annum for 8 Years annually, as a Rent-charge; and after that for 2 Years more, if 3 Men live ſo long; *and concludes that it was a corrupt Deed.* The Party ought to plead Quod fuit *per viam corruptæ Barganiæ.* And it is not ſufficient to conclude that it was corrupt, altho' by the Demurrer only it be confeſs'd. Noy 151. 152. Symonds v. Cockerill.

* The Original is, viz. had (not) given, but ſeems miſprinted.

9. The Defendant *borrowed* 200 *l. of the Plaintiff*; and *it was agreed* between them *that he ſhould pay the* 200 *l. at ſuch a Day, and* 20 *l. for the Intereſt for one Year, and that ſuch Lands ſhould be conveyed to the Plaintiff, upon Condition that if the Money was paid at the Day, then the Grant ſhould be void.* The Defendant *pleaded the Statute of Uſury, and averr'd that the Land was worth* 12 *l. a Year, and ſo he had double Uſe.* The Plaintiff *replied, that upon the borrowing* the 200 l. *it was agreed that the Defendant ſhould have the Profits of the Land until Breach of the Condition, and travers'd* that there was *any Agreement that he ſhould have the Profits, and alſo* 20 *l. for Intereſt.* And upon a Demurrer it was objected that the Replication was ill, becauſe the Lands being convey'd to the Plaintiff, by Conſequence the Profits are ſo too; and therefore he cannot aver a *verbal Agreement againſt the Deed*, that he had not the Profits. But the Plaintiff had Judgment. Roll Rep. 41. pl. 8. Trin. 12 Jac. B. R. Dodd v. Ellington.

Brownl. 191. S. C. by the Name of Burglacy v. Ellington, and held accordingly that the verbal Agreement may be averr'd; for in this Caſe it is Parcel of the original Contract.

10. Tanfield Ch. Baron ſaid, that upon an Information betwixt **Paramore and Robinſon** in B. R. where *ſeveral Contracts upon Uſury being alleg'd, Iſſue was join'd whether* it were *Corrupte agreatum Modo & Forma prout.* It was reſolv'd by all the Juſtices of England to be an ill Iſſue; for he *ought to have travers'd the Agreements*, becauſe they were ſeveral. Cro. J. 544. pl. 4. Mich. 17 Jac. in B. R. in Caſe of Heath v. Dauntley.

11. Debt on a *Bond for* 100 *l.* dated 12 July &c. condition'd *to pay* 58 *l. at ſix Months End.* The Defendant *pleaded the Statute* 21 Jac. of Uſury. The Plaintiff *replied that he lent the* 50 *l.* on the 12th of July &c. *for a Year, and that the Defendant ſhould pay for it* 8 l. [4 l.] for the Forbearance *for a Year*, and that Plaintiff ſhould not demand it till the End of the Year; *but* that *by the Miſtake of the Scrivener it was made but for half a Year, which he not knowing, accepted it.* The Defendant *rejoin'd that the lending was only for half a Year*, and that he was to pay 8 l. [4 l.] for it for that Time, *abſque hoc that on the ſaid 12th July it was agreed that the Loan ſhould be, or that he ſhould forbear it for a whole Year.* Upon Demurrer it was objected that the Plea was ill, becauſe it was *not pleaded that Corrupte agreatum fuit* &c. And ſo the Court, abſente Brampſton, held. And they all held the Allegation, againſt the Words of the Condition, was good; for it is only ſhewing the true Agreement; but they all held the Rejoinder ill, becauſe in the Traverſe the Defendant had made the Day, (viz. 12th July) Parcel of the Iſſue, when he ſhould only have travers'd the Agreement. But no Judgment was given, becauſe the Parties agreed. Cro. Car. 501. pl. 1. Trin. 14 Car. B. R. Neviſon v. Whitley.

Jo. 396. pl. 3. Mich. 13 Car. Neviſon v. Whitby, S. C. the Plaintiff replied that he thought the Bond was made for Payment at the End of the Year, according to the ſaid Agreement, and that he was *Illiterate.* And the Opinion of Jones, Crooke, and Barkley was, that the Plaintiff ought to have Judgment; For the corrupt Agreement was the Ground of the Matter; and if there was no ſuch Agreement the Obligation is good.

In Debt upon a Bond, the Defendant *pleaded the Statute* 12 *Car.* 2. *and that it was corruptly agreed* between him and the Plaintiff, *that on the* 11*th of May* 1686, *the Plaintiff ſhould lend the Defendant* 50 *l. and that he was to pay for the Forbearance* thereof *to the* 12*th of November following* 2 *l.* 10 *s. and ſhould give a Bond for the Performance of* the ſame, *which Bond he gave, and the Plaintiff received &c.* The Plaintiff replied, *that the Agreement was to lend the Defendant* 50 *l. and that the Defendant ſhould pay after the Rate of* 5 *l. per Cent. and no more, and that the Plaintiff having ſo much Money in J. S. a Scrivener's Hands, it was agreed that J. S. ſhould pay the* 50 *l. to the Defendant, and take a lawful Bond with Intereſt after the Rate of* 5 *l. per Cent. and that J. S. did pay the Defendant the ſaid* 50 *l. and in the Abſence, and without Notice of the Plaintiff, took the Bond Ut ſupra ex errore of the Scrivener, & contra voluntatem & abſque Notitia of the Plaintiff the* 2 *l.* 10 *s. was inſerted* in the Condition, *and traverſed the corrupt Agreement.* And upon Demurrer to the Replication, it was inſiſted for the Defendant, that it is expreſsly alleged in the Plea that the Plaintiff accepted the Bond, which implies a Conſent to it; and tho' the Replication ſays, that he had no Notice at the Time the Bond was taken; yet if he had Notice when it was accepted by him, that carries his Conſent to the corrupt Agreement. But adjudg'd that it did not, and that this is the ſame with the Caſe of **Nevison and Whitley**. For *tho' the Plaintiff did know how it was when the Bond was accepted*, as it muſt be ſuppoſed in the Caſe of Neviſon, That the Plaintiff had Notice how it was when the Action was brought, *yet that does not make the Plaintiff Party to the corrupt Agreement*, and the Plaintiff muſt uſe the Bond of Neceſſity to recover the Money. 2 Vent. 83, 84. Mich. 1 W. & M. B. R. Buſh v. Buckingham.

12. Debt was brought on a Bill to pay 7 l. the 1ſt of May, and if *Default* of Payment be, *to pay* 3 *s.* 4 *d. for every Month* that it ſhall be in Arrear after May 1ſt. Defendant makes no Averment that the Agreement was to pay the 3 s. 4 d. for every Month Pro Lucro, Intereſſe & Diem dando Solutionis, but only with a ſic, the ſaid Sum exceeds 8 l. per Cent. whereas he ſhould have averr'd that the ſame did exceed 8 l. upon the 100 l. thoſe being the effectual Words in the Statute. Judgment pro Quer. Jo. 409. pl. 2. Mich. 14 Car. B. R. Swailes v. Bateman.

13. 500 *l. was lent upon Articles dated the* 8*th of March*, to be paid at ſuch a Time; and in the mean time *to pay* 15 *l. half-yearly from November before.* In Debt the Defendant demurr'd, for that it appear'd by the Declaration that the Contract was uſurious; but it was anſwer'd, that the Defendant ought to have pleaded that Corrupte Agreatum fuit &c. and ſo give the Plaintiff an Opportunity to reply to it. But *upon reading the Articles it was, Whereas Money was lent* &c. which might be in November, or before; and therefore Judgment was given for the Plaintiff. Sid. 285. pl. 21. Paſch. 18 Car. 2. B. R. Dande v. Currer.

3 Keb. 303. pl. 42. Paſch. 26 Car. 2. B. R. S. C. Judgment for the Plaintiff.

14. *Indebitatus* Aſſumpſit *for* 10 *l. and a Computaſſet for* 35 *l.* in the ſame Declaration. The *Defendant pleads the Statute of Uſury* to the Indebitatus, and *avers that both the Indebitatus and* the *Computaſſet were for the ſame Cauſe of Action.* It was reſolved, that the Averment was naught; for the Ground of the Indebitatus is the Debt, and the Ground of the Computaſſet is the Account; and ſo it cannot be averr'd that there is the ſame Cauſe of both, eſpecially as it is here, where one is for 10 l. and the other for 35 l. But Hale ſaid, He ſhould have pleaded the Statute to the Indebitatus, and then that afterwards they came to an Account for the ſame Wares &c. Freem. 367. pl. 472. Paſch. 1674. Tayler v. Herbert.

15. Debt upon a Bond. The Defendant *pleads* the Statute 12 Car. 2. of Uſury, and ſays *that corrupte agreatum fuit, that he ſhould pay more than* 6 *l. per Cent.* The Plaintiff *replies*, Quod *non corrupte agreatum fuit*, and held a good Replication; for if by the *Miſtake of the Writer* the Money was made payable without any corrupt Agreement, it is not uſurious within the Statute. Freem. 264. pl. 286. Mich. 1679. Booth v. Cook.

3 Mod. 35. S. C. and that the Defendant did not ſhew any particular Agreement; but only in ge-

16. Debt on Bond. Defendant pleads Quod corrupte agreatum fuit, that Intereſt ſhould be paid for it *above the Rate of* 6 *l. per Cent.* Plaintiff demurs, and held good; for that the *Plea* ſhews not *what* Intereſt, nor that the *Bond was for the very Money*, but only by Intendment; (to wit) ſuper Agreamento prædicto, the Bond was given; and ſays not expreſsly Pro eadem Pecunia. Judgment pro Quer. For that they would not eaſily avoid a Bond, and the corrupt Agreement ought to be ſpecial-

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ly and particularly ſet forth, and the Quantum of Intereſt, otherwiſe the Plaintiff can never tell what to anſwer. 2 Show. 329. pl. 339. Mich. 35 Car. 2. B. R. Hinton v. Roffee.

neral, that he was indebted to the Plaintiff in a Sum not exceeding 80 l. nor did he ſhew when the Intereſt was to commence, and on what Day it became due. And Judgment for the Plaintiff, becauſe the Defendant ought to have ſet forth the Agreement, and apply it to the Sum in the Declaration.

17. Uſurious Contract was pleaded in Bar of Debt upon a Bond, but *not ſaid that Defendant was indebted to Plaintiff at the Time of Bond given, or that there was an Agreement to lend Money upon the uſurious Contract*; and for that Judgment niſi pro Quer'. 12 Mod. 385. Paſch. 12 W. 3. Crow v. Brown.

18. Where the *Statute is not pleaded*, the Bond, tho' uſurious, is good. 3 Salk. 391. pl. 7.

19. Error of Judgment in the Palace-Court, wherein the Plaintiff *declared that the Defendant became indebted to him by Bond in the Sum of* 107 *l.* The Defendant, without craving Oyer, *pleaded that he was indebted truly to the Plaintiff in* 92 *l.* 5 *s.* 9 *d. and that by way of corrupt Agreement for the Forbearance* of that Sum for a *Year, this Bond was given &c.* The Plaintiff replied, *That the Bond was given Pro vero & juſto Debito*, and *traverſed the corrupt Agreement.* And upon Demurrer to this Replication, it was inſiſted that it was ill, becauſe the Plaintiff did *not ſhew how much the juſt Debt was.* Sed non allocatur; for there was ſufficent to induce the Traverſe; and if it had been alleg'd, you could not have traverſed the Inducement, and the Declaration ſufficiently ſhews the Debt. 6 Mod. 303. Mich. 3 Annæ, B. R. Villars v. Cary.

1 Salk. 3. pl. 7. Trin. 1 Ann. B. R. S. C. but S. P. does not appear. —— 7 Mod. 38. S. C. but S. P. does not appear.

20. The Plaintiff declares upon a *Promiſſory Note for* 30 *l. dated* 4 *Feb.* The Defendant *pleads, That it was corruptly agreed* between him and the Plaintiff, *that he ſhould pay* unto the Plaintiff 45 *s. for the Loan* of the ſaid Sum of 30 l. *for* 3 *Months*; and then ſets out the laſt Statute againſt Uſury &c. It was excepted to the Plea, that it was *not aver'd that the Note was given ſubſequent to the late Act againſt Uſury.* To which it was anſwer'd and reſolved by the Court, That by the Date of the Note it appears to be ſo. Gibb. 130. pl. 2. Trin. 3 & 4 Geo. 2. B. R. Baynham v. Matthews.

(N) *Trial.* Where.

See (A) pl. 2. 6. 9, 10.

1. BY 13 *Eliz. cap.* 8. *S.* 3. *Juſtices of* Oyer *and* Terminer, *of Aſſiſe, and of Peace, in their Circuits and Seſſions, and Mayors, Sheriffs, and Bailiffs of Cities, have Power to hear and determine all Offences committed againſt* 37 *H.* 8. 9.

2. *Trial* was where the Contract was, and not where the Bond was made; and held good. Le. 148. pl. 206. Trin. 31 Eliz. B. R. Kinnerſly v. Smart.

Cro. E. 195. pl. 10. S. C. accordingly; for the Bond is confeſs'd, and now the Point is Whether it be made by Uſury, which was alleg'd to be where the Trial was.

3. Information tam quam &c. *in the Exchequer*, for taking more than 6 l. per Cent. contra formam Statuti. After Verdict for the Plaintiff, it was *moved* in Arreſt of Judgment, *That it lies not in this Court for Uſury committed in London, tho' it would lie upon the Statute of* 21 *Jac.* And in Truth the Intereſt taken here was more than 10 l. per Cent. And by the General

General Concluſion of Contra formam Statuti, it ſhall be intended againſt the Form of that Statute which allows the largeſt Intereſt; and there are 4 Statutes againſt Uſury, one of H. 8. which allows 10 l. per Cent. another of Q. Eliz. which allows 8 l. per Cent. a third of K. Ja. and a 4th of Car. 2. which allows but 6 l. per Cent. By the Statute Jac. 1. cap. 4. there muſt be no Suit upon a Penal Statute, but as therein directed, which does not extend to the Court of Exchequer, unleſs the Offence is done in Middleſex. But per Hale Ch. B. The Offence laid in the Information being for taking more Intereſt than 6 l. per Cent. ſhall be taken to be grounded upon *that Statute that prohibits taking more than 6 l. per Cent.* and that Law *gives the Suit in no Court in particular*, and therefore may well be proſecuted here; tho' if a particular Court had been named, as in 21 Jac. it would be otherwiſe. The Court took time to adviſe. Hardr. 420. Trin. 17 Car. 2. in the Exchequer. Anon.

4. The Defendant was indicted *at the Old Baily* for Uſury, and being convicted, he brought a Writ of Error, and the Judgment was reverſed becauſe the *Court of Seſſions* had no Juriſdiction in this Matter. 3 Salk. 188. pl. 8. Paſch. 8 W. 3. the King v. Bakeſtraw.

S. P. & S. C. cited; and accordingly, the Ch. J. being abſent, a Rule was made to ſhew Cauſe why the Indictment ſhould not be quaſh'd. It was admitted by the Counſel that moved, That upon the Statute of Q. Eliz. which prohibits the Taking above 10 l. per Cent. the Juſtices of Peace at Seſſions have Juriſdicton; but inſiſted that they have not upon any of the later Statutes. 2 Barnard. Rep. in B. R. 143. Paſch. 5 Geo. 2. The King v. Pexley.

5. Indictment was *at the Seſſions before the Juſtices of the Peace at Hick's Hall* for Uſury contra Formam Statuti; and Judgment was againſt the Defendant, upon which a Writ of Error was brought in B. R. and the Judgment reverſed; For the Juſtices of the Peace have no Juriſdiction in this Caſe. 2 Salk. 680. pl. 1. Paſch. 4 Ann. B. R. the Queen v. Smith.

(O) *Found. How. And in what Caſes it muſt be* found by the Jury, or may be judg'd of by the Court.

S. P. Lane. 59. Arg. and agreed by the Barons clearly, Pag. 60. Trin. 7 Jac. in the Exchequer, in Caſe of Vaux v. Auſtin.

1. IF an *Information* be brought *againſt* 2, upon the Statute of Uſury, and *one only is found guilty*, no Judgment can be given in the Caſe. Arg. To which the Court agreed. Lane. 19. Paſch. 4 Jac. in the Exchequer, in Page's Caſe.

2. An Information upon the Statute of Uſury. The Defendant pleads Nil Debet. The Jury finds an uſurious Receipt, but does *not find any Loan*. A new Venire Facias ſhould be awarded, and not a new Niſi Prius. Jenk. 283. pl 13. cites 8 Rep. 65. b. Loveday's Caſe.

There is a Difference between an *Information* in which it ought to be preciſely alleged, that *Corruptè agreatum fuit*, and a *Special Verdict* wherein all the Circumſtances are found, which being apparent to the Court to be Uſurious, and cannot by Intendment have any other Conſtruction, it ſufficeth, and in the principal Caſe 'tis apparent that the Money was lent for Intereſt, and is more than the Statute permits; wherefore being *Uſury apparent*, the Court ſhall judge it accordingly. Cro. J. 508. in Caſe Roberts v. Trenaine. —— Ibid. cites it to have been ſo adjudg'd in the Caſe of Higgins v. Mervin.

3. A ſpecial Verdict *found that it was agreed*, but did *not* find that it was *Corruptly agreed*. Exception was taken thereto; Sed non allocatur; becauſe it appear'd to the Court judicially, that the Bargain was corrupt, and therefore it need not be found. 2 Roll. Rep. 48. Mich. 16 Jac. B. R. Roberts v. Tremoile.

4. Uſury *ſhall not be intended unleſs the Jury find it* expreſsly. Arg. Bridgm. 112. in Caſe of Webb and Jucks v. Worfield.

5. In *Caſe* &c. upon a Special Promiſe the Plaintiff *ſet forth that he was poſſeſſed of ſeveral Pieces of hammer'd Money* &c. *and that the Defendant in Conſideration the Plaintiff would pay that Money, being in Number and Tale* 300 *l.* he *promiſed to repay* 300 *l. of new Money, together with* 4 *l.* 10 *s. more for the Intereſt of every* 100 *l. for* 8 *Months* &c. *and then declares upon an Indebitatus aſſumpſit for* 313 *l.* 10 s. After Verdict, it was moved that the Contract was Uſurious, it being to pay 4 l. 10 s. for the Intereſt of 100 l. for 8 Months: but per tot. Cur. Judgment was given for the Plaintiff, Trin. 1 Annæ. It was agreed, that if it had appear'd by the Plaintiff's own Declaration that the Contract was Uſurious, and could not be otherwiſe, Judgment ought to be given againſt him; but that it *does not appear here that the Contract muſt neceſſarily be Uſurious; and the Jury having found the Aſſumpſit, the Court would not intend Uſury*, but the contrary. And Powel J. obſerved that the Conſideration of the Promiſe here is, viz. that the ſaid Plaintiff would *pay* to the ſaid Defendant the ſaid 300 l. ſo that here *is no Loan*, without which there can be no Uſury; and they would not intend a Loan, unleſs the Jury had found one. Lutw. 271. 273. Trin. 13 W. 3. Yeoman v. Barſtow.

3 Nels. Abr. 512. pl. 27. cites S. C. ſays it was adjudg'd that the Word (Pay) ſignifies lending; for it was not as a Debt, but to be repaid therefore it muſt import lending and nothing elſe. [But I obſerve no ſuch Judgment, Opinion or Suggeſtion, in the Book he cites for it.]

(P) *Sureties.* Puniſh'd or favour'd.

1. IN Debt on Bond Defendant *pleaded that he himſelf borrow'd* 100 *l. of W. paying for the Forbearance exceſſive Uſury, and the Plaintiff was his Surety for the Payment, and that the Obligation upon which the Action is brought was given* by him to the Plaintiff *to indemnify him againſt W.* Manwood held this a good Bar; For when the Plaintiff was impleaded upon the principal Bond, he might have diſcharg'd himſelf upon this Matter, and therefore his Laches ſhall turn to his Prejudice, and therefore the Iſſue was join'd upon the exceſſive Uſury. 3 Le. 63. pl. 93. Hill. 19 Eliz. B. R. Potkin's Caſe.

B. was bound with P. as his Surety to J. S. in a Bond of 500 l. and that was upon a corrupt and Uſurious Contract againſt the Statute,

and P. was bound unto the Plaintiff in a Bond, as a *Counter-Bond, to ſave the Plaintiff harmleſs* from the ſaid Bond of 500 l. B. is ſued by J. S. upon the ſaid Bond, and ſo damnified: and thereupon B. ſued P. upon the Counter-Bond, who pleaded the Statute of Uſury, pretending that all Aſſurances depending upon ſuch Uſurious Contracts are void by the Statute. But by the Opinion of Wray Ch. Juſt. the ſame is no Plea; For *the Statute is*, That *all Bonds, collateral Aſſurances &c made for the Payment of Money lent upon Uſury*, ſhall be utterly void; But *the Bond here*, upon which the Action is brought, *was not for* the *Payment* of the Money lent, *but for the Indempnity of the Surety.* 2 Le. 166. pl. 200. Paſch. 26 Eliz. B. R. Baſſet v. Prowe.

2. In Debt on *Bond to ſave the Plaintiff harmleſs from an Obligation* wherein he and the Defendant were bound to W. &c. *and from all Suits concerning the ſame.* The Defendant pleaded the Statute of Uſury, and that it was made upon a corrupt Agreement between him and W. But the Court held the Plea ill; For tho' the firſt Obligation were void, yet the 2d Obligation is forfeited, becauſe the Defendant hath not ſaved him harmleſs from Suits concerning it, nor does the Defendant anſwer thereto, but to the Obligation only. Cro. E. 642. pl. 43. Mich. 40 & 41 Eliz. C. B. * Button v. Downham.

2 And. 121. pl. 65. S. C. accordingly. —— Noy. 73. Dowman v. Butter S. C. and Judgment for the Plaintiff. But ſays that

Glanvil ſaid it would be a dangerous Precedent to avoid the Statute. For the Surety may be a Friend of the Uſurers, who will not plead the Statute in an Action of Debt brought againſt him, and ſo the Statute would be to little Purpoſe. And after the Judgment given for the Plaintiff, Glanvil ſaid that Judgment will be quickly carried to Cheapſide. —— S. C. cited Mo. 398. pl. 520. in Caſe of Reynolds v. Clayton.

* Lutw. 469, 470. in the Caſe of Maſon v. Fulwood, the Reporter ſays he has ſeen the Roll of this Caſe, which is 865, by which Record it appears that as well the Intereſt as the Principal was in Hazard, tho' it does not fully appear in Cro. E. or Mo.

There is a Nota added that the Reaſon conceived was that *the Surety by Intendment cannot know of the corrupt Contract to plead it in Avoidance of the Bond*, and therefore the Principal ought to take Care thereof. Ibid. —Goldsb. 174. pl. 107. S. C. held accordingly per tot Cur. But the Reporter adds, Sed Quære.

3. Debt upon an *Obligation to ſave the Plaintiff harmleſs* from an Obligation, wherein the Plaintiff, as Surety for the Defendant, was bound to J. S. to pay 100 l. the *Defendant ſaid the Obligation* made to J. S. *was upon an Uſurious Contract* &c. *& ſic non damnificatus*. Tanfield ſaid, the Plea is good, or otherwiſe the Statute would be defrauded; For by a *Compact* the Uſurer would ſue the Surety, who ſhould pay him and have his Remedy on his Counter-Bond. But all the Court held it no Plea; For he muſt take Care to ſave his Surety harmleſs. And adjudg'd for the Plaintiff. Cro. E. 588. pl. 22. Mich. 39 & 40 Eliz. B. R. Robinſon v. May.

(Q) *Relief.* In what Caſes given.

1. THE Court decreed Money to the Plaintiff againſt the Defendant, albeit he had *Judgment and Execution*, being upon the Point of Uſurious Contract. Toth. 231. cites 37 Eliz. and 28 Langford and Barnard.

Ibid. 173. Lord Hutchins ſaid, that if the Sureties had not been Plaintiffs as well as the Woman, he would not have reliev'd even againſt the Penalty. —Ld. Chancellor, in the Caſe of Boſanquet v. Daſhwood, Mich. 1734. ſaid, That as to the Laws relating to Gaming the Court would not interpoſe, becauſe Gamſters on both Sides are equally guilty, and in ſuch Caſes the Court will ſtand neuter; but the Borrower and Lender are not in the View of Gamſters. MS. Rep.

2. A *Woman reſorted to Gaming-places at Court, and by ſupplying Perſons of Quality there with Money, made great Profit; for which Purpoſe ſhe borrow'd much Money, and gave the Lenders great Rewards* from time to time; but *afterwards ſhe borrow'd more*, and being arreſted for this laſt Money *gives Bond and Judgment* for it, and then brings a Bill to have an Allowance for the former exceſſive Præmiums which ſhe had given before, and to bring the Defendants to an Account. The *Defendants*, by Anſwer, confeſs'd the Receipt of 5 or 10 Guineas for the Loan of Ten Guineas for a Week or 10 Days; but *inſiſted that the Sums ſo received were paid as Profit*, and not towards Satisfaction of the Money lent. The Court order'd the Plaintiff to pay principal Intereſt and Coſts at Law, and here, or the Bill to be diſmiſs'd with Coſts; for that it would not interpoſe or meddle with *Play-Debts*, or Things of this Kind; per Lds. Commiſſioners. 2 Vern. 170. pl. 156. Trin. 1690. Taylor & al' v. Bell, Bagnall, & al'.

1 Salk. 22. pl. 2. Tomkins v. Bernet, S. C. tho' ſaid to be Coram Treby Ch. J. and that Treby Ch. J. allow'd, That where a Man pays Money on a Miſtake in an Account,

3. Upon a Trial at Guildhall, in an Indebitatus Aſſumpſit for Money received to the Uſe of the Plaintiff, the Caſe was, the Plaintiff was *Co-obligor* with J. S. to the Defendant, and between J. S. and the Defendant there was an *uſurious Contract*; the *Plaintiff paid Part* of the Money to the Obligee, and after *pleaded the Statute of Uſury* upon this Bond, and this is adjudged an uſurious Bond; upon which he brought this Action for the Money, which he paid before the Bond was prov'd uſurious; and the Queſtion was if the Action lay: And Holt Ch. J. ſeem'd to incline ſtrongly that it did not lie; For here there was a *Payment actually made* by the Plaintiff to the Defendant, *in Satisfaction* of this uſurious Contract; and if they will make ſuch Contracts, they ought to be puniſhed; and he was not for encouraging ſuch Kinds of Indebitatus Aſſumpſits; for it is like to the Caſe of Bribes, and he who receives it ought to be puniſh'd,

niſh'd, but he who gives them ought not to be encourag'd by any way to recover his Money again. Skin. 411. pl. 7. Hill. 5 W. & M. Tomkins v. Barnet.

or where one pays Money under, or by a meer Deceit, it is reaſonable he ſhould have his Money again; but where one knowingly pays Money upon an illegal Conſideration, the Party that receives it ought to be puniſh'd for his Offence; and the *Party that pays it is Particeps criminis.* And there is no Reaſon that he ſhould have his Money again; for he parted with it freely, & *volenti non fit Injuria.*——S. C. cited by Ld Chancellor in the Caſe of **Boſanquet v. Daſhwood**, 11 Nov. 1734. MS. Rep. And his Lordſhip ſaid that this ſeems to be a right Authority, and that that Action muſt be founded upon the 1ſt or 2d Clauſe of the Statute, that the firſt prohibits receiving more than 6 l. per Cent. And if a Contract is made, ſuppoſe on the Loan of 500 l. to pay 10 l. per Cent. and 300 l. Part is paid back again, there is not, ſtrictly ſpeaking, more paid illegally till more than Principal and legal Intereſt is paid back; ſo that this would not be a Payment contrary to the Act of Parliament. It does not appear, but rather imports that all was not paid, but leſs than the Money originally lent. Then as to the 2d Clauſe, that makes the Contract void, and poſſibly upon that Part, it might be thought too hard to ſay that if a Perſon ſubmits to pay the Money, when he hath Liberty at Law to avoid the Contract, he ſhall have an Action to recover the Money; and he did not ſee how the Court could diſtinguiſh between Surplus and legal Intereſt; and therefore he thought that Determination perfectly right. The Meaning of Volenti non fit Injuria is carried farther than is reaſonable to lay Streſs upon. Particeps criminis is alſo carried too far; tho' the Party ſubmits to the Oppreſſion, yet he is not Particeps criminis; but there is no Reaſon why he ſhould profit by it, if he recover'd what was really lent. But the Queſtion is, what Meaſure a Court of Equity ſhould go by in this Caſe; and tho' this Court will not differ with the Courts of Law in Conſtruction of what is the Law, yet in Application of the Rules, as well as Proceedings, it will differ. The Direction of the Act is, that none ſhall take more for the Loan of Money than 6 l. per Cent. that is the Thing principally guarded againſt by the Statute; and the other Clauſes by which the Contract is made void, and the Party made ſubject to a Penalty, are to inforce Obedience to the Law, and to prevent the Practice, but this Court is not for criminal Proceedings; and as to thoſe the Party muſt take his Remedy in a proper Court; but if there be a Bond or a Mortgage, and a Suit for Recovery of the Money due thereupon, the Defendant may plead the uſurious Contract as well in this Court as at Law, and avoid the Contract.

4. Defendant is not obliged to *diſcover* any Uſurious Contract unleſs the Plaintiff offers to waive the Penalty. MS. Tab. Tit. Uſury, Jan. 24, 1724. Brand v. Cumming.

5. A. enter'd into a *Bond* to B. for a Sum of Money, *to pay 6 l. per Cent.* Intereſt. *Afterwards A.* being unable to pay off the Bond, *conſented to pay 10 l. per Cent.* for the Money, *and continued paying at that Rate for 14 Years.* B. died. *A. became Bankrupt.* The Aſſignees of A. brought a Bill, and thereupon the *Executors of B. was decreed*, by the Maſter of the Rolls, *to Account*; and that, for what had been really lent, legal Intereſt ſhould be computed and allow'd, and what had been paid more ſhould be deducted out of the Principal to be due on the Account; *and if B. had received more than was due with legal Intereſt, the ſame to be refunded* by the Executor, and the Bond to be deliver'd up. And afterwards the Ld. Chancellor affirm'd the Decree; but ſaid, he did not determine How it would be, had all the Securities been deliver'd up, that not being before him. Caſes in Equ. in Ld. Talbot's Time, 38 Mich. 8 Geo. 2. Boſanquett v. Daſhwood.

S. C cited Arg. in the Caſe of Proof v. Hines. Caſes in Equ. in Ld. Talbot's Time, 113. and alſo 114. where it is ſaid that tho'the Statute does not go ſo far as to make the Party receiving the uſurious Intereſt liable to refund; yet having prohibited the taking beyond ſuch a Sum, and avoided the Contract, the Taking it is a Breach of the Statute, and the actual Receipt of the Money will (in a Court of Equity) make him liable to refund, the Wrong being the ſame, whether the uſurious Intereſt has been actually paid or not.

In this Caſe it was ſaid by Lord Chancellor, Suppoſe a Mortgagor makes a Covenant for a collateral Advantage above legal Intereſt, not for Payment of Intereſt; as in Conſideration of a Sum to enable one to build, another ſhould grant Ground-Rents which are above the Value of legal Intereſt; yet even in Things of this Kind not ſtrictly within the Statute, this Court will not allow ſuch Advantage, but relieve the Borrower. And he ſaid, That if an Action of Law is brought upon an uſurious Contract, *there is no dividing the Whole*, the uſurious *Plaintiff either loſes or gains the Whole*; but ſuppoſe the Borrower Plaintiff, is there no Medium to go by to make the Thing agreeable to the Statute. Bills waiving the Penalty, where the Plaintiff ſubmits to pay the Principal with legal Intereſt, are frequent, and Decrees thereupon. Where Part of the Money is advanced only, it is uſual to ſend it to the Maſter to ſee what was really lent; but this Court does not meddle with Penalties, unleſs to relieve againſt them, but does that which is reaſonable, and brings Things to a proper Standard between the Parties: So that it is plain, where the Bill is to redeem, the Court may direct that legal Intereſt may be computed for it, and illegal Intereſt ought not to have been paid, and ſhall be employ'd to the right Purpoſe.

pose. Volenti non fit &c. may be said in every hard Bargain. But the Crime arises from the Extortion of the Lender, and not from the Necessity of the Borrower. The Language of the Act calls these Contracts fraudulent and covenous; and shall not a Court of Equity interpose to prevent them? It is reasonable it should, and this may make Gentlemen a little more cautious how they enter into these Contracts. And is a Court of Equity's thus interposing a Departing from the Act? Or is it not inforcing it? And if it should, in pursuing its own Rules, go a little farther than the Courts of Law would do, I do not know that any honest Man in the Kingdom need be sorry for it. As to refunding, his Lordship ask'd if there ever was a Suit for Redemption where it was not decreed, that if the Party was overpaid he should refund? If a Man receives what is not his own, must he keep it? If, indeed, the Securities had all been deliver'd up, and no other Foundation for a Suit than to have the Money refunded, that might have had another Consideration. But he said, It is the constant Course of the Court, that where there is a Suggestion that the Party is overpaid, the Order is always, That, if it is so, the Party receiving shall refund. MS. Rep. Nov. 11. 1734. S. C.

For more of Usury in General, see **Assurances and Bottomry, Conditions,** and other proper Titles.

Utlawry.

There is no Letter to this in Roll.

[A] *Error.* Utlawry. [*In the Return.*]

S. P. Cro. J. 358. pl. 17. and upon Error brought the Outlawry was revers'd. Mich. 12 Jac. B. R.

1. **If Outlawry** of two **be, that they** Quarto exacti non comparuerunt, **upon which they were outlaw'd; this is erroneous, because it is not** Nec eorum aliquis; **For peradventure one of them appear'd. Mich. 14 Ja. B. R.** *Arney and Watkins*, **revers'd for this. Mich. 11 Jac. B. R.** *Clark's* **Case adjudged. H. 13 Ja. B. R.** * *Taverner's* **Case adjudged.**

Middleton's Case.——S. P. 2 Roll Rep. 400. Mich. 21 Jac. B. R. The King v. Miller. ——S. C. accordingly, Palm. 388.——S. P. 3 Mod. 89. 90. Hill. 1 Jac. 2. B. R. Anon. accordingly.

*Roll. Rep. 295. pl. 11. S. C. accordingly.——3 Bulst. 171. The King v. Taverner, S. C. but S. P. does not appear.

* Br. Error, pl. 146. cites S. C. that it is Error; Per Brian and Vavisor. And so it was in a Manner agreed; but the Attorney of the King contra, and that no County but the County of *Suffex* can be held there.——Br. Utlagary, pl. 43. cites S. C. & P. because it says not in what County.

2. **If an Outlawry be** return'd **in this Manner,** Ad Comitatum meum tentum apud Ciceſtriam in Comitatu Suſſex &c. **it is erroneous, because it is not** ad Comitatum meum Suſſex tentum &c. **For tho' it may be intended that it was at the County of Suſſex, because Suſſex comes after, yet it is not Reason that a Man shall lose his Goods by Intendment. P. 7 Ja. B.** *Whitting's* **Case adjudg'd and revers'd.** * **6 H. 7. 15. b. 11 H. 7. 10.**

So where A. was outlaw'd for Murder, and it was mov'd for Error, that the Sheriff return'd *ad Com. meum tentum apud D. in the County of Northumberland*, when it should be *in Comitatu meo Northumbria* tentum &c. And this was held Error Per Curiam, according to the Case in 6 H. 4. where the Return was Ad Comitatum meum Somerset tentum, and was therefore held erroneous, because the same Person may be Sheriff of several Counties, as of Surry and Sussex; and so of Huntingtonshire and Cambridgeshire. 2 Roll's Rep. 52. Mich. 16 Jac. B. R. Alder's Case.

So where the Court was said to be held *at the County* of Hereford, but because it did not say *for the County*, the Outlawry was revers'd. 2 Keb. 128. pl. 83. Mich. 18 Car. 2. B. R. The King v. Tufton.

So

So where the *Proclamations* were return'd to be *Ad Comitatum meum tent. apud ſuch a Place, in Com. prædicto*, inſtead of *Pro Comitatu*, the Outlawry was revers'd; for anciently one Sheriff had 2 or 3 Counties, and might hold the Court in one County for another. Vent. 108. Hill. 22 Car. 2. B. R. Anon.

So where the Sheriff in the Return of the Exigent, had return'd *Exigi feci ad Comitatum meum tent. pro Comitat. prædict. apud Paynſwick*, and it did *not appear that Paynſwick was in the County*; and for that Cauſe it was revers'd. Freem. Rep. 525. pl. 709. Mich. 1680. The King v. Maſon.

So where Error to reverſe an Outlawry for Murder was aſſign'd, That *it did not appear upon the Return of the Exigent in the Primo Exact. that the Court was held Pro Comitatu*, it was revers'd. 3 Mod. 89. Hill. 1 Jac. 2. B. R. Anon.

3. **If the** Names of the Coroners **who outlaw'd the Party,** are not put into the Record, **it is erroneous. M. 13 Jac. B. R. adjudg'd.** *Earle's* **Caſe.** Roll Rep. 266. pl. 38. S. C. accordingly, and ſays the Clerk inform'd the Court that their Names ought to be put to the Judgment of Outlawry in all Counties beſides London; For that there it is not uſual.

Where a Return was Quod ad quartum Comitatum &c. non comparuerunt, Ideo *per Judicium Coronatorum utlagati ſunt*, but did *not ſhew that there is any Coroner, or his Name.* The Court doubted thereof; For all the Exigents in London are ſo return'd where the Mayor is Coroner. Cro. J. 358. pl. 17. Mich. 12 Jac. B. R. Middleton's Caſe. —— But where one was outlaw'd, and aſſign'd for Error that he was outlaw'd Per Judicium Coronatorum, and did not ſhew the Name of any of the Coroners, the Judgment for this Cauſe was revers'd. Cro. J. 528. pl. 7. Paſch. 16 Jac. B. R. Patrick's Caſe.

Outlawry upon the Statute of Recuſancy was reverſed in Error, becauſe it was per Judicium Coronatorum, and did not name them. Palm. 121. Mich. 18 Jac. B. R. Markham v. Gargrave. ——And after 2 Scire Facias's ad Audiendum Errores, and upon Default of the Defendant, and Examination of the Jurors, Judgment was enter'd That it be revers'd. But at the End of the Term the King's Attorney inform'd the Court for the King, That this Outlawry was certified into the Exchequer, and that the Exigent, which is the Ground of the Outlawry, is good, and had the Names of the Coroners; and that the Courſe of the Bank is ſo, to make Entries without particular Names of the Coroners in the Roll, but Relation is had to the original Writ, and alleg'd Diminution in the Record, and pray'd a Certiorari to the Cuſtos Brevium for the Writ. The Court doubted if he ſhould be admitted to this after Judgment given; for by what appear'd to the Court, the Record before them was Error. But it was held, that tho' the Party himſelf was bound by this Default, yet the King was not; and as to the Judgment, it was in the Breaſt of the Judges all this Term. And as in Qua. Imp. againſt 2, if the Right of the King appears, the Court ought to award a Writ to the Biſhop for his Clerk, who is Party, ſo here. And the Original was certified upon a Writ of Diminution, with the Names of the Coroners; whereupon Judgment as to this was recall'd. But afterwards the Judgment was revers'd for Variance. Ibid. ——Cro. J. 576. 577. S. C. but S. P. does not appear.

The Judgment in an Outlawry was, Ideo *per Judicium A. B. and C. Armigeros, and omitted Coronatores, and* * *Comitatus prædicti*; and it was held clearly that both were Error. Palm. 43. Mich 17 Jac. B. R. Anon.

* S. P. 2 Roll Rep. 82. Anon. S. P. and ſeems to be S. C.

4. But **otherwiſe it is upon an Outlawry** in London, **becauſe there** the Uſe is Not to put **the Names of the Coroners. M. 13 Jac. B. R.** S. P. Dyer 317. a. pl. 6. Mich. 14 & 15 Eliz. that the Return in London is made generally, without ſaying Per Judicium Coronatorum. —— Cro. J. 531. pl. 11. Paſch. 17 Jac. B. R. Garrard v. Regem, Exception was taken for *not naming any Coroners.* Sed non allocatur; For this Outlawry was *in London*, where there is not any Coroner, but the Mayor for the Time is perpetual Coroner; and the Courſe is not to return there Per Judicium Coronatorum, but *generally Ideo utlagatus eſt.*

5. **If there are** only 14 Days between the 2 Counties in the Return of the Exigent, **it is erroneous. H. 13 Jac. B. R.** *Taverner's* **Caſe adjudged.** 3 Bulſt. 171 Paſch. 14 Jac. The King v. Taverner, S. C. accordingly. —— Roll's Rep. 295. pl. 11. S. C. accordingly.

6. **If a Man be return'd outlaw'd in this Manner,** Ad Comitatum meum S. tentum &c. Anno Regni Domini noſtri Jacobi &c. **leaving out this Word** (Regis) **it is erroneous. P. 7 Jac. B.** *Burford's* **Caſe adjudged.**

7. So **if the Return be** Ad Comitatum meum &c. Anno 44 Reginæ, **leaving out** (Elizabethæ) it is erroneous. **P. 7 Jac. B.** *Braundling's* **Caſe adjudged.**

8. **If the Return of the Exigent be,** Ad Comitatum meum Oxon tentum apud Oxon 22 Junii 6 Jac. Angliæ &c. & Scotiæ 42. exactus & non comparuit ad Comitatum &c. tentum &c. 19 Julii anno ſupradicto. * Ad Comitatum meum &c. 16 Auguſti anno 6 Jac. Angliæ & Scotiæ 43 &c. **The Return of the 2d County is not good, becauſe it is not** Angliæ; **for tho' the 1ſt and the 3d are good, and therefore the 2d may be intended to be ſo alſo, yet becauſe it ſhall** not be taken by Intendment, **it is not good. H. 7 Jac. B. Per Curiam,** *Pen's* **Caſe.**

* Fol. 803.

[9] 8. **If a Return upon an Exigent in London be,** Ad Huſtingum tentum in Guildhalda Civitatis London tali die A. B. exactus fuit, & non comparuit, **it is not good, becauſe there are two Huſtings in London, one is De Communibus Placitis, the other is De Placitis Terræ, by which in ſuch Caſe he ought to ſay** Apud Huſtingum de Placitis Terræ, **or** Communibus Placitis, **or otherwiſe it is uncertain in which Huſtings it is, and ſo not good. *6 H. 7. 15. b. ſaid to be adjudged erroneous. 11 H. 7. 10. ſaid to be uſed ſeveral Times to defeat an Outlawry, by leaving out of thoſe Words** (Communibus Placitis.)

* Br. Error, pl. 146 cites S. C. —— Br. Utlagary, pl. 43. cites S. C. — Upon a Recovery in Debt, and Outlawry upon it, the Judgment (among other Errors) was revers'd, for that the Sheriff return'd that he was outlaw'd in Huſtingis, and did not ſay in Huſtingis de Communibus Placitis. Cro. E. 50. pl. 2. Mich. 28 & 29 Eliz. B. R. Lancelot v. Johns. ——It was aſſign'd for Error to reverſe an Outlawry, that *the Proclamations* of Outlawry *commenc'd in the Huſtings de Communibus Placitis* to proceed upon the Exigent, *and that the laſt Proclamation was in the Huſtings de Placitis Terræ*; and therefore ill for the Variance. But the Court doubted; For there are Precedents that the ſaid Huſtings are held Alternatim every Fortnight &c. Cro. J. 660. pl. 10. Hill. 20 Jac. B. R. Archer v. Dalby. ——Palm. 278. Hill. 19 Jac. S. C. ſays, that upon examining two Clerks of the Huſtings upon Oath, they inform'd the Court that Proclamation of Outlawry may be made either in Placitis Terræ, or in Communibus Placitis; but *when it commences in the one, it is not the Courſe to change or proceed in the other; but in Caſe de Allocato Comitatu,* the Courſe is to proceed in the next Huſting, tho' it be not of the ſame Nature as the Huſting where the Proclamation commenc'd. And the Court afterwards aſſented to this Courſe, becauſe the Words in the Proclamations are *Ad Proximum Huſtingum tuum exigi facias.*

10. Capias iſſu'd, the Sheriff return'd *Non inveni* for *Non eſt inventus*, and the Defendant was outlaw'd, and this alleg'd for Error; and it was awarded Error; Quod nota. Br. Error, pl. 190. cites 9 H. 5. 12.

11. The Sheriff return'd that *Cepit Corpus W. N. and one J. S. reſcu'd him*, and upon this *J. S. was outlaw'd upon Proceſs, and without Addition*, and well in this Caſe. But it was revers'd by Writ of Error, becauſe he did *not return the Place where the ſaid Reſcous was made.* Br. Error, pl. 194. cites 10 E. 4. 15.

12. Proclamation iſſued to the Sheriff, who return'd the Writ thus, Quod *Virtute iſtius Brevis proclamari feci ad Comitatum meum tentum tali Die*, but does *not mention the Year.* This Return is ill; Per Curiam. Br. Return of Writs, pl. 3. cites 27 H. 8. 29.

13. The *Sheriff* who was *out of his Office, return'd a Proclamation* upon an Exigent; and therefore the Juſtices held that the Outlawry was void by the Stat. 6 H. 8. and awarded that no Proceſs be made upon it. D. 41. b. pl. 8. Trin. 30 H. 8. Anon.

Dal. 67. pl. 32. S. C. in the ſame Words, only the 26 H. 8. 3. [which is right] is in Dal. made 27 H. 8. which ſeems a Miſtake. —— * Br. Error, pl. 2. cites S. C.

14. In Debt, upon the Exigent a Writ of *Proclamation* iſſued according to the Statute, and was *return'd ſerv'd*, but the *Sheriff had not put his Name to the Return*; and therefore the Outlawry was challeng'd. Dyer, Brown and Weſton thought this no Cauſe of Reverſal, it appearing by the Return that he was legally demanded; for the Words are Ad Comitatum meum tentum &c. proclamari feci; ſo that it appears to have been done by the Sheriff; and the Statute of York only lays a Penalty on the Sheriff for not ſetting his Name to the Return of a Writ, but his not doing it is not Error; tho' if nothing be written, nor any Return made on the Back of the Writ, this will be Error. But Welſh and Harpur contra, and [cited] * 26 H. 8. 3. an Exigent was return'd ſerv'd,

ſerv'd, and the Sheriff's Name omitted in the Return, and held Error. And the Clerks ſaid there were many Precedents where Returns for this Cauſe, were adjudg'd inſufficient. But Dyer ſaid we will be advis'd of it. Mo. 65. pl. 176. Trin. 6 Eliz. Anon.

15. Upon a Recovery in Debt and Outlawry upon it, Errors were aſſign'd. 1ſt. The Defendant brought Debt againſt Lancelot and J. S. and the Sheriff *return'd* Quod *non habent Bona aut Catalla quod ſummoniri poſſint*; whereas it ought to be *Per quod* [*quæ*] ſummoniri &c. 2dly. It ought to be *Neque eorum aliquis* habet. 3dly. It is return'd *Quinto exacti fuere per quod utlagati exiſtunt*, whereas it *ought to be Per judicium Coronatorum* utlagati; for they are Judges, and the Certificate is to be by them; and for theſe Errors the Judgment was revers'd. Cro. E. 50. pl. 2. Mich. 28 & 29 Eliz. B. R. Lancelot v. Johns.

16. A Man was outlaw'd, and the Sheriff return'd that *on ſuch a Day, omnes & ſingulas Proclamationes fieri feci*, but did *not ſhew that on ſuch a Day he made the firſt, and ſuch a Day the ſecond* &c. and this being aſſign'd for Error, the Outlawry was revers'd. Goldsb. 97. pl. 16. Trin. 30 Eliz. Anon.

17. An Exigent iſſued into London. The Sheriff return'd that he had *proclaim'd the Party de Comitatu in Comitatum* quouſque; whereas he ought to ſay *De Huſtingo in Huſtingum*; and it was held Per Cur. to be clearly Error. Le. 326. pl. 359. Trin. 31 Eliz. B. R. Marſh's Caſe. Cro. E. 225. pl. 10. Paſch. 33 Eliz. B. R. S. C. held accordingly.——

Ow. 147. S. C. but S. P. does not appear.

18. *Capias utlagat.* was *awarded* 25 *Eliz.* and was *returnable* 35 *Eliz.* and ſo meerly void; for every Capias ought to be returnable the enſuing Term, for the Miſchief which otherwiſe might befal the Priſoner, to be kept always in Priſon, as appears 21 H. 7. 16. 8 E. 4. 4. Dy. 175. and then he was never lawfully his Priſoner, and might well let him at large. Cro. Eliz. 467. (bis) pl. 17. Hill. 38 Eliz. in B. R. in Caſe of Nector & al'. v. Gennet.

19. A Perſon was outlaw'd, but becauſe it did *not appear* by the Return *that the Judgment* of the Outlawry *was by the Coroners*, as it ought to be, it was revers'd upon Error brought. Cro. E. 648. pl. 3. Hill. 41 Eliz. B. R. Beverley v. Beverley, cites 21 H. 7. 73.

20. Outlawry was reverſed, becauſe 1ſt, It was *not ſhewn where the* Outlaw was *Inhabiting*. 2dly, Becauſe it was ſhewn *that Proclamation* was made, but not that it was made *at the Pariſh-Church where* &c. Mar. 20. pl. 46. Paſch. 15 Car. Anon.

21. An Outlawry was reverſed, becauſe the *Place where the County-Court was held is not ſhewn in the Secundo Exactus*. Sty. 451. Paſch. 1655. Anon.

22. Exception was taken to the Return, that the Value of the Lands in Toto was found, but *not the Value of every particular Parcel*. Sed non allocatur. Hard. 7. pl. 7. Trin. 1655. Croſs's Caſe.

23. Error to reverſe an Outlawry in High Treaſon was aſſign'd, that it did *not appear where the Huſtings were held*; for it is at a Court of Huſtings, without ſaying *pro Civitate London*. The Outlawry was reverſed. 4 Mod. 366. Mich. 6 W. & M. in B. R. The King and Queen v. Sir Tho. Armſtrong. It was aſſign'd for Error, that the *Huſtings are ſaid to be held in Civitate London*, and not *pro Civitate*; and therefore the Outlawry was reverſed. 2 Barnard. Rep. in B. R. 298. Trin. 6 Geo. 2. Martin v. Duffield.

(A. 2) Error.

This is in Roll. (A) (A. 2) Error. Outlawry void for *Uncertainty in the Time.*

1. If an Outlawry be, That the Party fuit exactus at 3 ſeveral times, Anno 10 Jac. and that he fuit quarto exactus 25 Die Februarii, & non Comparuit without any Year, and quinto exactus ſuch a Day in March 10 Jac. Tho' it may be intended that he was quarto exactus in 10 Jac. yet an Outlawry ſhall not be good by Intendment; for peradventure the Clerk would have made it Quarto exactus Anno 8 Jac. before, which had been clearly ill. M. 14 Ja. B. R. *Chapman's Caſe*, reverſed for this. And the Court ſaid, that it is not like to the Caſe of Co. 4. of a Caption before a Coroner in the County, which is intended of the County, becauſe that is by way of Expoſition of a Word, but here is a Defect.

Litt. S. 437. the 2d Part, S. P. and Co. Litt. 259. b. ſays nota, the Original is Reverſera tiel Utlagarie per Brief de Error. But tho' Impriſonment be good Cauſe to reverſe an Outlawry, yet it muſt be *by Proceſs of Law in Invitum*, and not by Conſent or Covin; for ſuch Impriſonment ſhall not avoid the Outlawry, becauſe upon the Matter it is his own Act.

2. If a Man be impriſon'd at the Time of the Outlawry pronounced, it is erroneous, be it in Outlawry for Felony, or in a perſonal Action. 7 H. 6. 25. 38 Aſſ. 27. 3 H. 6. 46. b. 1 H. 7. 13. b. 21 E. 4. 73. b.

He *ought to ſay under whoſe Cuſtody, and in what County*, and if not it is not good, and he ſhall be hanged, and ought to aver his Plea. Br. Utlagary, pl. 68. cites 1 H. 7. 13.

This Plea and the 2 next belong more properly to (A. 4)

S. P. Br. Utlagary, pl. 79. cites 11 H. 7. 5. and it ſhall be tried by the Letters Patents.

3. If a Man be in the Buſineſs of the King by Commandment, by Letters Patents, at the Time of an Outlawry pronounced, it is erroneous. 11 H. 7. 5.

S. P. and it ſhall be tried by Certification of the Captain. Br. Utlagary, pl. 79. cites 11 H. 7. 5.——S. P. Ibid. pl. 47. cites 2 E. 4. 1.

4. If a Man be in Calais, under a Captain there in the King's Service, at the Time of the Outlawry pronounced, it is erroneous. 11 H. 7. 5. 2 E. 4. 1. 4 E. 4. 10. b. Co. Litt. 74. Co. 9. *Abbot de Strata Marcella*, 31. b.

5. At the Seſſions held at Lancaſter die Lunæ in Feſto Sancti Bartholemei Apoſtoli, *Capias* was *awarded returnable die Jovis poſt Feſtum Sancti Barth.* and did *not ſay Proximo poſt Feſtum Sancti Barth. proximo futur'* where it is *incertain whether it ſhall be the next Die Jovis, or a Year after*, it is Error. Br. Error, pl. 175. cites 18 E. 4. 12.

6. *And another* Capias was *returnable prima Septiman' Quadr'* and did not ſay prox' futur'. it is Error. Br. Error, pl. 175. cites 18 E. 4. 12.

7. *And* alſo a 3d Error, *that one Seſſions was held meſne between the Date of one Capias and the Return*, where it ſhould be return'd at the next Seſſions; and per Cur. it is Error, wherefore it was awarded that the Record ſhould be reverſed, and the Party reſtored to all that he loſt by the ſame Judgment. Br. Error, pl. 175. cites 18 E. 4. 12.

8. Exception was taken to the Return of an Outlawry, That the Outlawry is recited to have iſſued at the Feaſt of the Converſion of St. Paul in 1653, *without* ſaying in what *Year of our Lord* Chriſt. Sed non allocatur; for 1653 muſt relate to the Year of our Lord, and can have no other Intendment. Hard. 6. pl. 7. Trin. 1655. Croſs's Caſe.

(A. 3) *How*

* [A. 3] *How it ſhall be [expreſs'd.]*

Fol. 804.

* There is no Letter to this, nor to any of the Diviſions in Roll, till you come to (B)

1. IF the Record be That a Feme is outlaw'd, it is erroneous; for ſhe ought to be waived. M. 14 Ja. B. R. between † *Haiman and his Wife and Cotton.* The Judgment reverſed for this.

† Roll Rep. 407. pl. 41. Trin. 14 Jac. B. R. S. C. by Name of Haiman's Caſe.——3 Bulſt. 212, 213. Anon. ſeems to be S. C.

When a Feme is outlaw'd, ſhe is ſaid waived *quaſi relicta ab lege*, and not outlaw'd as a Man is; for a Feme is *not ſworn at the Leets as a Man* ſhall be, therefore the *one is within the Law*, and the *other not*. Br. Utlawry, pl. 70. cites F. N. B. 161.——Co. Litt. 122. b. S. P.

2. Error &c. to reverſe an Outlawry, for that the Capias was awarded *againſt* 3 *Men and two Women*, and ſo to the Exigent, and the Return was Ideo per Judicium &c. *Utlagati ſunt*; whereas for the Women it ought to have been *waviatæ* ſunt; and the Outlawry was reverſed. Cro. J. 358. pl. 17. Mich. 12 Jac. B. R. Middleton's Caſe.

[A. 4] *What Perſons. In reſpect of the Place where they are at the Time of the Outlawry, ſhall be bound by it.*

See (A. 2) pl. 2, 3, 4.

1. IF a Man be over the Sea in the King's Service, by his Letters Patents, or with any Captain of the King, at the Time of the Outlawry pronounced, it is erroneous. 2 E. 4. 1. 11 H. 7. 5. 26 H. 6. Error 27.

See the Note to pl. 4. infra, and (A. 2) pl. 2. 3. & 4.

2. If a Man goes over the Sea of his good Will for his Pleaſure, or for his own private Buſineſs, and not for the Buſineſs of the King or Realm, and then the Exigent is awarded againſt him for Felony, and is outlaw'd, he being there, yet it erroneous as well as if he had been there for the Buſineſs of the Realm; for he being there he cannot take Conuſance of the Proclamations. H. 15 Jac. B. R. *Carter's* Caſe adjudg'd, and the Outlawry reverſed, tho' it was ſaid by the Clerks, that in all the Precedents (except one *Skirrow's* Caſe in 23 El. which was adjudg'd accordingly to this Judgment) it is alleged that he was over the Sea in the Buſineſs of the King or Realm.

3. If a Man be indicted of Felony, and after the Exigent pronounc'd departs voluntarily out of the Realm to the Parts over the Sea, without any Buſineſs of the King or Realm, and then the Outlawry is pronounc'd againſt him, he ſhall never avoid this Outlawry by Writ of Error, inaſmuch as he was here at the Time of the Exigent pronounc'd, by which he had Conuſance of the Matter with which he was charg'd; For otherwiſe every one may defeat the Courſe of Juſtice by his own Act, and remain beyond Sea till the Witneſſes who are to prove him Guilty are dead, and then to come back. Hill. 15 Jac. B. R. in *Carter's* Caſe, reſolv'd per Curiam.

Cro. J. 464. pl. 12. S. C. accordingly. ——2 Roll Rep. 11. 12. S. C. but nothing ſaid by the Court as to this Point of being abroad on the Buſineſs of the King.

Cro. J. 464 pl. 12. S. C. but S. P. does not appear. —— 2 Roll Rep. 11. S. C. Arg. says that such bare Averment shall not be received; for 2 E. 4. 1. and 26 H. 6. Error 28. where he alleges that he was in the Service of the King, he must have a Certificate from the Captain, and that 9 H. 4. 3. and 10 H. 4. is accordingly.

4. But **otherwise it is if he went beyond Sea,** in the Business of the King or Realm **after the Exigent pronounc'd, and before the Outlawry; For there the Outlawry is erroneous. Hill. 15 Jac. B. R. in *Carter's* Case, agreed per Curiam.**

2 Roll Rep. 11. 12. S. C. resolv'd that the Pleading was good, and the Outlawry was revers'd; but by all the Justices, if the Attorney had confess'd that he went over Sea after the Exigent awarded, then the Outlawry could not be revers'd, but now this Covin does not appear.—The King's Attorney might have replied that after the Exigent, and before the Outlawry pronounc'd, he departed; but since he has confess'd the Plea, & non Constat Curiæ, that he departed after, therefore the Outlawry was revers'd. Cro. J. 464. S. C.

5. But **in the Case before, where he** departs voluntarily before the Outlawry, and after the Exigent, **if he brings Writ of Error he may** assign for Error, that he was over the Sea Tempore Promulgationis Utlagariæ prædictæ **generally; For if he was within the Realm after the Exigent pronounc'd, and departed after, this shall come of the other Part. Hill. 15 Jac. B. R. *Carter's* Case adjudg'd, and the Outlawry revers'd.**

Note, where Exigent issues against a Man in Prison, at the Prayer of the Party, he shall be brought to the Bar to answer to the Action of the Plaintiff, in Avoidance of the Error. Br. Utlagary, pl. 60. cites 14 H. 6. 54.

6. **If one be** imprison'd who is sued in an Action, and brought to the Bar, and demanded if he will appear, **if he** will not, but after is outlaw'd, **this Imprisonment is not any Error. M. 8 Jac. B.**

* Fol. 805.

7. **P. 6 E. 1. B. Rot. 25.** Revocatio Utlagariarum diversarum, ex quo ipsi habuerunt Terras in Comitatu prædicto quamvis Vicecomes returnavit * **fraudulenter quod non sunt Inventi nec aliquid habuerunt,** & quod Restituantur &c.

8. 5 *E.* 3. *cap.* 13. Enacts, That *if any will defeat an Outlawry by Reason of Imprisonment testified by the Sheriff or others having no Record, let the Party yield himself to Prison; and then the Justices shall cause the Plaintiff to appear at a certain Day, at which Day the Averment of such outlaw'd Person shall be receiv'd, and so also shall the King's Counsel or Prosecutor have their Averment against such Testimony.*

* A Question was, whether these Statutes extend to Treasons generally, viz. at Common Law, and declar'd by the 25 E. 3. or only to the new Treasons made so by the said Acts; and the Opinion was, that they extend to all Treason, by Reason of the Words (against any Offenders in Treasons.) D. 287. a. pl. 49. Hill. 12 Eliz. Anon.—— 3 Inst. 32. cap. 2. and 216. cap. 101. S. P. and cites S. C.—— 2 Hawk. Pl. C. 460. cap. 50. S. 8. accordingly.

9. 26 *H.* 8. *cap.* 13. Enacts, That *all Process of Outlawry to be had or made within this Realm against * any Offenders in Treason, being Resiant or inhabiting out of the Limits of this Realm, or in any of the Parts beyond the Seas, at the Time of the Outlawry pronounc'd against them, shall be as good and effectual in Law to all Intents and Purposes, as if such Offenders had been resident, and dwelling within this Realm at the Time of such Process awarded, and Outlawry pronounc'd.*

10. The Statute of 5 & 6 *E.* 6. *cap.* 11. is in the same Words. And enacts further, That *if the Party so to be outlaw'd, shall, within one Year next after the said Outlawry pronounc'd, yield himself to the Chief Justice of England for the Time being, and offer to traverse the Indictment or Appeal whereon the said Outlawry shall be pronounc'd as is aforesaid, that then he shall be received to the same Traverse, and being thereupon found Not guilty by the Verdict of 12 Men, he shall be clearly acquitted and discharg'd of the said Outlawry &c.*

One Outlaw'd for High Treason went beyond Sea, and was taken at Leyden in Holland, and brought into England, and being brought to the Bar of B. R. desir'd Leave of the Court to reverse the Outlawry, and be tried by Virtue of this Statute of E. 6. He alleg'd that it was not a Year since he was outlaw'd

outlaw'd, and therefore desired the Benefit of this Law; but the same was denied, because he did not render himself according to the Statute, but was apprehended and brought before the Chief Justice. And thereupon a Rule was made for his Execution at Tyburn, which was done accordingly. 3 Mod. 47. Trin. 36 Car. 2. B. R. The King v. Sir Tho. Armstrong.

The Defendant was indicted for High Treason in counterfeiting the King's Coin, and outlaw'd in February last; and would assign for Error, that he was out of the Realm at the Time of the Outlawry. But that being objected to, he said, I do now surrender myself into the Hands of the Chief Justice, in Pursuance of the Statute of 5 & 6 E. 6. 11. and am ready to traverse the Indictment; and pray that my Render may be recorded. But the Attorney General oppos'd it, and said that when the Outlawry was laid before him, he should offer some Reasons to shew that the Prisoner was not within the Benefit of that Act. The Court said they could not allow such Entry; for that would be to admit his Surrender good, which was in Dispute; but an Entry was made thus, viz. Memorandum, The Prisoner being brought up by the Keeper of Newgate, charg'd with an Indictment of High Treason, and alleging that he was outlaw'd for the same, and that he was beyond the Sea at the Time of the Outlawry, has offer'd to surrender himself up to the Chief Justice, and to traverse the Indictment; and then he was remanded back. Barnard. Rep. in B. R. 79. Mich. 2 Geo. 2. 1728. The King v. Johnson.

[A. 5] *What Persons may be Outlaw'd.*

1. AN Infant of the Age of 14 **may be outlaw'd, and it is not erroneous,** D. 1, 2. Ma. 104. 12.

2. But **an Infant** within the Age of 14 **cannot be outlaw'd; for if he be it is erroneous.** D. 1, 2. Mar. 104. 10. 12. 3 H. 5. Fitzh. Utlagary 11.

It was agreed Mich. 3 H. 5. Utlawry 11. that Utlawry against an Infant within the Age of 12 Years, of Felony or Trespass, is void; and to this agrees Hill. 38 E. 3. 5. and that an Infant outlaw'd shall not be imprison'd. And it appears that the Law was so in the Time of Bracton, who says in Lib. 3. Tract. 2. cap. 11. fol. 125. Minor vero & qui infra Ætatem 12 Annorum fuerit, utlagari non potest, nec extra Legem poni; quia ante talem Ætatem non est sub Lege aliqua, nec in Decenna. Theloall's Dig. of Writs, lib. 1. cap. 15. S. 19.——Co. Litt. 128. a. (q) S. P. and cites Bracton accordingly.

3. But **the Outlawry of such Infant** is not void, **it being a Record,** but voidable by Error. * D. 7. El. 239. 39.

* And. 10. pl. 22. Hawtry v. Aucher, S. C. accordingly.——Mo. 74. pl. 203. S. C. accordingly.

4. An * Abbot or Prior **ought not to be outlaw'd.** 39 E. 3. b. [13 a.] S. P. Br. Utlagary, pl. 72. cites 39 E. 3. 13.—— * S. P. Br. Exigent, pl. 2. cites 26 H. 8. 7.—S. P. Br. Exigent, pl. 72. cites F. N. B. Tit. Debt.——S. P. Tho' he be return'd Nihil in the first County, and is return'd Nihil upon a Testatum in a foreign County also. Ibid. pl 3. cites 27 H. 8. 22.—But Ibid. pl. 39. cites 14 H. 6. 21. That Exigent does lie against an Abbot; Per June and Newton.

5. In Trespass it was agreed, that Process of Outlawry by Capias and Exigent *does not lie against a* * *Corporation*, as Mayor and † Commonalty &c. *but Distress.* Br. Corporations, pl. 11. cites 45 E. 3. 2. 3. Br. Process, pl. 22. cites S. C.—— * S. P. Br. Utlagary, pl. 72. cites 39 E. 3. 13.—Exigent lies *against a Mayor.* Br. Exigent, pl. 39. cites 14 H. 6. 21.

† S. P. Br. Corporations, pl. 43. cites 22 Ass. 67. ——Br. Exigent, pl. 60. cites S. C. and 21 E. 4. 14. accordingly.

6. *Mainpernors* were outlaw'd by Exigent upon their Mainprize, and yet they were not Parties to the Original. Br. Exigent, pl. 56. cites 8 H. 4. 7.

7. Process of Outlawry lies not against an *Earl or Baron*; for it is intended that they are sufficient. Br. Exigent, pl. 72. cites Old Nat. Brev. Tit. Debt. S. P. Br. Exigent, pl. 2. cites 26 H. 8. 7.—— S. P. And so of a *Duke or Countess, not only because it is intended that they have Lands, but for the Dignity* which is in them; for it was brought against the Baron and his Feme, Countess of B. Br. Exigent, pl. 37. cites 14 H. 6. 2.

But

But if *Reſcous* be *return'd upon a Duke, Baron, or Lord, Capias ſhall iſſue* againſt him *for the Contempt*. But adds Nota, That generally Capias does not lie againſt a Lord; for he is intended ſufficient to be diſtrain'd; but for Contempt Capias lies. Br. Exigent, pl. 55. cites 11 H. 4. 14, 15. and 1 H. 5. 14.

If a Nobleman be *indicted, and cannot be found*, Proceſs of Outlawry ſhall be awarded againſt him per Legem Terræ, and he ſhall be outlaw'd per Judicium Coronatorum; but he ſhall be tried per Judicium Parium ſuorum, when he appears. 2 Inſt. 49 ——3 Inſt. 31. S. P.——2 Hawk. 424. cap. 44. S. 16. S.P. ſays it ſeems to be clear, That if a Peer abſents himſelf, and cannot be found, he may be outlaw'd per Judicium Coronatorum &c.

Where in Aſſiſe againſt a Peer a Diſſeiſin was found, the Judgment was Ideo capiatur, it was alleg'd for Error, That a Capias pro Fine lies not againſt a Peer; but the Court held it good; a Fine being given in this Caſe upon the Statute, and no Perſon being exempted therein, it ſhall bind a Nobleman as well as any other. And *for a Contempt* a Capias lies againſt a Nobleman, and this Fine is for a Contempt to the Law, and ſo is 1 H. 5. and Judgment was affirm'd. Cro. E. 170. pl. 9. Hill. 32 Eliz. B. R. The Ld. Stafford v. Thynne.——So in Debt againſt a Peer, who *pleaded Non eſt Factum*, which was found againſt him, and Judgment was Ideo Capiatur, and held well, a Fine being due to the Queen. And Judgment affirm'd. Cro. E. 503. pl. 26. Mich. 38 & 39 Eliz. B. R. The Earl of Lincoln v. Flower—In Caſes of Contempt Capias lies againſt them; per Cur. 6 Rep. 54. a. Mich. 3 Jac. in the Star-Chamber, in the Counteſs of Rutland's Caſe.

A Peer was *indicted for incroaching on the Highway*. Exception was taken for not ſaying of what Place he was. Sed non allocatur; for the Proceſs of Outlawry lies not againſt him, but Diſtreſs; and ſo it was ruled in Ld. Paget's Caſe. Cro. E. 148. pl. 16. Mich. 31 & 32 Eliz. B. R. The Lord Dacres's Caſe.

Br. Exigent, pl. 2. cites 26 H. 8. 7. That Capias lies againſt a Knight;

8. Proceſs of Outlawry does *not* lie *againſt a Knight*; for it is intended that he is ſufficient. Br. Exigent, pl. 72. cites F. N. B. Tit. Debt. *But* Brooke ſays *this does not hold good at this Day*; for Knights are outlaw'd often times.

for a Man may be a Knight, and have no Lands, and therefore upon a Teſtatum a Man ſhall have Elegit in a Foreign County.

Capias does not lie againſt a Biſhop, *tho'* he be *return'd Nichil in the firſt County, and* is return'd Nichil *upon a Teſtatum in a Foreign County alſo*.

9. If a *Biſhop* be *ſued in a County where he has nothing, and the Sheriff returns him Nichil, where he has Land in the County Palatine of L.* or C. *where Writ of the King does not* run; Upon ſuch Return, Proceſs of Outlawry ſhall not iſſue; for he is a Peer of the Realm, and therefore Exigent ſhall not iſſue; ſaid by ſome of the Juſtices in the Exchequer-Chamber. Br. Exigent, pl. 47. cites 5 E. 4. 108.

Br. Exigent, pl. 3. cites 27 H. 8. 22.—— Nor Proceſs of Outlawry does not lie againſt an Archbiſhop. Br. Exigent, pl. 72. cites F. N. B. Tit. Debt.

Contra peradventure of a Biſhop of Wales or Ireland; for they are not Peers of the Realm, no more than a Biſhop of France. Br. Exigent, pl. 47. cites 5 E 4. 108.

But upon Recovery againſt a Biſhop a Man *ſhall have Elegit*, but not Capias ad Satisfaciendum. Br. Exigent, pl. 3. cites 27 H. 8. 22.

But if *Reſcous* be *return'd upon a Lord of Parliament*, Capias lies for the Contempt.

10. Capias does not lie againſt *a Lord of Parliament*, tho' he be return'd Nichil in the firſt County, and is return'd Nichil upon a Teſtatum in a foreign County alſo. Br. Exigent, pl. 3. cites 27 H. 8. 22.

Ibid.——And Exigent lies againſt a Lord of Parliament, if he *be not certified a Lord of Parliament*. Ibid.

If a Lord of Parliament be outlaw'd, 'tis Error as it is held. But Brooke *ſays he has heard this denied of ancient Curſitors*. Br. Exigent, pl. 72. cites F. N. B. Tit. Debt.

Ld. Raym. Rep. 349. S. C.

11. A *Foreigner, that never was in England, was outlaw'd* in an Action on ſeveral *Promiſes* for Goods ſold and deliver'd. But ſee Carth. 459. Mich. 10 W. 3. B. R. Matthews v. Erbo.

[A. 6] *At what Time* they ſhall be *ſaid Outlaw'd.*

1. D. 15 El. 317. b. *Puttenham* **brought Covenant, and Defendant pleaded an Outlawry, which was certified That the** Exigent was deliver'd to the Plaintiff there, but was not return'd at the Day; but thereupon Teſtatum fuit in Curia pro Regina that he was outlaw'd; **and after the Defendant relinquiſh'd the Plea of the Outlawry, and pleaded in Bar; for the Outlawry, certified as above, ſhall be ſufficient** as to the Queen, **but ſhall not be ſo againſt every Subject.**

2. **By this Caſe it appears, that** a Man cannot plead an Outlawry in Diſability **of the Perſon,** unleſs the Exigent be return'd. S. P. And. 36. pl. 91. Mich. 4 & 5 Eliz. Lambert v. Proctor.——None ſhould be outlaw'd till *after the Exigent* be *return'd*; for the Inquiring after him in the County is in order that he may appear; and therefore if he does appear at the Return of the Exigent, the Law is ſatisfied, and the Outlawry muſt not be recorded againſt him. G. Hiſt. of C. B. 159. cap. 17.——3 New Abr. 762. Tit. Outlawry, S. P. in much the ſame Words.

3. In *Mortdanceſtor* the *Defendant pleaded Outlawry in the Demandant,* and *vouch'd the Record of the Coroner*; But becauſe the Exigent was not return'd in Bank, and becauſe it was not return'd [among the Records,] therefore non allocatur. Br. Nonabilitie, pl. 25. cites 28 Aſſ. 49. Theloal's Dig. Lib. 1. cap. 15. S. 20. cites S. C. but the Book is miſprinted, as in 23 Aſſ. (4. 9.) where it ſhould be (49.)

4. Before the Defendant can diſable the Plaintiff, the Outlawry *muſt appear of Record*; and the Judgment, after the Quinto exactus given by the Coroners in the County-Court, is not ſufficient, until the Writ of Exigent be returned, and the Outlawry appear of Record. Co. Litt. 128. b. S. P. or that the Outlawry be removed by a Certiorari. Co. Litt. 288. b.——In Caſe of *Treaſon or Felony*, if any Perſon be Outlaw'd, the Judgment upon the Exigent at the 5th County Court upon Default of the Party is, Ideo &c. *Per Judicium Coronatoris Domini Regis comitatus pradict' utlagatus eſt.* Which Writ being duly return'd of Record by the Sheriff, the Party ſhall have the like corporal Puniſhment, and ſhall loſe and forfeit as much as if he had appear'd &c. and Judgment had been given againſt him in Caſe of Treaſon or Felony reſpectively. And note, that in theſe Words (Ideo utlagatur) both the corporal Puniſhments and Forfeiture, alſo are implied. 3 Inſt. 212.——Serjeant Hawkins ſays it ſeems agreed, that when a Judgment of Outlawry for Treaſon or Felony *appears of Record by the Sheriff's Return of the Exigent*, the Party is as much attainted, and ſhall forfeit and loſe as much as if Sentence had been given againſt him upon Verdict or Confeſſion. And it has been holden to be the ſame if it appears not by ſuch Return but only by the Coroner's Return of a Certiorari to them directed to certify whether the Party were outlaw'd or not. 2 Hawk. Pl. C. 446, 447. cap. 48. S. 22.

5. Popham ſaid, It is clear that if an *Exigent* be *awarded* againſt A. *and after he is quinto exactus*, and *before the Return* of the Exigent A. *dies*, yet the *Outlawry ſhall ſtand* in its Force, and ſhall not be reverſed; for Judgment was by Coroners upon the Quinto exactus, and they may certify the Outlawry. But *otherwiſe if A. had died before the Quinto exactus*, which was not denied. Noy 49. Hartland v. Yates.

6. The Defendant not having appear'd before or on the Return-Day, the Sheriff actually return'd him outlaw'd before a Superſedeas iſſued. The Queſtion was Whether ſuch Return ſhould be concluſive to the Defendant, or whether he had not 4 Days after the Return of the Exigent to appear and put in Bail, and ſo the Outlawry on the Return-Day irregular: For the Plaintiff was cited a Caſe in Point, which had been determined lately in B. R. between **Sanſome and Gore.** And there Ld. Ch. J. Raymond declared, That the Return of the Exigi Facias on the Return-Day was concluſive, and refuſed to relieve the Defendant. But

the Court, on hearing Counſel on both Sides, (notwithſtanding that Caſe) held that by the Practice of this Court, *Defendants always had till the Quarto Die poſt to appear to the Exigent*; and order'd that the Outlawry ſhould be diſcharg'd at the Plaintiff's Expence, but gave no Coſts to the Deſendant. Rep. of Prac. in C. B. 28. Eaſt. 11 Geo. 1. Colt v. Hall.

[A. 7] *By whom [the Judgment ſhall be given.]*

D 317. a. pl. 6. Mich. 14 & 15 Eliz. Puttenham's Caſe. 1. **THE Judgment in an Outlawry** in the Huſtings, **by the Cuſtom of London, is given** by the Recorder, **and not by the Coroners.** D. 15 El. 317. b. **by the Secundary.**

——S. C. cited 8 Rep. 126. a. in the Caſe of the City of London.——In London the Judgment is Ideo Utlagetur per Judicium Recordatoris. Co. Litt. 288. b.

S. P. Co. Litt. 288. b. 2. But in other Counties, **by the Common Law, Judgment in an Outlawry is given** by the Coroner.

3 New Abr. 769. in the ſame Words. 3. When the Exigent went out, it was to be ſued to the County where the Perſon really was, for there the tranſitory Action was originally laid; for the Creditor was to follow the Debtor wherever he was to be found; and becauſe the Outlawry was only firſt for Treaſon, Felony, or very enormous Treſpaſſes, therefore the Proceſs was to be at the *Torn*, which *was the Sheriffs Criminal Court*; *and* this *held not only before the Sheriff, but before the Coroners, who were the ancient Conſervators of the Peace*, being the beſt Men in every County to preſide with the Sheriff in his Torn, *and they pronounced the Outlawry* upon him. G. Hiſt. of C. B. 13. cap. 2.

See [A. 12] [A. 8] *In what Actions* they may be outlaw'd. *At the Common Law.*

Br. Proceſs, pl. 16. cites S. C.—It did not lie at the Common Law in any Action, unleſs in Treſpaſs Vi & Armis, and in Account; per Fairfax. Br. Exigent, pl. 51. cites 22 E. 4. 11. 1. **AT the Common Law, Proceſs of Outlawry was** only in Writs which were ſuppoſed Vi & Armis. 35 H. 6. 6. b.

2. **Alſo Outlawry lay for** Felony, **becauſe it** was Contra Pacem. 35 H. 6. 6. b.

Till a good While after the Conqueſt, none could be outlaw'd but for Felony. And after, in Bracton's Time, and ſomewhat before, Proceſs of Outlawry was ordain'd to lie in all Actions that were Quare Vi & Armis, which Bracton calls Delicta; for there the King ſhall have a Fine. Co. Litt. 128. b.

3. **Alſo it lay in** Writ of Diſceit, **becauſe it** is in Nature of a Treſpaſs. 35 H. 6. 6. b.

[A. 9] [*In what Actions.*] *By Statute.* See [A. 12]

1. IN Treſpaſs for Entry Ubi Ingreſſus non datur per Legem, no Outlawry lies, becauſe it is not Vi & Armis. 35 H. 6. 6. b.
2. Otherwiſe if the Writ ſuppoſes that he enter'd with ſtrong Hand. 35 H. 6. 6. b. Br. Forcible Entry, pl. 21. cites 35 H. 6. 23.——2 Hawk. Pl. C. 302. cap. 27. S. 113. ſays he takes it to be certain that Proceſs of Outlawry lies in all Indictments of Treſpaſs Vi & Armis.

3. By 18 *Ed.* 3. *cap.* 1. *An Exigent ſhall be awarded againſt the Receivers of the King's Wool or Money, who detain'd the ſame, and againſt thoſe who export Wool not Cocketed, or without Cuſtom, againſt Conſpirators or Confederators of Quarrels, thoſe who commit Riots, who bring in falſe Money, if they cannot be brought in by Attachment or Diſtreſs, and not againſt any other.*

4. By 18 *Ed.* 3. *cap.* 5. *No Exigent ſhall iſſue where one is indicted of Treſpaſs, unleſs it be againſt the Peace, or for Offences againſt the laſt mentioned Statute.*

5. By diverſe *Statutes*, Proceſs of Outlawry doth lie in *Account*, *Debt*, *Detinue*, *Annuity*, *Covenant*, *Action ſur le Statute de* 5 *Ri.* 2. Action ſur le Caſe, and in diverſe other Common or Civil Actions. Co. Litt. 128. b.

[A. 10] *To whom the Writ* ſhall be *directed to make the Return* of the Outlawry. Who ſhall do it, *and How.* To whom the Writ directed. Fol. 506.

1. D. 15 El. 317. b. By the Cuſtom of London the Writ is directed to the Sheriff of London, and not to the Coroner (who is the Mayor) Per Communem Bancum. This is at D. 317. a. pl. 6. Mich. 14 & 15 Eliz. Puttenham's Caſe.

[A. 11] *How* it is to be *certified.*

1. D. 15 El. 317. b. The Return of the Outlawry out of London in Banco, is generally made without ſaying Per Judicium Coronatoris, and ſo are the Precedents; Per omnes Prothonotarios. This Caſe is D. 317. a. pl. 6. Mich. 14 & 15 Eliz. Puttenham's Caſe.

[A. 12] *In*

the Court, on hearing Counſel on both Sides, (notwithſtanding that Caſe) held that by the Practice of this Court, *Defendants always had till the Quarto Die poſt to appear to the Exigent*; and order'd that the Outlawry ſhould be diſcharg'd at the Plaintiff's Expence, but gave no Coſts to the Defendant. Rep. of Prac. in C. B. 28. Eaſt. 11 Geo. 1. Colt v. Hall.

[A. 7] *By whom [the Judgment ſhall be given.]*

D 317. a. pl. 6. Mich. 14 & 15 Eliz. Puttenham's Caſe. 1. THE Judgment in an Outlawry in the Huſtings, by the Cuſtom of London, is given by the Recorder, and not by the Coroners. D. 15 El. 317. b. by the Secundary.

——S. C. cited 8 Rep. 126. a. in the Caſe of the City of London.——In London the Judgment is Ideo Utlagetur per Judicium Recordatoris. Co. Litt. 288. b.

S. P. Co. Litt. 288. b. 2. But in other Counties, by the Common Law, Judgment in an Outlawry is given by the Coroner.

3 New Abr. 769. in the ſame Words. 3. When the Exigent went out, it was to be ſued to the County where the Perſon really was, for there the tranſitory Action was originally laid; for the Creditor was to follow the Debtor wherever he was to be found; and becauſe the Outlawry was only firſt for Treaſon, Felony, or very enormous Treſpaſſes, therefore the Proceſs was to be at the *Torn*, which *was the Sheriffs Criminal Court*; *and* this *held not only before the Sheriff, but before the Coroners, who were the ancient Conſervators of the Peace*, being the beſt Men in every County to preſide with the Sheriff in his Torn, *and they pronounced the Outlawry* upon him. G. Hiſt. of C. B. 13. cap. 2.

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5. By diverſe *Statutes*, Proceſs of Outlawry doth lie in *Account*, *Debt*, *Detinue*, *Annuity*, *Covenant*, *Action ſur le Statute de* 5 *Ri.* 2. Action ſur le Caſe, and in diverſe other Common or Civil Actions. Co. Litt. 128. b.

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[A. 12] *In*

[A. 12] *In what Action [or Cases.]*

An Attorney brought a *Bill of Privilege upon an Obligation*, and after Judgment the Defendant was outlaw'd. He brought a Writ of Error to reverſe it, and aſſign'd for Error, that Proceſs of Outlawry did not lie upon that Judgment, becauſe there is no Capias in the original Action; And therefore, by the Opinion of the whole Court, the Outlawry was revers'd. Le. 329. pl. 465. Trin. 32 Eliz. B. R. Crew v. Bailes.——Cro. E. 216. pl. 11. Hill. 33 Eliz. S. C. accordingly.

1. IF an Attorney of Bank be nonſuited after Iſſue in a Bill of Treſpaſs of Battery, by which the Defendant has Coſts adjudg'd to him by the Statute, and an Attachment in Nature of a Capias (as the Courſe is) iſſues againſt him, yet he cannot be outlaw'd upon it. Pl. 16 Ja. B. between *Paſſet and Frier* adjudg'd, and the Outlawry reverſ'd accordingly.

Account was brought by Bill in B. R. againſt two. One pleaded, and it was found againſt him, the other made Default. The Court were of Opinion that no Outlawry could be againſt the Defaulter, inaſmuch as the *Suit* was *by Bill*, and *not by Original*, but only Alias Capias in infinitum. Sid. 159. pl. 12. Mich. 15 Car. 2. B. R. Davis v. Iſaac and Martin.

No Outlawry lies on a Bill. 12 Mod. 211. Mich. 10 W. 3. Martin v. Gell.

Br. Exigent, pl. 61. cites 22 Aſſ. 97.

2. Indictee of *Petty Larceny* ſhall not be outlaw'd. Theloal's Dig. of Writs, lib. 11. cap. 4. S. 1. cites 8 E. 2. Itin. Canc. Corone 402.

That in Appeal of Larceny, if the Defendant is return'd Nihil at two Counties, Exigent ſhall iſſue.

Br. Exigent, pl. 67. cites S. C. but ſays if he does not come at the Exigent the Iſſue is waiv'd, and without Day.——And Ibid. pl. 66. cites Fitzh. Corone 5. That if the Defendant in Appeal appears, and pleads to Iſſue, and after makes Default, Exigent ſhall iſſue; Quod nota bene.

3. In *Appeal of Rape*, the Defendant *pleaded Not guilty*, and was let *by Mainpriſe to attend the Inqueſt*, and after did not come; and therefore Capias lies, and Alias & Pluries and Exigent, and no Inqueſt awarded by Default, inaſmuch as it was a Caſe of Felony. Br. Enqueſt, pl. 28. cites 16 Aſſ. 13.

So if in *Appeal of Felony or Robbery* in the County, the *Defendant is return'd Nihil at 2 Counties*, there Exigent ſhall iſſue; Quod nota upon the 2d Capias in Felony. Br. Exigent, pl. 61. cites 22 Aſſ. 97.

In *Appeal* the *Sheriff return'd* Quod *cepit Corpus* of the Defendant, *and ſent him* &c. *who eſcap'd* Extra Cuſtodiam ipſius qui ipſum duxit &c. by which the Sheriff was amerc'd; and Plaintiff's Attorney ſaid that the Sheriff had been commanded to have the Body 2 or 3 Times, by which he pray'd the Exigent againſt the Appellee. Per Shard, This cannot be againſt him who is in Priſon, but ſue Writ to the Sheriff, and if he returns as you ſay, you ſhall have Exigent. Br. Exigent, pl. 43. cites 30 Aſſ. 23.

Serjeant Hawkins ſays he takes it to be certain, that Proceſs of Outlawry lies *in all Appeals whether of Felony or Maihem*. 2 Hawk. Pl. C. 302. cap. 27. S. 113.

Co. Litt. 128. b. —It appears that upon *Judgment of Account*, the *Plaintiff died before the Account made*, the *Executors* had Scire facias and Capias ad computandum upon it, and Exigent thereupon; For upon Capias after Judgment, Exigent ſhall iſſue upon the firſt Capias. Br. Exigent, pl. 21. cites 14 H. 4. 1.

4. In *Account*, the *Defendant was return'd Nihil*, by which *Capias iſſued*, and *not Venire facias Clericum*; For it ſeems that this Writ does not lie but where there is no other Proceſs given by the Law; but now Proceſs of Outlawry is * given in Account. Br. Exigent, pl. 58. cites 21 E. 3. 38.

This is given by the Statute of Weſtm. 2. 13 E. 1. cap. 11.

2 Hawk. Pl. C. 302. cap. 27. S. 113. ſays he takes it to be certain that Proceſs of Outlawry lies in all Indictments of Treaſon or Felony, and on all Returns of a Reſcous.

5. Note, that upon *Indictment of Death* of another, the *Capias was return'd Non eſt inventus*, Exigent ſhall iſſue immediately; and by the Award of the Exigent the Goods of the Party ſhall be forfeited. Br. Exigent, pl. 42. cites 22 Aſſ. 81.

6. *Detinue*

6. *Detinue of a Box with Charters.* The *Sheriff return'd Nihil*, and the Plaintiff pray'd Capias. Per Mombray, You ſhall not have it for the Smallneſs of the Demand; For it may be that the Box is worth nothing, and therefore it was denied; Quod mirum. Br. Exigent, pl. 62. cites 42 E. 3. 13.

Proceſs of Outlawry does not lie in *Detinue of Charters*. Br. Charters de terre, pl. 7. cites 9 H. 6. 20.——If it be *of Charters of Land* Exigent does not lie, becauſe it *ſounds in the Realty Contra of other Writings*. Br. Charters de terre, pl. 29. cites 8 H. 6. 29.——S. P. Br. Arbitrement, pl. 2. cites 9 H. 6. 60.——S. P. Br. Proceſs, pl. 66. cites 21 H. 6. 42. And ſays nota, that the Charters and Writings were put *all in one and the ſame Writ*, and there Exigent was awarded; Quod nota.——*But* if the Writ had been *of Charters only*, then Exigent ſhould not have iſſued; For this touches Franktenement; Quod nota Diverſity. Br. Exigent, pl. 27. cites S. C.——Br. Attorney, pl. 43. cites S. C.

Detinue of a Box with Charters and Muniments, who came by Exigent, and the *Plaintiff counted in Special of a Charter, by which J. enfeoffed his Father* &c. and now becauſe 'tis of Charters of Land, therefore Exigent ought not to have iſſued; but this does not appear before the Count, by which it was taken *miſcontinued*, but *not diſcontinued*, and the *Defendant* appear'd and *pleaded as if he had not come by Exigent, by which he pleaded in Bar*. Br. Exigent, pl. 26. cites 8 H. 6. 29.

D. 223. a. pl. 24 Paſch. 5 Eliz. Proctor's Caſe ſays, that in that Caſe the Matter was well debated, whether Proceſs of Outlawry lies in Writ of Detinue of Boxes with Charters, Writings and Muniments, and it ſeem'd that it did not. Lambert v. Proctor.—— But the Reporter ſays, ſee many Books thereof in the Time of H. 6.

Proceſs of Outlawry lies in Detinue. Co. Litt. 128. b.——It was given in Detinue by the Statute of 25 E. 3. cap. 17.

7. Capias lies not in *Pleg' Acquietand'*. Quære at this Day by the Statute of 24 *H.* 8. which gives Proceſs of Outlawry in Writ of Covenant; for it ſeems that *this Action is Covenant in its Nature*. Br. Exigent, pl. 63. cites 43 E. 3. 1.

8. In *Aſſiſe*, if the *Diſſeiſin* be *found with Force*, the Court ſhall award Capias pro Fine, and upon this Exigent. Br. Exigent, pl. 16. cites 7 H. 4. 39, 40.

S. P. per Herle. Br. Exigent, pl. 41. cites 9 Aſſ. 1.

9. The *Plaintiff* in Replevin *has the Beaſts of the Defendant in Withernam, and was compell'd to gage Deliverance thereof after Iſſue*, and *Writ awarded againſt the Plaintiff to deliver them*, and the *Sheriff return'd Averia Elongata*; by which the *Defendant had other Withernam* againſt the Plaintiff, and the *Sheriff return'd* it *Nihil*, by which 3 Capias's iſſued, and thereupon Exigent. And ſo ſee that the *Plaintiff* may be *outlaw'd in his own Suit*. Quod nota. Br. Replevin, pl. 18. cites 11 H. 4. 10.

Br. Proceſs, pl. 34. cites S. C.—— Br. Utlagary, pl. 64. cites S. C.—Br. Exigent, pl. 17. cites S. C.

10. *Juſticies* was *removed* out of the Country *by Pone*, and it *was for Debt*, and the *Sheriff return'd the Defendant Nihil*, and the Plaintiff pray'd Capias. And the Opinion was that he ſhall not have Capias; for the Statute gives Capias in Writ of Debt, which is *intended Original*, and *Juſticies is only Commiſſion to hold Plea in the County above* 40 *s.* Br. Exigent, pl. 57. cites 3 H. 6. 54, 55.

11. It was doubted whether Proceſs of Outlawry lies *in Action upon the Statute of Liveries*; and per Babbington, in Action given by Statute no other Proceſs lies, but ſuch as is given by the Statute. But *where Action which was at the Common Law is given De Novo*, as Debt againſt Executors, or Treſpaſs by Executors de bonis aſportat' in Vita Teſtat' &c. ſuch Proceſs lies as was at the Common Law before. Br. Exigent, pl. 25. cites 8 H. 6. 9.

2 Hawk. Pl. C. 303. cap. 27. S. 114. ſays it ſeems agreed that it lies not on any *Action on a Statute* unleſs it be given by ſuch Statute, either expreſsly, as in the Caſe of a *Præmunire*, and many other Caſes; or impliedly, as where a Recovery is given by an Action wherein ſuch Proceſs lay before, and agreeably hereto it has been adjudg'd, that it lies not in an Action on the Statutes *of Liveries*, or of *Maintenance*, nor in a *Decies tantum*. But ſays, it ſeems to be holden in the Year-Book, 8 H. 6. that it lies on all *Indictments on Statutes*; but the contrary is adjudg'd in 22 Ed. 4. as to the Statutes againſt *foreſtalling*; and it is there laid down as a general Rule, That it lies *not on an Indictment* any more than in an Action on a Statute, *unleſs* it be *expreſsly or impliedly given by ſuch Statute*.

Br. Exigent, pl. 46. cites 5 E. 4. 4.

12. It does not lie in *Conſpiracy*; per Martin; but ſeveral denied it. Br. Exigent, pl. 25. cites 8 H. 6. 9.

contra, That it lies upon Indictment of Conſpiracy, and this by the Statute; by ſome.——Br. Exigent, pl. 28. cites 22 H. 6. 7. That it does lie; but Brooke makes a Quære thereof, and ſays ſee the Statute and Nat. Brev.——Br. Champerty, pl. 5. cites S. C. and 21 H. 6. 7. That it was ſaid that Proceſs of Outlawry lies in Conſpiracy.——2 Hawk. Pl. C. 302. cap. 27. S. 113. ſays it ſeems probable that it lies on an Indictment of Conſpiracy, *Deceit*, or any other *Crime of a higher Nature than a Treſpaſs, with Force and Arms*, but *not on any Indictment for a Crime of inferior Nature.*

It was preſented before the Coroner,

13. Upon *Preſentment or Indictment for the King*, it is agreed that Proceſs of Outlawry lies. Br. Exigent, pl. 25. cites 8 H. 6. 9.

That F. was Felo de ſe, and that J. S. had certain Goods of F. in his Poſſeſſion. Upon this being certified into B. R. Proceſs iſſued againſt J. S. till he was outlaw'd. It was doubted at firſt, if Proceſs of Outlawry lay upon ſuch Preſentment; but Ive, a Clerk of the Crown-Office, affirm'd that it did; and ſaid he could ſhew 500 Precedents to that Purpoſe. 2 Le. 200. pl. 251. Mich. 26 Eliz. B. R. French's Caſe.

S. P. Br. Exigent, pl. 59. cites S. C.

14. It was agreed that Proceſs of Outlawry lies not in *Maintenance*. Br. Maintenance, pl. 11. cites 8 H. 6. 36, 37.

per Martin, Strange, and Cotteſmore.——S. P. Br. Brief, pl. 403. cites 11 H. 6. 11.——S. P. Br. Error, pl. 185. cites 22 E. 4. 11. Per Fairfax.——It was moved, That Proceſs of Outlawry lay not in Maintenance; but upon View of the Statute Vaviſor ſaid that the Statute, and the Declaration of the Statute, gives Proceſs of Outlawry in this Action. 9 H. 7. 21. b. pl. 17.——S. P. Br. Proceſs, pl. 110. cites S. C.——Br. Exigent, pl. 45. cites S. C.——Br. Exigent, pl. 28. cites 22 H. 6. 7. That it does lie; but Brooke makes a Quære thereof, and ſays ſee the Statute and Nat. Brev.——Br. Champerty, pl. 5. cites S. C. and 21 H. 6. 7. That it was ſaid that Proceſs of Outlawry lies in Maintenance.—See the Note to pl. 11.

15. A Man ſhall not have Exigent in *Præcipe quod reddat*, unleſs three Writs are return'd ſerved, viz. three Capias's, nor Recovery *upon Voucher againſt the Tenant*, unleſs three Writs are awarded againſt the Vouchee, where he is return'd nihil; per Paſton J. Br. Exigent, pl. 38. cites 14 H. 6. 21.

S. P. Br. Exigent, pl. 4. cites 3 H. 6. 30. —— Where Replevin is removed

16. If *Recordare* or *Pone* is ſued *to remove Plaint in Replevin out of a baſe Court into Bank*, the Writ is good, tho' it has no Vill nor Addition of the Defendant; for the Writ is warranted by the Plaint, and ſhall agree with the Plaint, and Exigent ſhall go upon it; per June & Newton. Br. Exigent, pl. 39. cites 14 H. 6. 21.

into Bank which was in the County by Plaint, there lies Capias; For the *Statute thereof ſays in taking of Beaſts* &c. And it *is taking of Beaſts, be it by Plaint or by Writ*; Per Martin and Cockain; but contra per Babbington. Br. Exigent, pl. 5. cites 3 H. 6. 54, 55.——Ibid. pl. 57. cites S. C.

Proceſs of Outlawry lies in *Replevin*, and the King may have a Fine; *But* this is *not* by Common Law nor *upon the Original, but* the Statute of 25 E. 3. cap. 17. gives the Exigent, and that is *upon the Pluries return'd*; For the Original is Vicontiel, and is determined; And the Words of the Statute of H. 5. are "In every Original in Actions perſonal, whereon Proceſs of Exigent lies &c." and that Statute is conſtrued ſtrictly. And here it muſt be ſuch an Original as the Court proceeds upon, and not ſuch as is determin'd; for the Court does not proceed upon that; and therefore in *Homine replegiando*, the Original Replevin being Vicontiel, the Court proceeds upon the Pluries, and conſequently the firſt Replevin needs no Addition within the Statute, and where the 1ſt has none, the 2d muſt not vary; Per Cur. 1 Salk. 5. pl. 13. Mich. 2 Annæ B. R. Earl of Banbury v. Wood.——6 Mod. 84. S. C. accordingly.

S. P. per Martin. Br. Exigent, pl. 25. cites 8 H. 6. 9.

17. Outlawry does not lie in *Decies tantum*. Br. Brief, pl. 439. cites 21 H. 6. 54.

——Br. Additions, pl. 36. cites S. C. per Moile.——See the Note to pl. 11.

Br. Champerty, pl. 5. cites S. C. and 21 H. 6. 7.

18. In *Champerty*, Proceſs of Outlawry lies not. Br. Exigent, pl. 28. cites 22 H. 6. 7.

S. P. Br. Proceſs, pl. 16. cites 35

19. In *Writ of Covenant* the Proceſs is only Diſtreſs Infinite by the Common Law, and the ſame here, but lately it is meſne Proceſs of Outlawry

lawry in Writ *of Annuity*; and in Writ of *Covenant by the Statute* 23 *H.* 8. *cap.* 14. and ſee the Abridgment of Statutes tit. Proceſs, that Proceſs of Outlawry lies in Action upon the * *Caſe* lately *by the Statute* 19 *H.* 7. *cap.* 9. and by the ſaid Statute of 23 H. 8. 14. Proceſs of Outlawry is given *in* † *Treſpaſs upon the Statute* 5 *R.* 2. ubi ingreſſus &c. For *at Common Law* Proceſs of Outlawry lay only in *Treſpaſs quare vi & armis*, and in Caſe of *Felony*; but now it is given by diverſe Statutes in *Debt*, *Detinue*, *Account*, and other Actions perſonal. Br. Exigent, pl. 29. cites 22 H. 6. 13. H. 6. 6.—Co. Litt. 128. b.—* S. P. Yelv. 158. in Caſe of Tuthill v. Milton.—But not where the Action is out of an Inferior Court; for 19 H. 7. 9. extends to Courts at Weſtminſter only. Sid. 248. pl. 15. Paſch. 17 Car. 2. B. R. Rogers v. Marſhal.——Ibid. 267. pl. 7. S. C.——Raym. 128. S. C.——19 H. 7. cap. 9. does not extend to the Marſhal's Court. Keb. 890 pl. 54. Paſch. 17 Car. 2. B. R. S. C.

† S. P. Br. Exigent, pl. 35. cites 37 H. 6. 23.——S. P. 2 Hawk. Pl. C. 303. cap. 27. S. 114.

20. In Writ of *Forcible Entry upon the Statute* 8 *H.* 6. Proceſs of Outlawry lies, and therefore ought to have Addition; Quod nota bene. Br. Exigent, pl. 35. cites 37 H. 6. 23. S. P. admitted per Cur. Keb. 563. pl. 6. Mich. 15 Car. 2.

B. R. The King v. Challoner.——S. P. becauſe the Statute expreſsly gives a Recovery by ſuch Writ and ſuch Proceſs lies in it by the Common Law. 2 Hawk. Pl. C. 303. cap. 27. S. 114.

21. In *Præmunire* a Man may have Proceſs by Proclamation only, and may have *Exigent if he will.* Br. Proceſs, pl. 80. cites 9 E. 4. 2. S. P. Br. Exigent, pl. 33. cites 9 E. 4. 2. 3.— See the Note to pl. 11.

22. In *Debt* a Man may have Capias Infinite, and may have Exigent, if he will. Br. Proceſs, pl. 80. cites 9 E. 4. 2. S. P. Br. Exigent, pl. 33. cites 9 E. 4. 2. 3.——Co. Litt. 128. b.——Proceſs of Outlawry was given in Debt by the Statute of 25 E. 3. cap. 17.

23. Utlawry *upon Indictment of Foreſtalling.* It was revers'd by Error, becauſe ſuch Proceſs lies not upon ſuch Matter of Foreſtalling. Br. Error, pl. 185. cites 22 E. 4. 11. Br. Exigent, pl. 51. cites S. C.—— S. P. Jenk. 123. pl. 48.

For it is not Vi & Armis, but Contra Pacem only.——See the Note to pl. 11.

(B) *Forfeiture.* Forfeiture *in Reſpect of the Perſon Outlaw'd.*

1. IF the Executor recovers in Account againſt the Receiver of Teſtator, and after is Outlaw'd, **yet he ſhall not forfeit this Debt; for it continues the Debt of the Teſtator, and is only put in certain by the Judgment.** 20 H. 6. 8. b.

2. The Father ſhall have the *Ward of* his *Son or Daughter*, and Heir, whether the Land be held of the King, or not; and if he be outlaw'd, yet he ſhall not forfeit the Ward; For he cannot compel the Heir to marry, as the Lord may. Nor *Guardian in Socage* cannot compel him; therefore it is no Chattle in them, therefore an Outlawry in them ſhall not loſe them the Ward. *But* if *Guardian in Chivalry* in Right or in Fact be outlaw'd, he ſhall forfeit the Ward. Note the Diverſity; Per Littleton. Br. Garde, pl. 6. cites 33 H. 6. 55.

3. A Feme *Executrix married*, and then *she and her Husband bring* an Action of *Debt*, *as Executrix*, and have Judgment. But it was *pleaded in Bar that he was outlaw'd*, and pray'd a Stay of Judgment. The Court agreed that in this Case the Husband did not forfeit the Goods which the Wife had as Executrix, because he had them only in her Right, as Executrix. 3 Bulst. 210. 211. Trin. 14 Jac. Hix v. Harrison.

4. *Executor brings an Action for Monies had, and receiv'd to the Use of Testator.* The Defendant *pleads Outlawry of the Testator*; Per Treby Ch. J. the Debt is forfeited to the King, and vested in him, notwithstanding the Death of Testator. 2 Lutw. 1601. 1604. Mich. 10 W. 3. Powis v. Williams.

* [C] Forfeiture. *In Personal Actions.*

* There is no Letter to this, nor to any of the following Divisions in Roll.——

1. **If a Man be Outlaw'd in a Personal Action, he shall forfeit his** † Goods. 11 H. 6. 17. 37.

See Standf. Prerog. 44. b. &c [cap. 16.——† Fin. Law 8vo. 351. S.P.——But shall *not* forfeit his *Lands*, but only the Profits thereof. Br. Forfeiture de Terres, pl. 30. cites 9 H. 6. 20.——Ibid. pl. 75. cites S. C.——Br. Utlagary, pl. 59. cites S. C.——But contra in 3 E. 3. For in *Dower* the Feme shall not recover Damages, because the Baron was outlaw'd for Trespass; so that against her the Franktenement was void. But Brook makes a Quære thereof; for it is void in Respect of the Profits, but is not void in Respect of the Franktenement. Nevertheless the Damages follow the Profits, as it seems. Br. Forfeitures de Terre, pl. 30. cites 9 H. 6. 20.

* S. P. And may seise *Ward, and all Chattles Personal.*

2. **If Tenant for** * Term of Years **be outlaw'd, the Term shall be forfeited to the King, and he may seise it, and** plow at his Pleasure. 9 H. 6. 21.

Br. Utlagary, pl. 59. cites 9 H. 6. 20.

Bond given *to a Feme sole* is not

3. But **if** Feme Covert **possess'd of a Term** be waived, **the King shall not have the** Term. 9 H. 6. 52. b.

forfeited by the Outlawry of the Husband. Arg. 10 Mod. 165. in the Case of Miles v. Williams, cites Noy 6—The constant Practice in Outlawry is to seize all the Debts due to the Wife; Per Parker Ch. J. 10 Mod. 245. Trin. 13 Ann. B. R. in Case of Miles and Williams.

S.P. Br. Forfeiture de Terres,

4. **If an** Executor **be outlaw'd, he shall not forfeit the** Goods of the Testator. 11 H. 6. 17. 37.

pl. 71. cites 33 H. 6. 31.——S. P. Per Williams J. 3 Bulst. 6. cites 33 H. 6. 31. 21 E. 4. 50. 10 E. 4. 1.——S. P. Per Coke Ch. J. 3 Bulst. 24. cites Stamf. fol. 188. (F)

5 Rep. 116. b. in Oland's Case, S. P.

5. **If** Tenant at Will **sows, and after is outlaw'd, the King shall have** the Corn. 9 H. 6. 21.

Cro. E. 850. pl. 6. S. C. and the S. P. admitted per Cur.

6. **If a Man be outlaw'd in a Personal Action, he shall not forfeit** Debts due to him upon Contracts. M. 43. 44 El. B. R. between *Shaw and Cutteresse*, **Per Curiam.**

Ibid. 851.——S. P. admitted per Cur. Cro. E. 203. Mich. 32 & 33 Eliz. B. R. in Case of Smith v. Bernard.—— Ow. 22. Mich. 37 & 38 Eliz. S. P. in Bernard's Case, S. C. And that after the Outlawry pardon'd, the Plaintiff may have an Action for them again.——S. P. admitted Cro. E. 575. pl. 21. Trin. 39 Eliz. C. B. in Case of Wolley v. Bradwell.——3 Le. 205 pl. 261. Trin. 30 Eliz. B. R. in Case of Markham v. Pitts S. P.—— S. P. and so of Debt for Trespass. Br. Utlagary, pl. 54. cites 16 E. 4. 4.——S. P. accordingly, Theloal's Dig. of Writs, lib. 1. cap. 15. S. 13. cites 50 Ass. 1 and Pasch. 16 E. 4. 4 and 49 E. 3. 5.

If a Man be *Outlaw'd of Felony, and J. S was bound to him by Specialty* in a certain Debt, the King shall have this Debt. Br. Forfeiture de terres, pl. 47. cites 50 Ass. 1.——Br. Chose en Action, pl. 9. cites

9. cites S. C —— Br. Forfeiture de terres, pl. 74. cites 49 E. 3. 5. S. P. —— *But* if the Debt was *without Specialty, e contra*; for the Party may wage his Law againſt his Debtee, but not againſt the King, and therefore the King ſhall not have the Debt; for the Act of the Offender ſhall not prejudice the Debtor, and the King ſhall not have this Debt which is without Specialty, tho' the Matter be found by Office for the King for the Reaſon aforeſaid. Br. Forfeiture de Terres, pl. 47. cites 50 Aſſ. 1. —— Br. Choſe en Action, pl. 9. cites S. C. —— Br. Forfeiture de Terres, pl. 74. cites 49 E. 3. 5. S. P.

But it was held 4 Rep. 92. 95. a. Trin. 44 Eliz. B. R. in **Slade's** Caſe, that Debts or Duties by ſimple Contract may be forfeited to the King by Outlawry, contrary to the ſudden Opinions in 49 E. 3. 5. 50 Aſſ. 1. 16 E. 4. 1. and 9 Eliz. 262. [D. 262. pl. 31.] —— S. P. by Baron Clark. Lane, 23. Mich. 4 Jac. in the Exchequer, in Bates's Caſe.

7. **If the** Recoveror of Damages **be Outlaw'd in a Perſonal Action, the King ſhall have them, and ſhall have** Execution upon the Judgment. **M. 5 Jac. in the Exchequer, between** *York and Allen*, **Per Curiam.** Fol. 807. Lane 20. S. C. accordingly,

—S. P. by all the Juſtices. Le. 64. pl. 84. Mich. 29 Eliz. C. B. in the Caſe of Beverly v. Cornwall. And the *Defendant may plead it in Bar to a Scire facias by the Plaintiff after Imparlance.* Jo. 239. Paſch. 7 Car. B. R. Wortley v. Savil.

Damages which he is *to recover* as by Reaſon of Treſpaſs done to his Land, Battery, Falſe Impriſonment &c. are not forfeited to the King. Fin. Law, 8vo. 351. cites 28 E. 3. 92. Stamf. Prærog. 188. b. —S. P. Br. Forfeitu re de terre, pl. 107. cites 24 E. 3. 56 and 4 H. 7. 17. accordingly.—But Damages *recover'd* are forfeited. Lane 20. York v. Allen. —— S. P. per Hyde Ch. J. Cro. C. 166. Mich. 5 Car. B. R. in Caſe of Benſon v. Flower.

Damages for not repairing according to Covenant are not forfeited by the Outlawry. 3 Salk. 275. pl. 17. Anon. —— 2 Lutw. 1513. Hill. 12 W. 3. Clerk v. Scroggs, S. C.

8. **If the** Conuſee of a Statute **in Nature of Statute Staple,** takes the Conuſor in Execution **upon the Statute,** and after is Outlaw'd **in a Perſonal Action,** the Debt **ſhall be forfeited to the King; ſo that the King may diſcharge the Conuſor out of Execution; for the being of his Body in Execution, is not any Satisfaction, but only a Means to come at it. P. 11 Car. B. R. between** *North and Fines*, **Per Curiam in Writ of Error. Intratur Mich. 11 Car. Rot. 520. in Action upon the Caſe for procuring the Diſcharge from the King.** Cro. J. 513. in the Caſe of the King v. the Executors of Daccombe in the Exchequer. Mich. 16 Jac. B. R. cites S. P. to have been adjudg'd 24 Eliz. in Birket's Caſe.

9. **If** A. takes an Obligation in the Name of B. **in which C. is bound to B. but it is taken to B. only** in Truſt **for A. and** after A. is Outlaw'd **in a Perſonal Action,** this Truſt **ſhall be forfeited to the King,** and he **ſhall have the Benefit of the Obligation. M. 24. 25 El. in the Exchequer,** *Morgan's* **Caſe reſolv'd and decreed accordingly. M. 16 Jac. in the Exchequer in the** *Lord of Somerſet's* **Caſe, cited by the Lord Chief Baron.**

10. **If a Man** be to preſent to a Church **by Voidance of it, and after is outlaw'd in a Perſonal Action, he ſhall forfeit it to the King, and he ſhall have a Quare Impedit. 8 R. 2. Quare Impedit,** 200.

11. **If** A. poſſeſs'd of a Leaſe for Years, grants it over to B. in Truſt for himſelf, **and after is outlaw'd in a Perſonal Action,** this Truſt **ſhall be forfeited to the King. P. 8 Car. in the Exchequer, between** the *King and Lamot and others.* **Reſolved per Curiam; for there [it is] reſolved, that a Plea of the Purchaſe of the Leaſe of B. without Notice of the Truſt, without Traverſe of the Truſt, was not good.** *But ſee Hardreſs 496.* Cro. J. 513. in Caſe of the King v. the Executors of Daccombe cites it as ſo held 24 Eliz. in Armſtrong's Caſe. ——

Truſt of a Leaſe in Groſs is forfeited on an Outlawry in a Perſonal Action, but not a Leaſe *to attend the Inheritance.* N. Ch. R. 133. 21 Car. 2. in the Exchequer, in Caſe of the Attorney General v. Sir George Sands, admitted, and cites the Earl of Somerſet's Caſe, Hob. Dacomb's Caſe. 2 Cro. Babington's Caſe, and Sir Walter Ralegh's Caſe.

12. *Matters of Account* may be forfeited for Outlawry. Fin. Law, 8vo. 351. cites Aſſ. pl. 5. 28 E. 3. 92.——Hard. 490. Arg. cites it as adjudg'd Hill. 30 Eliz. B. R.

13. A Man has a *Defeaſance upon a Statute Merchant*, and after *is outlaw'd*, and then *gets a Charter of Pardon*, and after *ſues Audita Querela upon the Defeaſance*; and good, notwithſtanding the Outlawry which was in Action Perſonal; for this Suit is only to diſcharge his Land, which Diſcharge cannot be forfeited to the King, nor was the Land by ſuch Outlawry forfeited. Br. Utlagary, pl. 71. cites 29 Aſſ. 47.

14. A Man *outlaw'd in Action Perſonal* ſhall forfeit his *Emblements*; per tot. Cur. Br. Emblements, pl. 21. cites 5 H. 7. 16.

15. By Outlawry *in Action Perſonal*, no *Action Real* ſhall eſcheat; per Walmſley J. Le. 63. pl. 84. Mich. 29 Eliz. C. B. in Caſe of Beverly v. Cornwall.

* See the laſt Note at pl. 6.

16. Debt upon * Contract, *Treſpaſs, Battery, Impriſonment &c.* the King ſhall not have by Outlawry. 3 Le. 205. pl. 261. Trin. 30 Eliz. B. R. Markham v. Pitts.

The Property is immediately veſted in the King; Per Holt Ch. J.

17. If a Man outlaw'd *purchaſes Goods*, or takes an *Obligation in Truſt*, the King ſhall have them; agreed by Counſel. Lane. 45. Paſch. 7 Jac. in Caſe of the King v. the Earl of Nottingham.

Carth. 442. in Caſe of Britton v. Cole.

18. *Goods mortgaged*, if not redeem'd, ſhall not be forfeited for Outlawry; per Williams J. Bulſt. 29. Trin. 8 Jac. in Caſe of Ratcliffe v. Davis.——Per Doderidge J. 3 Bulſt. 17. in Caſe of Waller v. Hanger, the King ſhall not have the Goods before the Party is ſatisfied.

Hutt. 53. S. P. in S. C.

19. A. makes *Feoffment on Condition* to B. that A. *pay* 100 *l.* to B. and his Heirs or Executors, and B. is outlaw'd, and A. pays the Money to B.'s Executors, as well he may, the Executors, and not the King, ſhall have the Money; per Hutton J. Winch. 58. Hill. 20 Jac. C. B. in Caſe of Bulloigne v. Jerviſe.

20. Quære, if by Outlawry of a Legatee of a Thing certain, before the Executor's Aſſent, ſuch *ſpecifick Legacy* be forfeited? Went. Off. Executors, 28. and ſays it cannot be given or granted before ſuch Aſſent.

21. Outlawry *upon an Information for a Miſdemeanor* is a Forfeiture of Goods and Chattels. 2 Salk. 494. pl. 1. 1 W. & M. in B. R. The King &c. v. Tippin.

22. When *Goods* are *ſold for as much as they are worth*, the Value of them may be aſcertain'd by Averment, and ſuch a Debt may be forfeited for Outlawry; per Powell J. Cumb. 426. Trin. 9 W. 3. B. R. in Caſe of Hayward v. Davenport.

23. A *Foreigner, that never was in England, was outlaw'd* in an Action on ſeveral *Promiſes* for Goods ſold and deliver'd; and upon a Special Cap. Utl. a Ship and other Effects belonging to the Foreigner were *ſeiſed* as forfeited. But ſee Carth. 459. Mich. 10 W. 3. B. R. Matthews v. Erbo.

[D] [Forfeiture of Land &c.] *of Franktenement.*

1. IF a Man be outlaw'd in a Perſonal Action, he ſhall not forfeit his Land, whereof he has an Eſtate of Franktenement. * 9 H. 6. 20. b. 21 H. 7. 7. 9 H. 6. 52. b.

* Br. Patents, pl. 3. cites S. C. — Br. Livery, pl. 5. cites S. C. —— Br. Office devant &c. pl. 2. cites S. C. —— Br. Iſſues return'd, pl 10. cites S. C.

2. But he who is outlaw'd ſhall forfeit the Profits of his Land of Franktenement to the King. 9 H. 6. 20. b. 21 H. 7. 7.

3. If a Man leaſes at Will, and Leſſee ſows, and after Leſſor is outlaw'd, the King ſhall not have the Emblements, but only the Rent; For he ſhall not have more than the Leſſor himſelf ſhould have. 9 H. 6. 21. Co. 5. *Oland* 116. * 8.

This was not the principal Point in Oland's Caſe, but is an Obiter Opinion there, and is not mention'd in any of the other Reports of the Caſe as I have obſerv'd. —— * This ſeems miſprinted for (b) in this and the next Plea.

4. But if the Tenant at Will had not ſown, then by the Outlawry of the Leſſor the King ſhould have the Profits, becauſe by the Outlawry the Will is determined. 9 H. 6. 21. Co. 5. *Oland* 116. 8. [b]

5. If a Man be outlaw'd in a Perſonal Action, the King ſhall preſent to his Churches when they void, tho' he has a Franktenement or Inheritance in them. 22 Aſſ. 33. admitted.

6. A Man ſhall forfeit his Land by Outlawry *of Felony*. Br. Forfeiture de Terres, pl. 75. cites 9 H. 6. 20.

Br. Office devant &c. pl. 2. cites S. C.—Br. Livery, pl. 5. cites S. C. —— S. P. For the King ſhall have the Eſcheat, or Annum diem & Vaſtum. Br. Utlagary, pl. 36. cites S. C. and 13 Aſſ. 5.

7. Where the *Tenant* is *in Arrears of Rent* to the Lord, and after the *Lord is outlaw'd*, and then *gets* Charter of *Pardon*, the Lord ſhall not have the Arrears. Per Martin J. But Brook makes a Quære thereof; but ſays they are the Iſſues of the Land which is real, and therefore the Law may be with Martin. Br. Forfeiture de Terres, pl. 73. cites 9 H. 6. 57.

It was agreed by the whole Court, That *Arrearages of Rent reſerv'd upon an Eſtate for Life*, are not forfeited by Outlawry, becauſe they are real, and no Remedy for them but a Diſtreſs; Otherwiſe if upon a Leaſe for Years &c. Het. 164. Hill. 5 Car. C. B. a Nota. —— Litt. Rep. 352. Mich. 6 Car. C. B. the S. P. in the ſame Words.

If *Teſtator leaſes for Life* rendring Rent, and the *Rent is Arrear*, and after the Teſtator is outlaw'd, and dies, this ſhall not be forfeited, but his Executors ſhall have the Rent; Per Hutton J. Winch. 58. in Caſe of Bulloigne v. Jerviſe. —— Hutt. 54. S. P. in S. C.

Lord Raym. Rep. 308. Hill. 9 W. 3. in the Caſe of Britton v. Cole, it is ſaid by Holt Ch. J. in delivering the Opinion of the Court, that it is a Doubt whether the Arrears of Iſſues in ſuch Caſe ſhall be charg'd upon the Reverſioner, becauſe the Charge ariſes from the particular Default of the Tenant for Life, and not from any Charge upon the Inheritance, as in the Caſe of Iſſues.

8. An *Abbot* may forfeit the Goods of the Houſe by Outlawry; but e contra of the Lands and Profits thereof; for thoſe are not forfeited by Outlawry. Br. Forfeiture de Terres &c. pl. 59. cites 10 E. 4. 1.

9. If the *Husband* be *outlaw'd* in Treſpaſs &c. the ſame *ſhall not ouſt the Wife of her Dower*; for by ſuch Outlawry he ſhall not forfeit Freehold or Inheritance. Perk. S. 388.

10. *Lands appointed to be ſold* by the Adminiſtrator of the outlaw'd Perſon who died inteſtate, or Lands *in Mortgage*, are not forfeited. Winch. 58. Hill. 20 Jac. C. B. by Hutton J. in Caſe of Bulloigne v. Jervaſe.

[E] For-

Fol. 808.

[E] Forfeiture in Perſonal Actions. *How the King ſhall take the Profits.*

In post M. S.

Br. Iſſues Return'd, pl. 10. cites S. C —— Br. Utlawry, pl. 36. cites S. C. and 13 Aſſ. 5. accordingly. —— Br. Forfeiture de Terres, pl. 30. cites S. C. and 13 Aſſ. 5. accordingly, upon Outlawry of Treſpaſs. —— Br. Ibid. pl. 105. cites S. C. Per Cur. —— Ibid. pl. 108. S. P. Per tot. Cur. —— Fin. Law 8vo. 351. S. P. —— For Outlawry in Action Perſonal the King ſhall *not ſeiſe, but take the Profits quouſque* &c. Br. Reſeiſer, pl. 1. (bis) cites 9 H. 6. 20. —— Br. Patents, pl. 3. cites S. C.

1. **If a Man be outlaw'd in a perſonal Action, by which the King is entitled to the Profits of his Land of which he has Eſtate of Franktenement, he may take the Profits,** as Rent or Corn, or by Manurance of the Paſture. 9 H. 6. 20. b.

* Br. Forfeiture de Terres, pl. 30. cites S. C. — Br. Office devant &c. pl. 2. cites S. C. —— Br. Iſſues return'd, pl. 10. cites S. C. — Fin. Law 8vo. 351. S. P.

2. **But the King cannot upon ſuch Forfeiture** plow the Land to ſow. * 9 H. 6. 20 b. Curia. 21 H. 7. 7.

3. Nor **can** cut Underwoods nor Trees. 9 H. 6. 21.

Br. Livery, pl. 5. cites S. C —— Br. Office devant, pl. 2. cites S. C.

4. **The King upon ſuch Forfeiture can** * not ſeiſe the Land, **becauſe then if he or his Heir reverſe the Outlawry or purchaſe Charter of Pardon, he ſhall be put to his Livery, which is not Reaſon. 9 H. 6. 20. b. Curia.**

* Unleſs he is *intitled by Office.* Br. Feoffments de Terres, pl. 3. cites 9 H. 6. 20. For the *Land is not forfeited,* but he ſhall take the Profits.

5. **The King by ſuch Forfeiture** has not any Poſſeſſion of the Land. 21 H. 7. 7.

* Br. Feoffment de Terres, pl. 3. S. P. cites 9 H 6. 20.

[5] For **the** Party outlaw'd * may make Feoffment, **and then the King ſhall not have more of the Profits.** 9 H. 6. 21. 21 H. 7. 7. **Curia.**

But otherwiſe where the King is *intitled by Office to ſeiſe*; for there he cannot make Feoffment till after Livery thereof ſued. —If the King has a *Term* by reaſon of an Outlawry *againſt Leſſee of a Term for Years*, and the *Leſſor will make Feoffment*, the Feoffment is void, becauſe of the Poſſeſſion of the King; For none can by any Means put the King out of Poſſeſſion by Matter in Fact; Quod nota. Kelw. 53 b. Trin. 19 H. 7. pl. 12.

* Br. Patents, pl. 3 cites S. C. — Fin. Law 8vo. 351.

6. **The** King cannot grant over ſuch Land **which he has by ſuch Outlawry, but it is void.** * 9 H. 6. 20. b.

7. So **he can** not leaſe **the Land.** 21 H. 7. 7.

S. P. accordingly. —— The King may diſpoſe of the *Land itſelf* of a Perſon outlaw'd. Raym. 17. Trin. 13 Car. 2. B. R. Windſor v. Sevwell, and denied the Book of 21 H. 7. 7. and ſaid that the Courſe of the Exchequer is againſt that Book. —— Le. 33. S. C.

8. But **he may grant to another** to levy the Profits in his Name. 9 H. 6. 20. b.

9. If a Man be outlaw'd, he ſhall *not forfeit his Deer* in his Park. Br. Account, pl. 94. cites 10 H. 7. 6. Per Vaviſor.

10. Where the King has the Profits of any Land, by reaſon of Outlawry in Action Perſonal, he may *juſtify for Damage feaſant, and have Treſpaſs*; for he has Intereſt in the Land. Quod nota. Br. Avowry, pl. 63. cites 15 H. 7. 2.

11. A *Leaſe for Years of an Advowſon in Truſt*, is forfeited by the Outlawry of Ceſty que Truſt. But it was held likewiſe, that the *King cannot have a Quare Impedit or an Ejectment, but a Subpœna only.* Hard. 490. Mich. 20 Car. 2. in the Exchequer, in Caſe of the Attorney General v. Sands, cites it as held Paſch. 12 Car. 2. C. B. in Sir Anthony Anger's Caſe.

[F] In what Caſes the *Forfeiture of one* ſhall be *Forfeiture* alſo *as to another.*

1. IF 2 Conuſees of a Statute take **by Capias** the Body **of the Conuſor** in Execution, and **after** one **of the Conuſees** is outlaw'd **in a perſonal Action, this ſhall be a Forfeiture of the Debt againſt both; ſo that the King may put the Conuſor out of Execution at large. P. 11 Car. B. R. between** *North and Fines*, **per Curiam, in Writ of Error upon a Judgment in Bank in Action of Caſe, whereof the Conſideration was to procure a Diſcharge from the King to ſet him at large out of Execution, in the Caſe aforeſaid. Mich. 11 Car. Rot. 520.**

2. Holt Ch. J. in delivering the Opinion of the Court, in the Caſe of **Britton v. Cole,** Ld. Raym. Rep. 308. cites Lane. 96. and 2 Roll's Abr. 159. [Prærogative (I)] pl. 4. which he ſays is obſcurely reported, viz. That the *Cattle of one Tenant in common* ſhall not be taken upon a Levari Facias upon the Outlawry of the other; *if the Eſtate of the other Tenant in common be particularly found*, it is good Law: For if a Levari Facias be to levy the Profits of a Moiety, the Cattle of the other Tenant in common there levant and couchant cannot be taken; For the Tenant in common, which was outlaw'd, can only forfeit the Pernancy of the Profits of his Moiety. But that Matter of the Tenancy in common *muſt be intended to be found upon the Inquiſition*, otherwiſe it is not Law; For if *A. hath Land in which B. has Common of Paſture* for Sheep, *A. is outlaw'd*, and the *Title of B. is not found upon the Inquiſition*, his Cattle may be taken upon a Levari Facias, until he hath pleaded his Title in the Exchequer, and hath it allow'd. Contra if his Title had been found upon the Inquiſition. In 2 Ro. Abr. 159. there are ſome Caſes which ſeem to the contrary; but they are not intelligible. As the Caſe there 159. *pl.* 2, 3. **Stafford v. Bateman** (the ſame Caſe, 3 Cro. 431.) which ſays, That upon a Levari Facias the Sheriff may ſeiſe, but not ſell, which is a Contradiction; for every Levari Facias requires a Sale as well as a Seiſure; therefore the Book is falſe printed, and it ought to *be a Fieri Facias*, as 3 Cro. is. Now no Levari iſſues for a Debt againſt the Perſon, but where the Land is Debtor. Ld. Raym. Rep. 308. Hill. 9 W. 3. in Caſe of Britton v. Cole.

[G] *Who ſhall have* the Forfeiture.

1. IF A. leaſes to B. a Coal-Mine within the County Palatine of Durham for Years, rendring Rent, **and after the** Rent being Arrear, **A. is outlaw'd in an Action of Debt in Banco, and the** Biſhop of Durham **is to have the Chattels of outlaw'd Men within his County, yet it ſeems, becauſe** this Debt follows the Perſon, **that the** King ſhall have the Arrearages, and not the Biſhop. **Dubitatur M. 8 Jac.** *Bromley's Caſe.*

(H) Forfeiture. *How much* ſhall be forfeited.

1. A. Has a *Recognizance* or *Bond*, and after is outlaw'd on Attaint, the King ſhall *ſeiſe all the Land of the Conuſor* or Obligor, tho' he himſelf could have had but a Moiety. 5 Rep. 56. Mich. 30 & 31 Eliz. C. B. in Knight's Caſe.

2. A. had recover'd againſt J. S. in an Action for Words, 500 *l. Damages.* Afterwards J. S. and W. S. *purchaſed Land in Fee, and alien'd it to B.* A. was outlaw'd, and ſo his Debt became forfeited to the King. The Queſtion was Whether the King ſhould have the Moiety of the Moiety of A. or the intire Moiety. And it was reſolved, that he ſhould have the entire Moiety, tho' A. ſhould have had but the Moiety of the Moiety. But the Debt coming to the *King*, he *by his Prerogative ſhall have Execution of the intire Moiety*; and it was adjudged accordingly. Cro. J. 513. Mich. 16 Jac. B. R. The King v. Death.

(I) Forfeiture. *Goods of whom* may be taken. *Strangers.*

S. P. per Doderidge J. Roll Rep. 7. in Caſe of Cullom v. Sherman, cites 15 E. 3.

1. IF a *Man* is *bound to two* in an Obligation, *and* the *one is outlaw'd*, the King ſhall have the intire Obligation to himſelf alone. Br. Choſe in Action, pl. 2. cites 19 H. 6. 7.

——See Pl. C. 243. a. S. P. in Caſe of Willion v. Ld. Barkley.

S. P. 3 Bulſt. 210. in Caſe of Hix v. Harriſon.

2. Where a *Feme Executrix takes Baron who is outlaw'd*, the *Goods of the Teſtator* by this ſhall not be forfeited; per Priſot. Br. Forfeiture de Terres, pl. 71. cites 33 H. 6. 31.

3. *So* it is *where the Executor himſelf is outlaw'd*, the Goods of the Teſtator ſhall not be forfeited. Br. Forfeiture de Terres, pl. 71. cites 33 H. 6. 31.

4. *Treſpaſſor takes my Goods, and after is outlaw'd*, theſe Goods are forfeited; per Hobart; and thoſe of the Exchequer wrote for them. Quære if by Information without Office? But it ſeems that the firſt Owner

Owner ſhall have them upon Suit made; for his Right remains. Br. Forfeiture de Terres, pl. 53. cites 6 H. 7. 9.

5. If there be a *Commoner*, or other *Tenant in Common with Defendant*, his Beaſts may be taken on the Land, unleſs the Title of the Commoner or of the Tenant in Common be found by the Inquiſition; and ſo it is of a *Leaſe for Years prior to Outlawry*; for they are bound by the Inquiſition, and ſo is their Title, till they avoid it by *Monſtrans de Droit* in the Exchequer. 1 Salk. 395. Hill. 9 W. 3. B. R. Britton v. Cole.

6. If an Outlaw *makes Feoffment of his Lands after Inquiſition*, the Cattle *of the Feoffee* may be taken for the Iſſues of thoſe Lands, a fortiori the Cattle of a wrong Doer, who has no Pretence of a Title; Per Holt Ch. J. Carth. 442. in Caſe of Britton v. Cole. 12 Mod 176. S. C. & P.

(K) Forfeiture. Strangers. *How far the Title &c. of Strangers are affected* by it.

1. IF the King has a Term by reaſon of an Outlawry againſt *Leſſee of a Term for Years*, and the Leſſor will make Feoffment, the Feoffment is void, becauſe of the Poſſeſſion of the King; For none can by any Means put the King out of Poſſeſſion by Matter in Fact; Quod nota. Kelw. 53. b. Trin. 19 H. 7. pl. 12.

2. If *Diſſeiſſee* be outlaw'd, he ſhall not forfeit the *Profits* of the Land. Arg. Goldsb. 55. pl. 8. in Beverley's Caſe.

3. If a *Copyholder* be outlaw'd, the King ſhall have the Profits of his Copyhold Lands, and the Lord has not any Remedy for his Rent. Arg. Le. 99. in Caſe of Suliard v. Everard. G. Treat. of Tenures 227. cites Co. Comp. Cop. 150. 164. that Lord Coke ſays that if a Copyholder be outlaw'd, the Lord upon Preſentment ſhall have the Profits of the Lands; but that it is ſaid Lex Cuſto 210. that if a Copyholder be outlaw'd in a Perſonal Action, it is no Forfeiture of his Copyhold, but the King ſhall have the Profits. But the Lord Ch. B. ſays, Quære of this; for then how can the Lord have his Services paid him?

4. A. acknowleged a *Recognizance* to B. and after to C. At the Suit of B. the Lands of A. were *extended at 20 l. per Ann.* Afterwards C was outlaw'd, by which the Recognizance came to the King, and Proceſs of Extent iſſued for him. It was found that A. had nothing but the Land extended by B. and that it was worth 40 *l. per Ann. more* than the 20 l. it was extended at. Scire Facias was awarded againſt B. to anſwer the *Surpluſage* above the 20 l. per Ann. B. pleaded his firſt Extent by Inquiſition, and that he was not yet ſatisfied. Judgment for B. for the Conuſee is to take his Chance. But Clerke the 2d Baron held ſtrongly the contrary. Cro. E. 265, 266. pl. 8. Mich. 33 & 34 Eliz. B. R. the Queen v. Wall and Green.

5. The King ſhall not have the Profits of the Land on an Outlawry againſt the *Ceſty que Uſe*, or *Ceſty que Truſt*. Sty. 41. per Roll Ch. J. in Caſe of the King v. Holland. But if Ceſty que Truſt, or Ceſty que Uſe of a Bond be outlaw'd, the King ſhall have the Bond. Cro. J. 513. in Caſe of the King v. the Executors of Sir J. Daccomb.

6. *A. recover'd a Judgment againſt B.* After Judgment *B. was outlaw'd at the Suit of J. S.* and *his Lands ſeiſed into the Hands of the Crown.* Afterwards *A. took out an Elegit.* The whole Court were of Opinion that the Lands being ſeiſed by the Crown before the ſuing out of the Elegit, there could

could not be an Amoveas Manum awarded, altho' the Judgment was prior to the Outlawry. Show. Parl. Caſes, 75. in Caſe of the King v. Baden, cites Hard. 106. [in the Exchequer, Trin.] 1657. Maſters v. Whitfield.

7. A. was outlaw'd at the Suit of B. and *Lands* in his Poſſeſſion were extended. *J. S. claim'd Title* to them, *brought Ejectment, and pleaded to the Inquiſition.* An Injunction was pray'd for the King to ſtay Proceedings at Law, but it was denied; For tho' a Perſon outlaw'd cannot after Extent *prevent* or avoid the *King's Title* by any Alienation as appears 11 H. 7. yet the Outlawry gives no ſuch Privilege to the Poſſeſſion of a *Diſſeiſor*, but that the *Diſſeiſſee* may enter and bring his *Ejectment*; For by the Outlawry the King has a Title only to the Profits, and no Intereſt in the Land. But it was order'd that the Ejectment ſhould be brought in this Court, becauſe the King's Revenue was concern'd. Hard. 176. Hill. 12 & 13 Car 2. in the Exchequer, Hamond's Caſe.

8. If there be two *Tenants in Common of a Rectory for Years*, and one is outlaw'd, yet the other upon ſhewing of the Matter may have Debt for the Moiety. Sid. 49. pl. 11. Mich. 13 Car 2. B. R. in Caſe of Cole v. Banbury.

9. If *Tenant for Life* is outlaw'd, and dies, it may be a Queſtion whether the *Iſſues Arrear* can be extended on the Reverſioner; Per Holt Ch. J. Carth. 442. Britton v. Cole.

Affirm'd in Dom Proc. Parl Caſes 72. S.C.

10. A. *owes Money to B. on a Judgment*, and *to C. on a Bond.* A. is *outlaw'd at the Suit of the Obligee*, and his Lands ſeiſed on the Outlawry; And the Queſtion was, Whether the Conuſee of the Judgment could extend theſe Lands? And it was held the Outlawry ſhould be preferr'd, and that the King's Hands ſhould not be amoved, unleſs the Conuſee could *ſhew Covin*, and practiſe between the Obligor and the Obligee. 2 Salk. 495. pl. 2. Mich. 5 W. & M. Attorney General v. Baden.

(L) *Actions forfeited.* What. *And what the King may have*, in Reſpect of the Outlaw.

1. A Man was *bound in a Recognizance, and had a Defeaſance*, and *Execution is ſued* againſt him, and *he pleads the Defeaſance*; and notwithſtanding this *Execution is awarded erroneouſly*, and after the *Conuſor is Outlaw'd in an Action Perſonal*, and then *gets a Pardon*, and *ſues a Writ of Error*, and well notwithſtanding the Outlawry; for he is not to recover any thing, but to diſcharge his Land by this Suit, which *Diſcharge*, nor the Land, was not forfeited to the King by Outlawry in Action Perſonal; quod nota. And therefore the Title and Cauſe to have Writ of Error was not forfeited. Br. Forfeiture de Terres, pl. 72. cites 29 Aſſ. 47.

2. It was awarded that he who is *outlaw'd for Treſpaſs*, and after *gets a Pardon*, *ſhall have* Action of *Treſpaſs of Battery* or Falſe Impriſonment *done before the Outlawry*, and ſhall recover his Damages tax'd by the Court; for otherwiſe the Tort ſhall be diſpuniſh'd. Br. Forfeiture de Terres, pl. 38. cites 29 Aſſ. 61.

The King *cannot have Action* of the Goods of him who is outlaw'd or attainted *by the Common Law before* that ſome Man has *ſeiſed* them to the Uſe of the King,

3. *For* the King may have *Debt or Action of Goods carried away* from him who is outlaw'd, but he ſhall *not* have Action *for the Tort.* Br. Forfeiture de Terres, pl. 38. cites 29 Aſſ. 61.

or that it be found by Matter of Record; and if the King may have Action, yet he has Election in what Court he will ſue, whether in Chancery or Common Law. Br. Prerogative, pl. 45. cites 39 H. 6. 26. Per Greenfield.

4. The King ſhall have Action of *Detinue of the Obligation* of him who is Outlaw'd; Per Brian, quod non negatur. Br. Forfeiture de Terres, pl. 107. cites 16 E. 4. 4. and 49 E. 3. 5.

If a Man be outlaw'd, the King may have good Action of *Detinue againſt any who have Poſſeſſion of the Goods*; For by the Outlawry the Property is in the King, and he who has the Poſſeſſion is charg'd to the King by way of Action. Br. Prerogative, pl. 45. cites 39 H. 6. 26.

5. Where the *King has the the Profits of any Land by Reaſon of Outlawry in Action Perſonal*, and Damage is done in depaſturing of the Graſs or Corn, he ſhall have Action of Treſpaſs; for *he has Intereſt* in the Land, and *yet he has not the Land it ſelf*. Br. Treſpaſs, pl. 172. cites 15 H. 7. 2.

Br. Feoffments to Uſes, pl. 13. cites S. C.

(M) Forfeiture. Patentee. Actions. *What Actions Patentee may have, and in whoſe Name.*

See Prerogative (M. b. 9)

1. GRantee of the King cannot have Action of Goods of a Perſon outlaw'd *without Poſſeſſion*; Per Grenefield; to which it was anſwer'd, that it is the common Courſe in the Exchequer. Br. Prerogative, pl. 45. cites 39 H. 6. 26.

2. *A. was accountable to J. S.* and afterwards *J. S. was outlaw'd* in a Perſonal Action. A. died. The Queen granted to B. omnia Bona & Catalla, Exitus, Proficua, forisfactur' & Advantagia quæcunque, which came to her by the Outlawry of J. S. — B. brought *Account againſt the Executors of A. de ſon Tort*. It was agreed of all Sides, that if this Action had been *granted ſpecially*, it had been clearly good; and tho' this Matter of Account is, at the Time of the Grant, *uncertain*, yet it may be *reduced to a Certainty by Matter ex poſt Facto*, viz. by the Account. And tho' the Account be not expreſsly named in the Letters Patents, yet the Words of the Grant (ut ſupra) do amount to as much. And Gawdy J. conceiv'd this Account ought to be brought *in the Queen's Name*. And per omnes J. If A. had been living at the Time of the Grant of the Queen, the Grant had not been good; for then the Action againſt the Executors, which is the Matter of Prerogative, had not been veſted in the Queen. 3 Le. 197. pl. 250. Hill. 30 Eliz. in the Exchequer. Anon.

3. If a Man be outlaw'd in a Perſonal Action, and the Queen has the Profits of the Land, and lets the ſame to another, the *Grantee* ſhall *have Treſpaſs* Quare Clauſum fregit; per 2 Juſtices. 3 Le. 213. pl. 282. Mich. 30 & 31 Eliz. B. R. in Caſe of Hitchcock v. Harvey.

(N) Patentee. *Value.* *How* the Value to be *conſider'd* on an Extent.

S C. cited and adjudg'd accordingly, Parl. Caſes 72. Attorney Gen. v. Baden. —— In Caſe of a Seiſure for Outlawry, the King ſhall be allow'd no more than the *extended Value*, and if more is made of what is ſeiſed, the Owner ſhall have it. Arg. 5 Mod. 117. in Caſe of Britton v Cole, cites Hard. 106.

1. DEfendant was outlaw'd at the Suit of an *After-judgment Creditor*, who *got a Leaſe from the Crown at a Quarter-part of the Value*, viz. for 120 l. per Annum, where the Lands were well worth 478 l. and he levied only the 120 l. per Annum, and let the Outlaw take the reſt. The firſt Judgment Creditor brought an *Elegit*, and would have the Leſſee account for the whole Value. But it was decreed (by which a former Decree was ſet aſide) that the Leſſee *could levy no more than the extended Value*, which was at 120 l. per Annum, and could not enter and take all the Profits; for the Crown has no Intereſt in the Land extended, but only Perception of Profits, but the Party may take out a *Melius Inquirend'*, and have them extended at a greater Value. And it was *agreed that the Leſſee ſhould change Place, and let in the firſt Judgment Creditor, and he pay the Leſſee* 200 *l. per Annum till Leſſee's Debt was ſatisfied*; *and the Outlawry to remain in Force.* And the Extent upon the Elegit after the Extent upon the Outlawry, was held void quoad the Protector. Hard. 106. Maſters v. Whitfield and Hoskins.

2. When the *Profits of the Land* are *found* by an Inquiſition to be of ſuch a *yearly Value*, then the *Lands remain a Debtor to the Value till the Debt is ſatisfied*; but he can only agiſt or mow thoſe Lands; Per Cur. 5 Mod. 118. in Caſe of Britton v. Cole.

See (E) pl. 5. 6. —— (P) pl. 3.

(O) Forfeiture. *Prevented, or ouſted,* by Alienation &c.

In Outlawry in Action perſonal, the Feoffment of the Party is good before the King has Poſſeſſion.

1. IF one is outlaw'd *in Action perſonal*, and Office is found that he was ſeiſed of ſuch Lands the Day of the Outlawry, he *may make* **Feoffment* of his Land well enough; *for the King is not ſeiſed.* Br. Office devant &c. pl. 2. cites 9 H. 6. 20.

But a Recovery againſt the Heir after Office and before Livery, is good *between the Parties*, but not againſt the King if it be upon feint Title. Br. Feoffment de terres, pl. 17. cites 21 H. 7. 7. —— The Courſe of the Exchequer is, that by *Feoffment before Seiſure*, the King is ouſted of the Pernancy of the Profits. But *not* by Feoffment after Seiſure. 1 Lev. 33. Paſch. 13 Car. 2 B. R. Windſor v. Saywel.

* S. P. And after this *the King ſhall not have any Profit of* it, Quod Curia conceſſit, Quod nota; For the King has not the Poſſeſſion, and the Owner has Power to make Feoffment, therefore the Profits ſhall go to the Feoffee. Br. Prerogative, pl. 38. cites 21 H. 7. 7. —— Br. Forfeiture de Terres, pl. 30. cites S. C. —— Ibid. pl. 24. cites S. C. becauſe the King cannot ſeiſe for Outlawry in Action perſonal. But where the King may ſeiſe, the Party cannot ſo ouſt him of the Land. —— Br. Iſſues Return, pl. 9. cites S. C. —— S. C. cited by Gaudy J. Golds. 181. pl. 115. Anon. —— Ld. Raym. Rep. 307. Hill. 9 W. 3. in Caſe of Britton v. Cole it was ſaid by Holt Ch. J. in pronouncing the Opinion of the Court that the Feoffment in ſuch Caſe is good, but the *Intereſt of the King to take the Profits continues notwithſtanding the Feoffment*; tho' the Opinion in 21 H. 7. 7. is contrary —— 1 Salk. 395. S C. and S. P. —— The Sale ſhall hold but the King ſhall have the Pernancy of the Profits. 12 Mod. 438. Anon.

2. A *fraudulent Gift of Goods* will not defeat the King of the Forfeiture by the Outlawry of one indicted for Recuſancy. See tit. Fraud (C) pl. 1. in the Notes, Pauncefoot v. Blunt.

3. If

3. If a Man *outlaw'd buys Goods in another's Name*, the King ſhall have the Goods in the ſame Manner as if he had taken them directly in his own Name. 12 Rep. 2. Paſch. 4 Jac. in Ford and Sheldon's Caſe.

For when any *Act* is done *with Intent* and Purpoſe *to defraud the King* of his lawful Duty, or Forfeiture by the Common Law, or Act of Parliament, the King ſhall not be barr'd of his lawful Duty or Forfeiture *Per Obliquum*, which belongs to him by the Law if the Act was made *De directo*. 12 Rep. 2. Paſch. 4 Jac. Ford and Sheldon's Caſe.

4. *A. recover'd Damages againſt B. who* at the Time of the Judgment, *was jointly ſeiſed in Fee with C.* Afterwards *B. and C. alien'd.* Then *A. is outlaw'd.* The *King*, 8 *Years after this Outlawry, extends the Moiety of this Land for theſe Damages* recover'd againſt B. The Barons were clear in Opinion that he ſhall have it in Extent; for it was liable to the Extent of the Party outlaw'd before the Alienation, and then when it comes to the King by the Outlawry, altho' it be after the Alienation, it continues extendible for the King, tho' the Alienation was before the the Outlawry. Lane 20. Paſch. 4 Jac. in the Exchequer, York v. Allein.

5. One *outlaw'd made a Leaſe* of his Lands, and afterwards *theſe Lands amongſt others were found by Inquiſition*, and *this Leaſe was pleaded in Bar* to bind the King, it being before Inquiſition. And the Court held that a Leaſe or other Eſtate made after the Outlawry and before the Inquiſition, if made *bona fide and upon a good Conſideration*, will prevent the King's Title; but *otherwiſe if* it be *in Truſt for the Party* only, but that no Conveyance whereſoever made after the Inquiſition will take away his Title. Hard. 101. Paſch. 1657. in the Exchequer, the Attorney General v. Freeman.

S. C. cited Arg. 10 Mod. 359. in Caſe of Thornby v. Fleetwood. —— If *before Judgment of Outlawry* the Land be alien'd, that prevents the King from the Pernancy of the Profits, cites 19 H. 7. 39. But if *after Inquiſition found*, it will not; For 'tis by the Inquiſition that the Intereſt is veſted in the King, and before that he has nothing at all. Cumb. 469. per Holt Ch. J. in delivering the Opinion of the Court, Britton v. Cole. —— 1 Salk. 395. S. C. and S. P. cites Lane 79. 3. Cro 431. 2 Roll. 159 —— Ld. Raym. Rep. 307. S. C. and S. P. by Holt Ch. J.

6. B. was outlaw'd in Debt, after Judgment at the Suit of S. and an Extent being taken out, it was *found by Inquiſition* 1 Oct. 1654. that he was *ſeiſed for Life of ſeveral Lands* in Hampſhire. They were *ſeiſed* into the King's Hands, *and demiſed* to the ſaid S. *under the Exchequer-Seal.* The Defendants as Tertenants pleaded, that *before this Inquiſition* and Seiſure the ſaid *B. by Fine* ſur conceſſit &c. *granted theſe Lands to one Abdy for* 500 *Years, if he ſhould ſo long live*; That *Abdy died*, and that *after the Inquiſition his Executors demiſed them to the Defendants for* 460 *Years.* The Attorney-General demurr'd, for that the 2d Leaſe was made ſince the Inquiſition and Seiſure, during which Time no Eſtate could be granted of the Lands ſeiſed. But the Court ſaid, that any one who has an Eſtate or a Right precedent to the Outlawry may grant it over, unleſs it be the Outlaw himſelf, who cannot by his own Act defeat the King's Intereſt. Hard. 422. pl. 9. Trin. 17 Car. 2. in the Exchequer, the Attorney General v. Fox & al'.

7. Outlaw in Perſonal Action levies *a Fine* before Seiſure. The King cannot ſeiſe the Lands in the Hands of Conuſee, but if the Seiſure be before the Fine, the King may retain againſt the Conuſee. Raym. 17. Trin. 13 Car. 2. Windſor v. Seywell.

8. If a Perſon outlaw'd aliens his Lands before any Inquiſition taken for the King, which he may lawfully do, yet the *Alienee muſt plead off the Extent in the Exchequer by ſhewing his Title Precedent.* Carth. 442. in Caſe of Britton v. Cole, cited by Holt Ch. J. as Mich. 22 Car. 2. Riſdon v. Rainer.

(P) Forfeiture.

(P) Forfeiture. *Relation.* To what Time.

1. IN Aſſiſe it was found by Verdict that the Plaintiff *leaſed* the Land to the Defendant *for Life rendring Rent*, and for Default of Payment *to re-enter*, and the *Defendant did Felony*, by which the *Exigent was awarded*, and the *Leſſor entred for Rent Arrear*, the *Leſſee ouſted him and after was outlaw'd*; but the *King did not ſeiſe*, but the *Defendant continued Seiſin*, and the Defendant *is now a Clerk convict*. And by all the Juſtices, tho' the King had Cauſe to ſeiſe and did not ſeiſe, the Plaintiff ſhall recover the Land. And by the Reporter it ought to have been inquired when the Rent was Arrear; For if it was before the Exigent, then the Entry of the Plaintiff is lawful; Contra if it was Arrear after the Exigent. And therefore it ſeems that the *Judgment upon the Exigent*, ſhall have Relation *to the Teſte* of the Exigent. Br. Conditions, pl. 109. cites 27 Aſſ. 50.

2. Note, by all the Juſtices except Markham, if a Man be *attainted* of Felony or Treaſon *by Outlawry*, he ſhall forfeit all his Lands which he had at *the Day of the Felony or Treaſon done, or ever after*. Quære inde; for it ſeems but from the Time of the *Outlawry pronounced, or after*; for Outlawry *has no Relation*, as Verdict has. Br. Forfeiture de Terres, pl. 98. cites 30 H. 6. 8.

But if a Man be *indicted* of Felony, and hanging the Proceſs

3. In an *Appeal of* Death, or other Felony &c. Proceſs is awarded againſt the Defendant, and *hanging the Proceſs* the *Defendant conveys away the Land*, and after is outlaw'd, the Conveyance is good, and ſhall defeat the Lord of his Eſcheat. Co. Litt. 13. a.

againſt him, he conveys away the Land, and after is outlaw'd, the Conveyance ſhall not in that Caſe prevent the Lord of his Eſcheat. And the Reaſon of this *Diverſity* is manifeſt; for *in* the Caſe of the *Appeal the Writ contains no Time when the Felony was done*, and therefore the Eſcheat can relate [only] to the Outlawry pronounced. *But* the *Indictment contains the Time* when the Felony was committed, and therefore the Eſcheat upon the Outlawry ſhall relate to that Time. Co. Litt. 13. a. b.

4. By bare Outlawry the Party *immediately forfeits his perſonal Goods*, and they are veſted in the King, and he does *not* forfeit *the Profits of his Lands, nor Chattels Real, till Inquiſition* taken. Held per Cur. 1 Salk. 395. Hill. 9 W. 3. B. R. in Caſe of Britton v. Cole.

(Q) Forfeiture. In what Caſes. In General.

S. P. and ſo in Caſe of High Treaſon. Fin. Law, 8vo. 352.

1. WHEN a Perſon is *appeal'd or indicted of Felony, and abſents himſelf* for ſo long a time *that an Exigent is awarded* againſt him, he ſhall forfeit all his Goods and Chattels which he had at the Time of the Exigent awarded, tho' he render himſelf upon the Exigent, and be afterwards found Not Guilty. 5 Rep. 110. b. 111. a. Paſch. 43 Eliz. B. R. in Foxley's Caſe.

2. If a Man has a *Charter of Pardon of elder Date than the Exigent*, the Chattels are ſaved; for the Cauſe of the ſaving them appears of Record. 5 Rep. 111. a. in **Foxley's Caſe**, cites 43 E. 3. 17. but ſays that it does not appear by the Book what Remedy the Party has, if the Cauſe of the ſaving of them be by Matter in Fact, as by Impriſonment, or that the Party was beyond Sea &c.

(R) *Advan-*

(R) *Advantage* of the Forfeiture. *How* to be taken. See (S)

1. DEBT *upon Obligation.* The *King's Serjeants ſaid, that the Plaintiff was outlaw'd, and pray'd to have the Obligation for the King.* Per Brian, We cannot give Judgment of it as Juſtices *without Writ*, but the King may have Writ of Detinue; and if this Matter was upon this Confeſſion, there Judgment may be given for the King. Br. Utlagary, pl. 41. cites 4 H. 7. 17.

2. B. *recover'd in a Quare Impedit*, and *before* he had *Execution he was outlaw'd.* The *Queen brought a Scire Facias to execute the Judgment.* Reſolved per tot. Cur. That the Scire Facias to execute the Judgment was well brought, and there was Privity enough to ſue Execution of the Judgment, becauſe the Thing is in the Queen as it was in the Plaintiff, and that is a Thing in Action, and therefore it cannot be a Thing in Poſſeſſion in the Queen; and ſo ſhe is not to preſent, but is to proſecute the Execution of the Judgment. Mo. 241. pl. 378. Mich. 29 Eliz. Beverley's Caſe.

3. A. outlaw'd B. in an Action of Debt, and J. S. having *Goods of B. in his Hands, A. brought a Bill againſt J. S. to diſcover what Goods he had of B.'s.* But J. S. *demurr'd, becauſe A. ſhew'd no Title* to thoſe Goods. It was inſiſted againſt the Demurrer, that the Crown was only a Truſtee for the Plaintiff. But Ld. Commiſſioner Gilbert held contra; and that it is meerly out of Grace that the King makes ſuch Grant of Goods of Perſons outlaw'd to the Plaintiffs, who have no manner of Right before the Crown has granted them to him, and ſo allow'd the Demurrer. 2 Wms.'s Rep. 269. Paſch. 1725. v. Bromley.

4. *And* in ſuch Caſe the *Attorney-General* muſt be made a *Party.* 2 Wms.'s Rep. 269. v. Bromley.

(S) Forfeiture. *Remedies* to get at it. See (R)

1. A *Bill* was *exhibited* againſt one outlaw'd, *to diſcover his Real and Perſonal Eſtate, and what ſecret Gifts and Conveyances he had made*, becauſe by the Outlawry his Goods and the Profits of his Lands were forfeited. The Defendant demurr'd, for that Nemo tenetur prodere ſeipſum, and to diſcover his Eſtate upon a Forfeiture. But the Court e contra; and that he ought to anſwer, becauſe the Crown is intitled to his Eſtate by Courſe of Law, and the Outlawry is in Nature of a Gift to the King, or a Judgment for him; and a common Perſon may have a like Bill in a like Caſe, to enable him to take out Execution. And he was ruled to anſwer. Hardr. 22. Mich. 1655. in the Exchequer. The Protector v. the Ld. Lumley.

S. P. admitted Hardr. 145. Hill. 1658. in the Exchequer, in Caſe of the Attorney General v. Wicoe; For the Effect of ſuch a Bill *is only to diſcover that which is forfeited* already, and *not to diſcover a Cauſe of Forfeiture.*

2. It is the Courſe of the Exchequer, in Caſe of an Outlawry, to prefer an *Information in the Nature of a Trover and Converſion againſt one who has the Goods of the Party outlaw'd*; per Hale Ch. J. Mod. 90. pl. 58. Mich. 22 Car. 2. B. R. Anon.

3 New Abr. 759. Tit. Outlawry, accordingly, in totidem Verbis.

3. When the *Inquiſition* is taken, it *is return'd* by the Sheriff *into C. B. and* then *a Tranſcript of the Outlawry and Inquiſition is tranſmitted into the Exchequer*; *and* thereupon *if any Debts be return'd due from any one to the Outlaw*, on Application to the Exchequer *a Scire Facias iſſues* to ſuch Perſon, *to ſhew Cauſe why the King ſhould not have ſuch Sum* found due on the Inquiſition to the Outlaw. The Reaſon of returning the Tranſcript of the Record from C. B. into the Exchequer is, that when the Inquiſition has return'd the Outlaw to be poſſeſs'd of any Goods or Lands, he being out of the King's Protection cannot enjoy any thing, and the Profits of the Lands are to be ſeiſed into the King's Hands; but the Lands are not forfeited, unleſs it be in a Capital Caſe, and then after the Year and Day he forfeits as if he had been convicted: But in other Caſes the Profits are ſeiſed whilſt he continues outlaw'd, and therefore the Tranſcript of his Record is ſent into the Exchequer, that the Court of Ordinary Revenue may have it in Charge; but the Court of Exchequer uſually grants a Cuſtodiam to ſuch Perſon as ſued the Outlawry. G. Hiſt. of C. B. 13, 14. cap. 2.

(T) Forfeiture. *Seiſure or Office. Neceſſary*; in what Caſes. And in what Caſes the King ſhall be ſaid ſeiſed by Office. [*the Tit. Office L.*

But it was ſaid there, that *of Goods* the Law is otherwiſe. Ibid. —— Br. Iſſues Return'd, pl. 10. cites S. C.

1. IT was in a manner agreed, that where it is *found* by Office *that J. N. was outlaw'd in Treſpaſs, or other Action Perſonal, and was ſeiſed of ſuch Land the Day of the Outlawry*, that by this the King is not ſeiſed, nor the Eſcheator cannot ſeiſe by ſuch Office. And it was agreed per Cur. That the *Party*, in ſuch Caſe, *may diſturb the Eſcheator from taking the Profits*; for the Office is not ſufficient for the King. Br. Office Devant &c. pl. 9. cites 9 H. 6. 20.

S. C. cited Le. 64. pl. 84. Mich. 29 Eliz. C. B. in Caſe of Beverley v. Cornwall.

2. *Obligation in a Suit* in Banco is put *into the Cuſtody of an Officer, and* after *it is ſurmiſed that the Plaintiff is outlaw'd*, and the *King's Attorney* came and *demanded the Obligation for the King*, and the Court would not grant it till the *Plaintiff, and the Officer* who kept it, were *warn'd*. Br. Obligation, pl. 38. cites 37 H. 6. 28.

* 2 Le. 206. Arg. S. C. cited and admitted —— Lane. 37. in Sir Edw. Dimock's Caſe, Arg. cites 21 H. 7. 8. S. P. —— Ibid. 63. per Tanfield Ch. B. Trin. 7 Jac. in the Exchequer in S. C. —— And ſee pl. 5.

3. In *Outlawry* the Queen ſhall have Obligations, Statutes, Recognizances, * Leaſes for Years, next Avoidances, without Office, becauſe the Queen is intitled by the Record of the Outlawry; per Clark J. Mo. 292, 293. Paſch. 32 Eliz. in the Exchequer, in the Caſe of Sir M. Finch v. Throgmorton.

4. If the Outlaw *purchaſes Cattle after the Outlawry*, the Property of them is immediately veſted in the King; Per Holt Ch. J. Carth. 442. Hill. 9 W. 3. B. R. in Caſe of Britton v. Cole.

5. By Outlawry, *Leaſe for Years* is forfeited before any Seizure; and therefore if it be *ſold* after Outlawry, and *before Seizure*, the King ſhall avoid the Sale; but if one Outlaw'd ſell an Eſtate in Fee *before Seizure*, the Sale is good, and the King ſhall not have the *Pernancy of the Profits*; but if the Sale be after Seizure, the Sale ſhall hold, but the King ſhall

ſhall have the Pernancy of the Profits; but even in Caſe of a Leaſe there ought to be an Office found for the King; Per Holt Ch. J. 12 Mod. 438. Mich. 12 W. 3. Anon.

(U) *In what Caſes* the King may ſeiſe, *and when.*

1. A *Man leas'd for Years, or at Will*, and *after was outlaw'd in a Perſonal Action*, as Treſpaſs, and Writ iſſued to inquire of what Land he was ſeiſed at the Time of the Outlawry; and it was found that he was ſeiſed of the Land leaſed, by which the *King committed it to another who entred*, and the *Leſſee* for Years *brought* Writ of *Treſpaſs*; and the Defendant pleaded the Matter above. And the Opinion of the Court was, that of the proper ſhewing of the Defendant himſelf, the King cannot ſeiſe, and then the Grant is void. Br. Patents, pl. 3. cites 9 H. 6. 20.

2. *Leaſe of Goods* to A. *for Years.* A. is outlaw'd; a Scire facias iſſues for the King. He ſhall not have the Goods till the Leaſe be ended; Per Dodderidge J. 3 Bulſt. 17. Hill. 2 Jac. in Caſe of Waller v. Hanger, cites 13 R. 2.

(W) Seiſure. *Of the different Writs* of Seiſure, *and their* different *Operations*; *and what may be taken by them.*

1. THE *Writs* of Execution for the King *are Ca. Sa.* to take the Body, *Fi. Fa.* to take the Goods, *Extendi fac* to take the Lands, and the *long Writ in the Exchequer*, which comprehends them all. Now even by that Writ the Goods of a Stranger cannot be taken, becauſe the Sheriff has no ſuch Authority thereby. But otherwiſe it is of a *Levari fac. de Exitibus terræ.* Cumb. 470. Mich. 10 W. 3. B. R. Britton v. Cole. 12 Mod 177. S. C. & P.

2. The *Cattle of a Stranger* being Levant and Couchant on the Land of the Perſon outlaw'd, may be taken by Virtue of a *Levari fac.* for the King. Cumb. 469. Britton v. Cole. Comyns's Rep. pl 34. S. C. accordingly.—— 1 Salk. 395.

S. C. & P.—For they, and not the Cattle of the Owner of the Lands, are the Iſſues of the Lands; Per Holt Ch. J. Carth. 442. S. C.—— 5 Mod. 117. S. C.———— Skin. 617. pl. 13. S. C. accordingly.——Comb. 434. 469. S. C. accordingly.—12 Mod. 176. S. C. accordingly.—— Ld Raym. Rep. 305. S. C. accordingly.—— And Ibid. 306. Per Holt Ch. J. The Land is Debtor to the King, and that makes the Cattle upon it liable to this Execution; For if the King ſhould not have this Remedy, the Pernancy of the Profits of the Land upon Outlawry would be very ſmall, and it may be would be worth nothing; for then it would be in the Power of the Man outlaw'd to defraud the King of the whole, by letting of the Land to Paſturage; in which Caſe, if he could not ſeize the Cattle Levant and Couchant upon the Land, he could not have any Remedy againſt him who ſhould hire the Land for Agiſtment; nor could he have the Money payable by ſuch Contract, becauſe it would be an Agreement in groſs.——But if the Outlaw had made a *Leaſe* of ſuch Lands *before the Exigent return'd*, then the *Cattle of a Stranger* cannot be ſeiſed by Virtue of a Levari facias on the Lands; Per Cur. 5 Mod. 117. in Caſe of Britton v. Cole.

3. Outlaw *aliens* his Eſtate, Feoffee puts in his *Cattle*; they are ſubject to a Seizure for the King, the Feoffee having the Eſtate in the ſame Plight Ld. Raym. Rep. 307. S C. & S. P.

by Holt Ch. J.

Plight and Condition as the Feoffor had it; and tho' the Feoffment be good, yet it deſtroys not the King's Title; Per Holt Ch. J. in delivering the Reſolution of the Court. Cumb. 469. Britton v. Cole.

S. P Per Holt Ch. J. Ld Raym. Rep. 307. in S. C.

4. The *Goods of the Perſon outlaw'd* are not the Iſſues leviable by the Levari; for thoſe are the King's without Inquiſition; and that makes out the Difference between Chattels Real and Perſonal, the one being leviable by Levari, the other not. Cumb. 469. Britton v. Cole.

5. In Caſe of a *Fi. Fa.* no Goods ſhall be taken on the Land, but the *Goods of the Debtor only*; for that Writ gives the Sheriff Authority to levy only De Bonis & Catallis of the Owner, and therefore *differs from a Lev. fa.* which gives Authority to levy De Exitibus terræ. Cumb. 470. Hill. 10 W. 3. B. R. Britton v. Cole.

(X) Proceſs of Outlawry; *awarded by whom.*

1. A Man was *indicted of Death before the Coroner*, and in the Roll of the Coroners; and upon this he *was outlaw'd upon the Roll of the Coroners before whom he was indicted.* Quære if the Coroner may award Proceſs of Outlawry. Br. Utlagary, pl. 38. cites 27 Aſſ. 47.

2. The Opinion of all the Court of Common Pleas was, that if one be Outlaw'd before the Juſtices of Aſſiſe, or Juſtices of Peace, upon an Indictment of Felony, that they may award a *Capias Utlagatum.* And ſo was the Opinion of Periam Chief Baron, and all the Court of the Exchequer, as to the Juſtices of Peace; For they that have Power to award Proceſs of Outlawry, have alſo Power to award a *Capias Utlagatum*, as incident to their Authority and Juriſdiction. See the Statute of the 34 H. 8. cap. 14. for Certificate of a ſhort Tranſcript of every Attainder, Conviction, or Outlawry of Felony, by the Clerks of the Aſſiſe, Clerks of the Peace &c. into the King's Bench, on Penalty of 40 s. &c. And note well, that ſuch Tranſcript is by the ſaid Act made to be of as great Force as the Record itſelf, but cites Lambert in his Juſtice of Peace, fol. 563. contra, and 1 Ed. 6. cap. 1. that Juſtices of Peace, in Caſe of Profanation of the Sacrament, ſhall award a *Capias Utlagatum* throughout all England. 12 Rep. 102. Anon.

(Y) Proceſs of Outlawry. *Upon what Return* it ſhall iſſue.

And the Capias ſhall be ad reſpondendum Regi, & ad Habendum Corpus of the Defendant. Ibid.

1. THE Sheriff return'd upon a Capias quod *mandavi Ballivo* &c. *who anſwer'd Quod cepit Corpus* &c. and *had not the Priſoner at the Day.* And *Diſtreſs was awarded to the Sheriff againſt the Bailiff, and he return'd Nihil*, and thereupon *iſſued Capias infinite*, but *not Exigent*; For this does not lie in this Caſe at the Common Law, and the Statute does not give it. Br. Exigent, pl. 46. cites 5 E. 4. 4.

Contra peradventure of a Biſhop of Wales or Ireland; for

2. In Cam. Scacc. it was ſaid by ſome of the Juſtices, that if a *Biſhop* be *ſued in one County where he has nothing, and the Sheriff returns him Nihil where he has Land in the County Palatine of L. or C. where the King's Writ does not run*, upon ſuch Return of Nihil, Proceſs of Outlawry ſhall

ſhall not iſſue; For he is a Peer of the Realm, and therefore Exigent ſhall not iſſue. Br. Exigent, pl. 47. cites 5 E. 4. 108. they are not Peers of the Realm Ibid.

any more than a Biſhop of France. Markham Ch. J. ſaid we will be adviſed.

3. After the Sheriff has return'd a *Cepi*, if he has not the Body at the Day, the Court will not award an Exigent on the *Suggeſtion of an Eſcape*, unleſs the Sheriff will return one. 2 Hawk. Pl. C. 303. cap. 27. S. 117.

(Z) *Proceſs and Proceedings.*

1. IN Caſe of *Felony one Capias only ſhall be awarded*, and no more, *and then Exigent*. Brook makes a *Quære*; for it is ſaid elſewhere, that there ſhall be *one* Capias *in Murder*, and *two in Felony*. Br. Exigent, pl. 42. cites 22 Aſſ. 81. Br. Proceſs, pl. 149. cites S. C. Brook ſays at this Day it is uſual to have two Capias's and Exigent in Felony, and in Treaſon only one Capias and Exigent.

2. 25 *E.* 3. *Stat.* 5. *cap.* 14. Enacts, That *after one is* * *indicted of Felony before the Juſtices of Oyer and Terminer, the Sheriff ſhall be commanded to attach his Body by a Capias; And if he returns a Non eſt inventus, another Capias ſhall iſſue, returnable in* 3 *Weeks, whereby the Sheriff ſhall be directed to ſeiſe his Chattels, and to keep them till the ſaid Return. And if the Sheriff then alſo return a Non eſt inventus, and the Indictee cometh not, the Exigent ſhall be awarded, and the Chattels ſhall be forfeited. But if he yield himſelf, or be taken by the Sheriff or other Officer before the Return of the* 2*d Capias, his Goods and Chattels ſhall be ſold.* Serjeant Hawkins ſays, It ſeems to be agreed that in all Indictments not Capital, there muſt be 3 Capias's to the Sheriff of the County, where the Proſecution is commenc'd before the Exigent ſhall go, unleſs it be after Judgment; in which Caſe, and in all Caſes of Death or High Treaſon, one Capias is ſufficient. But quære as to *Appeal of Rape*, whether 3 Capias's are not ſtill neceſſary, as they were at Common Law, notwithſtanding it's being made Felony by Statute; That it ſeems doubtful whether 2 Capias's were not required by the Common Law in all Indictments and Appeals of any other Felony; but that, however, it is certain that they are requir'd in all Indictments of any other Felony by this Statute. 2 Hawk. Pl. C. 303. cap. 27. S. 115. 116.

* It ſeems to have been the general Opinion that this Statute extends to Appeals as well as Indictments, tho' it mentions only the latter; but it extends not to any Indictment or Appeal of Death, tho' it ſpeaks of Felony in general. 2 Hawk. Pl. C. 303. cap. 27. S. 116.

3. In Capias ad Computandum, or ad Satisfaciendum, and *in every Capias which iſſues after Judgment*, Exigent ſhall iſſue after the firſt Capias, becauſe it is of a Thing adjudg'd. 40 E. 3. 25. a. pl. 28.

4. In Debt it was agreed, that if *at the Exigent return'd, the Defendant comes by Superſedeas upon Mainprize*, and the *Plaintiff is eſſoign'd*, the Defendant ſhall have *Idem dies* without Mainpriſe; and there, if the *Defendant does not come at the Day*, the Plaintiff ſhall only have *Diſtreſs*, and never Exigent again. Br. Proceſs, pl. 23. cites 45 E. 3. 10.

5. *Action in one County*; a Man may have *Latitat in another County, where Capias lies in the Original*; but the Exigent ſhall not iſſue but only in the County where the Original is brought, and not in the foreign County where the Latitat is awarded; but after Latitat awarded in a foreign County, he may reſort to an Exigent in the firſt County where the Original is brought; and this againſt the ſame Party. Br. Exigent, pl. 19. cites 11 H. 4. 27.

6. 6 *H.* 6. *cap.* 1. Enacts, That *before any Exigent be awarded againſt Perſons indicted of Felony and Treaſon before the King in his Bench, Writs of Capias ſhall be directed as well to the Sheriff of the County in which they be indicted,* *Appeal of Death in the County of Lincoln,*

against J. S. late of Chester, Yeoman, and Capias issued to the Sheriff of Chester, according to the Statute.

indicted, as to the Sheriff of the County whereof they be nam'd in the Indictments, the same Capias having 6 Weeks at least before the Return of the same; which Writs return'd, the Justices shall proceed as they have done before; and if any Exigent be awarded, or any Outlawry pronounc'd against such Persons indicted before the Return of the said Writs, the same shall be void: And this Ordinance shall endure so long as shall please the King.

And it seems that Process shall issue to Chester, *by the general Words of the Statute*, which wills that in such Case Capias shall issue to the Sheriff of the County where he dwells, and to the Sheriff of the County where the Fact was done. And so it seems the County Palatine to be bound by those several Words. Quære. Br. Cinque Ports, pl. 22 cites 31 H. 6. 11.——Br. Exigent, pl. 71. cites S. C. That *Capias was awarded to the County Palatine, according to this Statute, and was not certified*; by which the *Plaintiff pray'd Exigent* And because the *Statute is general*, therefore Process was granted in the first County, but it does not appear what Process; therefore *it seems that it shall be 3 Capias's in the 1st County, and then Exigent*; for the Statute does not restrain it, as it seems, and the Statute *speaks of Indictment of Treason and Felony.* Br. Exigent, pl. 71. cites 31 H. 6. 11.—S. C. cited 2 Hawk. Pl. C. 505. cap. 27. S. 124. and says, It seems to have been admitted in this Case, that an Appeal originally commenc'd in B. R. is within the Equity of this Act, and that an Outlawry thereon is erroneous, if there were no Capias containing the Space of 6 Weeks, directed to the Sheriff of the County whereof the Appellee is nam'd, as this Statute requires; by which it seems implied that such an Appeal is not within the Statute of 8 H. 6. but of 6 H. 6. and that the same is still in Force.

Appeal in the County of S. against J. B. late of C. in the County of S. Yeoman, alias dictus J. B. of D. in the County of E. and *Process with Proclamation at the Exigent was not made in the foreign County according to the Statute,* because he *is not nam'd in the Premisses of the County where the Writ is brought.*

7 8 *H.* 6. *cap.* 10. *S.* 2. Enacts, That *upon every Indictment or Appeal by which any of the Lieges dwelling in other Counties than there where such Indictment or Appeal is taken of Treason, Felony, or Trespass, before any Justices of Peace, or other having Power to take such Indictment &c. or other Commissioners or Justices in any County, Franchise or Liberty, before any Exigent awarded after the first Capias return'd, another Capias shall be awarded, directed to the Sheriff of the County whereof he which is so indicted is supposed to be conversant, containing 3 Months from the Date of the Writ where the Counties be holden from Month to Month; and where the Counties be holden from 6 Weeks to 6 Weeks, he shall have 4 Months, until the Day of the Return of the Writ; by which 2d Capias it shall be commanded to the Sheriff to take him by his Body, if he may be found within his Bailiwick: And if he may not be found, that the Sheriff make Proclamation in two Counties before the Return, that he, which is so indicted or appealed, appear before the Justices or Commissioners where he is indicted or appealed &c. to answer to the King, or to the Party of the Felony, Treason, or Trespass whereof he is indicted or appealed: After which 2d Capias return'd, if he which is indicted or appeal'd come not at the Day, the Exigent shall be awarded.*

But *contra where he is sued in the County of S. by Name of J. B. of C. in the County of N. alias dictus J. B. of D. in the County of S.* For it appears by the Premisses that he is not conversant, nor dwelling in the County where the Writ is brought; for *that which is in the Alias dictus is not answerable, as* to say *that he was not of the Vill in the Alias dictus the Day of the Writ, nor ever after; but* to say *that he was not dwelling in the Vill or County in the Premisses the Day of the Writ* &c. is a good Plea. Br. Proclamation, pl. 5. cites 1 E. 4. 1.——S. P. & S. C. cited in Marg. 2 Hawk. Pl. C. 505. S. 126. And says, That if a Defendant be *nam'd of B. and late of C.* there is no Need of any Capias to the Sheriff of the County wherein C. lies, because it appears that the Defendant is at present conversant at B. *But* if a Defendant be *named of no certain Place at present, but* only *late of B. and late of C. and late of D.* being all of them Counties different from that wherein the Prosecution is commenced, a Capias shall go to the Sheriff of every one of those Counties

P. was *indicted* of Felony *before the Justices of Gaol-Delivery in the County of S.* and outlaw'd upon it, and brought Error, because in the *Indictment* he is *supposed to be of London*, and the Capias was awarded to the Sheriff of S. whereas by this Statute it ought to be to the Sheriffs of London, in which he inhabited; and for this Cause the Outlawry was revers'd. Cro. Eliz. 179 pl. 10. Pasch 32 Eliz. in B. R. Pursell's Case.

Appeal in the County of D. and the *Appellee was dwelling at Chester the Day of the Writ purchas'd,* and *Process continued till he was outlaw'd.*

S. 3. *If any Exigent be awarded in such Indictment or Appeal against the Form aforesaid, or any Outlawry pronounc'd, they shall be * void.*

Per Choke, the Statute of 8 *H.* 6. *cap.* 10. wills, that *in Indictments of Felony, Treason, Trespass, or Appeal sued in another County than where the Defendant dwelt before Exigent awarded, Capias shall issue to the Sheriff where he dwells*; and no such Capias issued in this Case, by which, because he came the same Term that the Exigent was return'd, therefore he pray'd that the Outlawry be revers'd, and could not, but was put to his Writ of Error. Br. Utlagary, pl. 20. cites 19 H. 6. 1. 2.—— Fitzh. Tit. Error, pl. 26. cites S. C.

So

So of Imprisonment; and yet it is agreed that *otherwise it is in C. B.* For this is in B. R. and yet the *Statute says that for Default of the Capias, the Exigent shall be void.* Br. Utlagary, pl. 20. cites 19 H. 6. 1. 2.

* This is to be expounded by the Common Law, viz. that it shall be void by Writ of Error. Pl. C. 137. b. in Case of Browning v. Beston. ——— 5 Rep. 59. b. in Lincoln-College Case. Arg. S. P.——— Hob. 166. in Case of Winchcombe v. Puleston &c. Hobart Ch. J. says, that this is well expounded to be void by Writ of Error. ——— Serj. Hawkins says that this Point seems to be agreed. 2 Hawk. Pl. C. 306. cap. 27. S. 127.——S. P. Arg. Mar. 84. pl. 139. that where a Statute makes a Thing void, it shall be void according to the Words of the Statute, unless there shall be Inconvenience or Prejudice to him for whom the Statute was made, and that upon this Statute, the Outlawry is not void before Error brought.

S. 4. Provided that the Statute 6 H. 6. cap. 1. stand in Force.

S. 5. This Ordinance shall not extend to Indictments or Appeals taken within the County of Chester.

S. 6. Provided that if any of the Lieges be appealed or indicted of Felony or Treason, and at the Time of the Felony or Treason supposed, he was conversant in the County whereof the Indictment or Appeal makes Mention, the like Process be made against such indicted Person, or appealed, as hath been used before.

8. 10 *H. 6. cap. 6.* Enacts, That *if any such Indictments taken before Justices of Peace, or any other, shall be removed before the King in his Bench, or elsewhere, by Certiorari or otherwise, then before any Exigent awarded, after the first Writ of Capias return'd, another Capias shall be awarded, directed to the Sheriff of the County whereof he that is indicted or appeal'd is supposed to be conversant, returnable before the King in his Bench, at a Day containing 3 Months or 4 from the Date of the last Writ of Capias, according to the Manner that the Justices of Peace and other in the said Statute 8 H. 6. cap. 10. ought to have done: And if any such Exigent be awarded upon such Indictment or Appeal, after such removing against the Form aforesaid, or any Outlawry thereupon pronounc'd, the same shall be void.*

9. Where a Man is *taken upon Capias Utlagat.* and pleads, and after *makes Default*, another Capias ad Satisfaciendum shall issue, and he shall lose the Advantage of the Matters pleaded before. Br. Process, pl. 69. cites 22 H. 6. 16.

10. If the *first Day of the Exigent be pass'd*, the Sheriff *cannot any more proclaim it*, tho' the Day of the County be the next Day. Br. Process, pl. 176. cites 31 H. 6. 13.

11. In Debt 3 *Exigents* were *sued successively*, and *each were discharg'd by several Supersedeas's out of Chancery, in Delay of the Plaintiff*; by which, at the Plaintiff's Request, *special Exigent was awarded, reciting that he should not be allowed any Supersedeas of the Chancery*; and it was said that this is the Course of C. B. Br. Exigent, pl. 48. cites 7 E. 4. 9.

12. 19 *H. 7. cap. 9.* Enacts, That *like Process shall be had in Actions upon the Case in the King's Bench and Common Place, as in Actions of Trespass or Debt.*

13. 6 *H. 8. cap. 4. S. 1.* Enacts, That *where an Exigent shall be awarded at the Suit of the King, or any other Person, in any Action Personal, against any Person call'd of any Shire, or City being a Shire, or late of any such Shire or City whereunto such Exigent shall be awarded; and also in every Writ of Exigent in any Personal Action directed into London or Middlesex, the Defendant being call'd late of London or Middlesex, and at the Time of the Exigent awarded not dwelling in London or Middlesex, the Justices where the Exigent shall not be directed into London or Middlesex, shall award a Writ of Proclamation to the Sheriff of the County where it appears by the same Action the Defendant is or lately was dwelling, if the King's Writ run there; otherwise to the next Shire adjoining to such County where the King's Writ runneth not.*

D. was outlaw'd by the Name of D. late of London, Gent. alias dictus D. of N. in Com. K. Gent. and the Proclamation upon the Exigent was awarded against him in the County of K. and now D. comes in upon Cap.

And where the Exigent shall be directed into London or Middlesex, and the Defendant call'd late of London or Middlesex, and at the Time of the Exigent awarded shall not have his Dwelling in London or Middlesex, then the Writ of

Utlagatum, and pleads that the Time of the Writ purchaſed, he was dwelling at C. in Com. Middleſex, at which County no Proclamation was awarded, and pray'd that the Utlawry be reverſed; and the Juſtices, upon Peruſal of this Statute, ſaid that Iſſue ought to be taken between D. and the Queen, and tried; For this Caſe is not remedied by this Statute. And. 36. pl 90. Paſch. 4 Eliz. Diggs's Caſe. —— Bendl. 122. pl. 155. S. C. in almoſt the ſame Words. —— D. 212. b. pl. 44. ſays, it ſeems he ſhall well have the Plea; For the Alias dictus is not any Parcel of his Surname, nor intended Part of his Name, and therefore no Proclamation ought to have iſſued to the Sheriff of K. as it ſhould do if it had been expreſsly named in the Writ, of N. in the County of K. or late of N. in the County of K. For then a Proclamation muſt neceſſarily iſſue. Beſides where one is *ſued in Com. K. and is call'd of D. or nuper de D. in Com. E.* and the Truth is, that *neither at the Purchaſe of the Original, nor at the Day of the Exigent, he was commorant nor conuſant there, but in Com. S. and no Writ of Proclamation is awarded thither, but only into E.* yet the Outlawry in K. is good enough by this Statute, becauſe the Proclamation iſſued to the County of which he was call'd &c. and if it be falſe, then he may avoid the Outlawry by the Statute 1 H. 5. of Additions. But in this Caſe it ſeems he may well avoid the Outlawry, tho' he was call'd nuper de London, if he had removed his Habitation into another County at the Time of the Exigent awarded. And ſo it is of Original Proceſs in Middleſex, viz. Nuper de Villa Weſtm. or de Weſtm. But not ſo of other Counties.

of Proclamation ſhall be directed to the Sheriff of the Shire where the Defendant, at the Time of the Exigent awarded, hath his Dwelling; or in Caſe where the King's Writ runneth not unto the next Shire adjoining, which Writ of Proclamation ſhall contain the Effect of the Action.

And the Sheriff ſhall make 3 Proclamations in his County at 3 ſeveral Days, 2 thereof in the full County-Court, and the 3d at the General Seſſions where the Defendant is ſuppoſed to dwell, or in the Parts next adjoining, where the King's Writ runs not, that the Defendant yield himſelf to the Sheriff of the Foreign County to whom ſuch Exigent is awarded, ſo that the Sheriff of ſuch Foreign County may have his Body before the Juſtices before whom ſuch Exigent is awarded, at the Day therein ſpecified, to anſwer the Plaintiff.

S. 2. And ſuch Writ of Proclamation ſhall have the ſame Return as a Writ of Exigent, and be deliver'd of Record to the Sheriff or Deputy of the County into which ſuch Writ of Proclamation is awarded, who ſhall execute the ſame, and make true Returns thereof, on Pain of ſuch Amercement to the King as the Juſtices, before whom returnable, ſhall ſet. And the Officer, in whoſe Office ſuch Exigent is taken, ſhall make out ſuch Writs of Proclamation as ſhall be awarded, and take no more for making and entring the ſame of Record but Six-pence.

S. 5. And if an Outlawry be promulged againſt any Perſon in a Perſonal Action in a Foreign County, and no Writ of Proclamation awarded and return'd as aforeſaid, ſuch Outlawry ſhall be void, and all Outlawries contrary to this Act may be avoided by † Averment, without ſuing a Writ of Error.

† The Statute is to be underſtood that the Outlawry muſt be avoided by Plea; per le Ch. J. Gibb. 265. Paſch. 4 Geo. 2. B. R. in Caſe of Cooke v. Champneſs.

14. In Debt or Treſpaſs, if the *Defendant comes at the Exigent, and has Dies datus* &c. and *at the Day makes Default, Diſtreſs* ſhall iſſue; and if he be *return'd Nihil*, 3 *Capias's* ſhall iſſue, *and Exigent.* Quod nota; for *Dies datus* is always before the Count, and Imparlance after the Count. Br. Proceſs, pl. 1. cites 19 H. 8. 6.

15. 23 *H.* 8. *cap.* 14. Enacts, That *like Proceſs ſhall be had in every Writ of Annuity and Covenant, as in Action of Debt.*

Fitzh. Exigent, pl. 26. S. P. cites Trin. 11 E. 3.

16. A *Ca. Sa.* iſſued, and was *return'd Non eſt inventus.* Upon a *Teſtatum* of Latitat &c. *in a Foreign County*, a *Capias* iſſued thither, which *was return'd Non eſt inventus* alſo; whereupon an *Exigi facias iſſued immediately, without any Reſort to the County where the Original was brought*, and the Defendant was outlaw'd thereupon. But by the common Opinion of the Officers and Practicers, this was erroneous; for there *ought to have been another Capias upon the Reſort* [*to the firſt County*,] and then an Exigent. D. 295. b. pl. 18. Mich. 12 & 13 Eliz. Anon.

17. The

17. The *Huſtings* in London, in which Judgment of Outlawry was given, *was held 2 Weeks after the laſt Huſtings*; whereas the Huſtings are *uſually holden but every 3 Weeks*. The Sheriffs doubted if they might return the Party outlaw'd, without Danger of an Action on the Caſe. The whole Court held that they might. And Dyer the Ch. J. ſaid, that there is a Record in the Reign of R. 2. by which it appears, that in London *they might hold their Huſtings every Week, if they pleaſed*. 2 Leon. 14. pl. 23. Mich. 19 & 20 Eliz. C. B. Anon.

18. 31 *Eliz. cap.* 3. *S.* 1. Enacts, That *in every Perſonal Action wherein a Writ of Exigent ſhall be awarded, a Writ of Proclamation ſhall be awarded out of the ſame Court, with the ſame Teſte and Return as the ſaid Writ of Exigent ſhall have, directed, and deliver'd of Record, to the Sheriff of the County where the Defendant, at the Time of the Exigent awarded, is dwelling; which Writ of Proclamation ſhall contain the Effect of the ſame Action. And the Sheriff, to whom ſuch Writ of Proclamation is directed, ſhall make 3 Proclamations, viz. one in the open County-Court, one other at the General Quarter Seſſions of the Peace, where the Defendant at the Time of the Exigent awarded ſhall be dwelling, and the other one Month at leaſt before the Quinto Exactus, by virtue of the Exigent, at or near the moſt uſual Door of the Church or Chapel of the Town or Pariſh where the Defendant dwells at the Time of the Exigent awarded; and if he dwell out of a Pariſh, then in the Pariſh next adjoining to the Defendant's Dwelling, upon a Sunday immediately after Divine Service. And all Outlawries, where Writs of Proclamation are not awarded and return'd according to this Statute, ſhall be void; and the Officers making out ſuch Writs of Exigent and Proclamation, ſhall have ſuch Fees as are limited by* 6 *H.* 8. *and the Sheriff for making Proclamation at the Church Door, ſhall have* 12 *d.*

Upon this Statute there was framed a Writ of Proclamation, ſee Theſ. Brevium, 173. This Writ is additional to the Exactus in the Exigent; if he appears before the Return of the Exigent, he may ſue out a Superſedeas, which he procures from the Exigenter; but this Appearance must be firſt recorded of that Term in which the Exigent iſſues; and this is allow'd becauſe there is a Day given him by the Writ to come in; and his Neglect of not appearing is ſo very penal, that they give him Leave at any Time to appear, before the Outlawry pronounced and return'd. And the Reaſon of his being proclaim'd at the County-Courts is, that he may ſurrender himſelf; and if he does this, he ſhall not be obliged to put in Bail, becauſe he never was in Cuſtody. G. Hiſt. of C. B. 15, 16. cap. 2.

19. There be 2 *Kinds of Appearance* before the Quinto Exactus *to avoid the Outlawry*, viz. an Appearance *in Deed*, that is, to render himſelf &c. and the other is by an Appearance *in Law*, that is, by purchaſing a *Superſedeas* out of the Court where the Record is, which is an Appearance of Record; and therefore tho' it be *not deliver'd* to the Sheriff *before the Quinto Exactus*, yet it ſhall avoid the Outlawry. Co. Litt. 128. b.

20. If upon the Writ of *Proclamation* in a Perſonal Action the Party hath been required *to appear 5 ſeveral County-Court Days in the open County-Court*, and *once in the open Seſſions*, and *once at the Church-Door where he hath* dwelt, *or did lately dwell*, and he appears not, Judgment is to be given by the Coroners of the County-Court that he ſhall be outlaw'd, quaſi extra Legem poſitus. And thereupon there is to iſſue forth againſt him the Writ of Capias Utlagatum. Shep. Abr. Tit. Utlawry.

21. 4 *&* 5 *W. & M.* 22. Enacts, That *upon iſſuing an Exigent out of any of his Majeſty's Courts againſt any Perſon for any Criminal Matter, before Judgment or Conviction, there ſhall alſo iſſue a Writ of Proclamation, bearing the ſame Teſte and Return, to the Sheriff of the County, City, or Town Corporate where the Perſon in the Record of the ſaid Proceedings is mention'd to inhabit, according to the Statute of* 31 *Eliz.* 3. *which Writ of Proclamation ſhall be deliver'd to the ſaid Sheriff* 3 *Months before the Return of the ſame.*

Continued by 6 & 7 W. & M. 14. and made perpetual by 7 & 8 W. 3. 36.

22. Where one intends to ſue any Perſon to Outlawry, who is not eaſily to be taken, and has not ſufficient Eſtate in the County whereby to be ſummon'd &c. he uſually lays his Action in *London*, otherwiſe the Out-

lawry will ſcarce be perfected in 3 Terms; for there muſt be 15 *Days* or more *between the Teſte and Return* of each Writ of Capias, Alias and Pluries. The Return of the firſt Writ is the Teſte of the 2d, and ſo on; and there muſt be 5 *County-Days* between the Teſte and Return of the Exigent. But the *Huſtings* in London happening oftner than the County-Days, *greater Expedition* may be made there, which is the Reaſon that Actions are generally brought in London, when the Plaintiff deſigns to proceed by way of Outlawry. Inſtruct. Cler. 356, 357. Tit. Outlawries.

3 New Abr Tit. Outlawry, 766. S. P. in totidem Verbis.

23. The Proceſs of Outlawry being to put the Defendant out of the King's Protection, and by which he forfeited all his Goods, and was impriſon'd, and loſt the Profits of his Lands, there was great Care taken that no Perſon ſhould be outlaw'd without *ſufficient Notice, and great Contumacy to the Proceſs of the Court*; and therefore not only 3 *Capias's were iſſued* before there could be Proceſs of Outlawry, but *likewiſe* there were 3 *Officers concern'd* in that Proceſs, that it might not be made in the King's Court behind the Party's Back. The firſt Office is the *Chancery*, from whence the Original iſſued; the ſecond the *Philazer*, who made the Capias, Alias & Pluries; and the *Exigenters*, who made out the Exigent. G. Hiſt. of C. B. 12, 13. cap. 2.

3 New Abr. 771. tit. Outlawry S. P. in much the very ſame Words.

24. Before Outlawry was pronounced the *Defendant was to be quinto Exactus*, for he *had three Days for Appearance*, and for Grace; and *if he ſtood in Contempt* at all thoſe Days *at the 5th County Court he was pronounced outlaw'd* by the Sheriff and Coroners. And the Sheriff return'd ſuch Outlawry on the Exigent; and after, when ſuch Judgment was obtain'd in the Court below, and return'd by the Sheriff and recorded above, they could take out *Execution* againſt the Outlaw; which is either *general* to arreſt the Body, *or ſpecial* to arreſt the Body, extend the Goods, Lands, Debts and Choſes in Actions. G. Hiſt. of C. B. 13. cap. 2. cites Lutw. 330, 331.

3 New Abr. 766. tit. Outlawry S. P. in the ſame Words.

25. *After Judgment* you may upon a *Capias ad Satisfaciendum, without Alias or Pluries*, have an Exigent, and thereupon outlaw the Defendant, becauſe he *having been already in Court* before Judgment, and *having Cognizance of the Debt, he ought to pay* the Debt *on the firſt ſuing out of the Capias*, otherwiſe it is a Contumacy in not performing the Judgment of the Court, for which Diſobedience he is put out of the King's Protection. G. Hiſt. of C. B. 14. cap. 2.

26. A Motion to reverſe an Outlawry at the Plaintiff's Coſt, for that the Defendant was *outlaw'd in a foreign County*. On ſhewing Cauſe, it appear'd the Plaintiff had good Reaſon to proceed to Outlawry, the Defendant being a Clergyman, and *never appearing but on a Sunday*, and altho' he was outlaw'd in a different County from that where he dwelt, yet *the Outlawry was in the County where the Action was laid to ariſe*. The Court gave their Opinions Seriatim, and againſt the Opinion of the Ch. Juſtice, diſcharged the Rule to ſhew Cauſe, for that they *held the Outlawry*, tho' not in the County where the Defendant dwelt, yet where the Cauſe of Action was laid to ariſe, to be *regular*, and that it was not neceſſary to ſhew an Attempt to arreſt the Defendant. Rep. of Pract. in C. B. 78. Mich. 6 Geo. 2. Norton v. Gilbert.

(A. a) Proceſs and Proceedings; *where there are ſeveral Defendants.*

1. IN *Appeal* againſt three, if it *appears in the Writ that the one is Principal, and the other Acceſſary*, there the Exigent ſhall not iſſue againſt the Acceſſary till the Principal be outlaw'd. Br. Exigent, pl. 44. cites 44 Aſſ. 16.

But if it *does not appear by the Writ*, then *'tis not Error, tho' Exigent ſhould iſſue againſt all together*; Per Kniver J. Ibid.

2. *Pluries Capias in Debt* is *return'd againſt three*, and *Exigent iſſues againſt two, and Pluries Capias again againſt the third*; there if *the one appears at the Exigent*, and *no Exigent is return'd*, yet *he ſhall anſwer*, becauſe the Defendants are Executors, but he ſhall be diſcharged of the Mainpriſe, becauſe the Exigent ſhall be adjudged as null, inaſmuch as the Proceſs iſſued illy. Br. Exigent, pl. 20. cites 12 H. 4 17, 18.

3. *Exigent* was awarded *againſt* 4, and *one was return'd outlaw'd*, and *Superſedeas by the other* 3, and 2 *of them appear'd*, and the 3*d made Default*; Per Newton, the *Plaintiff cannot declare againſt them who appear*, but *Exigent de novo* ſhall iſſue againſt him who made Default, and the other two ſhall have *Idem dies*; and ſo it was. Br. Proceſs, pl. 68. cites 21 H. 6. 50.

4. *And* per Brown, if *he againſt whom* Exigent iſſues *appears at the Day*, and the *others make Default*, *Diſtreſs* ſhall be awarded againſt them, *and upon this Proceſs of Outlawry*; for in Plea perſonal, after Appearance, the Proceſs is Diſtreſs, and ſo infinite. And therefore Brooke ſays, it ſeems that this is common Proceſs of Outlawry; bnt ſays that this is a Miſtake; for Proceſs of Outlawry does not lie after Appearance but before. And adds, quære, if the Infinite Diſtreſs be not intended, where he is ſufficient to the Diſtreſs, and if the Proceſs of Outlawry upon Diſtreſs be not intended where he is return'd Nihil upon the Diſtreſs. Br. Proceſs, pl. 68. cites 21 H. 6. 50.

5. In *Debt againſt* 3 *Heirs in Gavelkind* upon the Obligation of their Anceſtor, the *one being within Age*, *they were outlaw'd*; the 2 *of full Age purchaſed a Charter* [*of Pardon*;] and upon a Scire Facias the Plaintiff counted againſt them, and in the Simul-cum againſt the 3d. The Court held that the Parol ſhould not demur for the Nonage of the 3d, becauſe by the Outlawry the Original is determined againſt him, and it is not void againſt the 3d becauſe an Infant, but voidable by Error. And if at full Age of the 3d the Plaintiff would ſue a Reſummons, it muſt be only againſt the other 2, who appear'd; for the 3*d was out of Court, and never appear'd as a Defendant* in this Suit. D. 239. pl. 39. Trin. 7 Eliz. Hawtrie v. Auger.

And. 10. pl. 22. Hawtry v. Awcher S. C. accordingly, and ſays, Note all this well. —— Bendl. 146. pl. 205. S. C. and the Pleadings.— Mo. 74. pl. 203. S. C. accordingly.

6. If there are *ſeveral Appellees*, and *ſome appear* and *others make Default*, and *thoſe that appear plead* a Plea *in Abatement of the Writ*, *or* any ſuch Plea *in Bar as goes to the Whole*, the Suit ſhall be continued againſt thoſe that made Default by Capias only, and no Exigent ſhall iſſue till ſuch Plea or Pleas be determined. 2 Hawk. Pl. C. 304. cap. 27. S. 118.

(B. a)

(B. a) Proceſs and Proceedings. *Againſt a Feme who has a Baron.*

1. DEBT *againſt Baron and Feme, at the Exigent they purchaſed Superſedeas*, and at the Day the *Baron appear'd*, and the *Feme made Default*, by which iſſued Exigent de novo againſt the Feme, and the *Baron had Idem dies by Mainprize*. Br. Exigent, pl. 7. cites 9 H. 6. 8.

Ibid. Marg. cites Paſch. 42 Eliz. C. B. Anon. that Proceſs in Debt continued againſt Baron and Feme till Exigent; that the *Baron appear'd but would not ſuffer his Feme to appear*; And it was ruled per Cur. that in this Caſe *ſhe may make Attorney* to prevent her being waiv'd.

2. In Debt, the Baron was outlaw'd and the Feme waiv'd. The *Wife came into Court in Ward by Proceſs, and produced the Queen's Pardon.* The Court held that *ſhe ſhall be diſcharged* of the Impriſonment, *but that the Pardon ought not to be allow'd*, becauſe without her Baron ſhe cannot ſue a Scire Facias againſt the Plaintiff to make him declare upon the Original, without her Baron; and the Pardon has a Condition in Law, viz. Ita quod ſtet rectus in Curia, which ſhe cannot do without her Baron. D. 271. b. pl. 27. Hill. 10 Eliz. Anon.

Cro. J. 445. pl. 23. Mich. 15 Jac. B. R. Anon. It was alleged, that the Courſe hath been in an Information of Recuſancy againſt Baron and Feme, that the Baron appearing has been compell'd to find Bail for himſelf and his Feme; but it was anſwer'd, that it was in the Diſcretion of the Court; and the Reaſon thereof may be alſo, becauſe the Baron is to put in Bail when ſhe appears, and the Loſs lieth only upon him; but this Reaſon will not ſerve where the Feme only is arreſted, as the principal Caſe was.

3. An Exigent was awarded againſt Philpot and his Wife, and divers others, upon an *Indictment of Recuſancy.* The *Husband appear'd* upon the Exigent, *and conform'd* himſelf according to Law; but the *Wife made Default* and did not appear. The Husband prayed to be bail'd De Die in Diem, until the Appearance of his Wife; for the Default of the Wife ought not to Prejudice the Husband. And the Practice and Uſage of C. B. is, where Proceſs of Outlawry iſſues againſt Baron and Feme, and the Baron appears, he ſhall have Day by Bail, until the Appearance of his Feme. But the Court ſaid, that it was in the Diſcretion of the Court, when he came in upon the Exigent, whether he ſhould be let to Bail. And this *Court uſed not to let the Baron to Bail, but to continue him in Priſon for the Contempt of his Feme*, until the Feme come in, wherefore the Bail was refuſed. Cro. E. 370. pl. 9. Hill. 37 Eliz. B. R. Philpot's Caſe.

Litt. 18. S. C. accordingly, that no Superſedeas ſhall be allow'd, but the Appearance of the Feme ſhall be entred; and cites D. 271. b. —— Hutt. 86. Anon. ſeems to be S. C. but nothing mention'd as to the Wife's appearing by Attorney; but as to the Reſt, ſame was

4. For a *Debt due by the Wife before Marriage*, the Husband was return'd outlaw'd, and the Wife waiv'd, but *before the Return of the Exigent an Attorney procur'd for the Wife a Superſedeas, ſurmiſing that ſhe had appeared by him as her Attorney.* It was mov'd that this Appearance ſhould be receiv'd; and all the Court conceiv'd, that *if upon the Exigent the Sheriff had return'd Reddidit ſe, or upon Pluries capias* had return'd *Capi corpus for the Wife*, then *her Appearance ſhould be entred, but not by Attorney*, as it is here, *and the Exigent ſhould iſſue only againſt the Husband*, and *Idem dies* ſhould be given *to the Wife.* But *when the Husband* upon the Exigent *is return'd Outlaw'd*, then *it ſhall be entred Ales ſans jour for the Wife*, for the Proceſs is determined; and if he will purchaſe his Pardon, he ſhall not have Allowance thereupon in a Scire facias, unleſs he appears for himſelf and his Wife; *but if for the Husband, the Sheriff* ſhould *return Capi corpus* upon a Pluries capias, *and a Non eſt inventa for the Wife*; yet an *Exigent ſhall iſſue againſt both*, becauſe it is intendable the Husband might bring in his Wife; *but if upon the Exigent the Sheriff return'd Reddidit ſe for the Husband* and for the Wife, *and ſhe is waiv'd*, the Husband ſhall go Sine die. But in this Caſe, *becauſe the Exigent was return'd againſt both, to be outlaw'd*, the *Superſedeas, ſuppoſing the Appear-*

ance

ance of the Wife, is meerly idle and void. Whereupon it was diſallow'd, and the Exigent appointed to be filed againſt both. Cro. C. 58. 59. pl. 2. Hill. 2 Car. in C. B. Smith v. Aſhe.

was agreed by all. And the Prothonotaries ſaid, that no Superſedeas was ever granted for the Wife in ſuch a Caſe.

5. A Feme Covert was ſued as a Feme ſole, her *Husband being beyond Sea, and not known to be alive*, and ſhe was outlaw'd; and then her Husband came again, and brought a Writ of Error for the Reverſal thereof in his own Name, and the Name of his Feme; and it was ſaid to be queſtionable, he not being Party to the Suit. Hutt. 86. Hill. 2 Car. Anon. cites 18 E. 4. 4.

(C. a) Of the *Capias Utlegatum.*

1. THE Sheriff on a *Capias Utlagatum* may juſtify to *break the Houſe* and take the Body, and ſeize his Goods for the Queen; for this Proceſs is in Law at the Suit of the Queen, but *not where the Proceſs is at the Suit of a Subject.* 4 Le. 41. pl. 111. Mich. 19 Eliz. C. B. Kemp v. Windſor.

He may raiſe the *Poſſe Comitatus*, and break the Houſe to take his Perſon. Goldsb. 79. pl. 14. Hill. 30 Eliz. Hare v. Curſon. ——— See Tit. Houſe (B) and Sheriff (C)

2. The Courſe of the Court is, if one be outlaw'd *after Judgment* in Debt, if he brings *Error*, and doth not aſſign his Errors, to award a *Ca. Utlag.* which is an Execution for the Party; and if he comes to aſſign Errors, *Comittitur*, and then to find *Bail* Body for Body, for the Outlawry, and to ſatisfy the Party for the Execution; ſo no other Execution ſhall ever be againſt him. Cro. E. 707. pl. 28. Mich. 41 & 42 Eliz. C. B. in Caſe of Leighton v. Garnon.

3. A Capias Utlagatum was pleaded, and Exception was taken becauſe it was *not alleged that it was ſued forth in Term-time.* Sed non allocatur; For Per Cur. This being a judicial Writ, it *ſhall be intended* to be ſued forth in Term-time, *when there is no Reaſon to the contrary*; for by the Courſe of the Court it ought ſo to be. Lutw. 329. 333. Paſch. 4 Jac. 2. Aldworth v. Hutchinſon.

4. One was *outlaw'd in Middleſex.* A *Capias* Utlagatum *may be ſued* out againſt him *into any other County without a Teſtatum.* Vent. 33. in' a Note there. Trin. 21 Car. 2. B. R.

You may after Judgment in Outlawry have a *Capias in any County*, becauſe he being a Perſon outlaw'd, *can have no Property any where*, but to be ſeiſed every where. G. Hiſt. of C. B. 14. cap. 2.

5. If one obtain a *Judgment* againſt a Perſon, and he *abſconds ſometimes in one County*, and *ſometimes in another*, Execution cannot be had againſt him in ſeveral Counties at one Time; but if he be ſued to an Outlawry after Judgment, the Plaintiff may ſue out as *many Writs of Capias* Utlagatum into the ſeveral Counties of England and Wales general or ſpecial, as he thinks fit; and the Defendant cannot be diſcharg'd without making Satisfaction to the Plaintiff, or Pardon of the Outlawry, or reverſing the ſame for Error. 3 R. S. L. 168.

6. The Court held, that no Capias Utlagatum can be ſued out *after the Death of the Defendant.* Note, in this Caſe the Writ was teſted after the Death of the Defendant. Rep. of Pract. in C. B. 36. Trin. 13 Geo. 1. Briſtow & al'. v. Dickon.

(D. a) *Exigent de novo.* Awarded in what Caſes.

1. *Account* againſt A. of L. Clerk; *Proceſs continued till the Exigent iſſued returnable immediately*; the *Sheriff returned* Quod adeo *tarde* venit, *that there were but* 3 *Huſtings in London ubi* &c. *poſt adventum brevis.* And *one came, and ſaid that he is A. of L. Clerk, and prayed that the Plaintiff count againſt him.* Skip. ſaid that *he who proffer'd himſelf was not Clerk the Day of the Writ purchas'd, and* alſo the *Defendant is A. Son of W. of the County of S. and he who appears is A. Son of B. of the County of N.* and pray'd Exigent allocato Huſtingo, by which Confeſſion *he who appear'd went quit; and the Court awarded Exigent de novo to the Sheriff of London, and that they ſhall not take him who appear'd and entred in the Rolls the Diverſity of the Names declar'd by the Plaintiff.* Birton pray'd Allocato Huſtingo; for as yet there is not any mean Huſting held in L. Per Wilby, of the mean Huſtings we cannot be aſcertain'd, by which ſue new Exigent. And another ſuch Matter was in B. R. the ſame Term, and ſuch Order ut ſupra. And ſo ſee *if any the ſame County or Huſting be held meſne between the* 4 *Exactus, or other Delay upon the firſt Exigent,* the *Plaintiff ſhall not have new Allocato Com. vel Huſtingo.* Br. Exigent, pl. 24. cites 21 E. 3. 35.

S. P. to cauſe him to come ad audiendum Judicium; quod nota, in Appeal of Death.

2. In Appeal the *Defendant render'd himſelf pending the Exigent*, and after he *eſcap'd* out of the Marſhalſea; and it was queſtion'd what Proceſs ſhall be now awarded; and by all the Juſtices Exigent de novo ſhall iſſue. Br. Proceſs, pl. 97. cites 26 Aſſ. 51.

Br. Exigent, pl. 68. cites S. C.

3. In *Treſpaſs Exigent iſſued*, and *one of the Name of the Defendant* came, and *pray'd Superſedeas*, and had it, and *at the Day of the Exigent return'd* came the *Plaintiff*, and *ſaid that he is not the ſame Perſon who is Defendant*, and pray'd new Exigent allocatis Com. and could not have it, but Exigent de novo; for it was his Folly that he had not put a Difference before. Br. Exigent, pl. 22. cites 38 E. 3. 1.

4. Where *Treſpaſs is ſine Die by Protection at the Exigent*, and after the Plaintiff comes back with Repeal, he ſhall not have Exigent de novo, but Pone per Vadios ſicut alias. Br. Proceſs, pl. 83. cites 39 E. 3. 4. 5.

5. *Treſpaſs againſt Baron and Feme*; Proceſs continued *to the Exigent*, and the *Baron appear'd* and the *Feme not*; and becauſe *in the Exigent the Feme was not named by Name of Coverture, but by her proper Name only*, the Exigent was diſcontinued, and the Baron awarded to anſwer, and Exigent de novo againſt the Feme, & Idem dies to the Baron. Br. Exigent, pl. 34. cites 39 E. 3. 18.

6. Exigent iſſued againſt a *Man in Sanctuary*, and *Proclamation is made at the Door of the Sanctuary* 3 *Times* &c. the Plaintiff ſhall not have Allocatis Septimanis, but Exigent de novo with new Proclamations, where the firſt Exigent is not fully ſerv'd. Br. Exigent, pl. 56. cites 11 H. 4. 40.

(E. a) Exi-

(E. a) Exigent *ſuperſeded.*

1. IN Debt *at the Exigent the Defendant had Superſedeas, and did not keep his Day*, by which iſſued *Exigent de novo*; and the Defendant *had another Superſedeas out of Chancery, and at the Day the Defendant was return'd outlaw'd, notwithſtanding the Superſedeas*; and thereupon it was awarded that the Outlawry was good; for if he does not keep his Day upon the Superſedeas firſt ſued, he ſhall have no other after, and alſo the Superſedeas iſſued out of Chancery upon Suit in Banco &c. Br. Superſedeas, pl. 8. cites 7 H. 4. 5. Br. Utlagary, pl. 65. cites S. C. And per Richil, the Superſedeas of the Chancery is not good; for they cannot take Conuſance of the Record in Banco, and it cannot be larger than it ſhould be here; and here he ſhall not have another Superſedeas when he fail'd his firſt Day by Superſedeas, by which the Outlawry was awarded good.

2. *Outlawry was revers'd by Reaſon of the Superſedeas, which bore Date a little Time before the Outlawry pronounc'd*, and *was ſhew'd to the Court ſeal'd*; ſo that *it was never ſhewn to the Sheriff*, nor deliver'd to him, as it ſeems. Br. Superſedeas, pl. 9. cites 8 H. 4. 7. Br. Error, pl 40. cites S.C.

3. If *Exigent* be *awarded for a Fine againſt him who is condemn'd*, and the *Party appears gratis before the Return, and tenders Pledges* of the Fine, he ſhall find his Pledges, and ſhall have Superſedeas. Br. Superſedeas, pl. 3. cites 34 H. 6. 43. in a Note of the Reporters. But Brooke makes a Quære how he may be known for the ſame Perſon.

4. *Special Exigent* was awarded *in Debt in C. B.* and enter'd that no Superſedeas of the Chancery ſhould be, becauſe 3 Exigents before had been diſappointed by Superſedeas of the Chancery. Br. Superſedeas, pl. 31. cites 7 E. 4. 9. Br. Exigent, pl. 48. cites S. C.

(F. a) Pleadings. Outlawry. *How* it may or ought to be *pleaded or ſet forth.*

1. IN Writ of Account by two, it was held that if the one be *outlaw'd of Felony* it ſuffices for the Defendant to plead it, *without ſhewing where, before whom, and for what Felony.* Theloal's Dig. of Writs, Lib. 1. cap. 15. S. 5. cites Trin. 9 E. 3. 463.

2. He who *pleads Record* of Outlawry *upon Indictment*, ſhall not ſay that Proceſs continued till he was outlaw'd; but *ſhall plead every Capias, and all the Record in certain.* Quod nota bene. Br. Pleadings, pl. 148. cites 11 H. 6. 15.

3. In *Præcipe* quod reddat it was ſaid, that when a Man *pleads Outlawry in the Demandant in the ſame Court*, he who pleads it *may commence at the Exigent* if he will; for if it be erroneous, yet it is good till it be reverſed. Br. Pleadings, pl. 112. cites 21 E. 4. 54. If one pleads Utlagatus, he may *begin to plead the Record where he will*, viz. at the Original and all the Record, or at the Capias, and over to the Exigent and Outlawry. 2 And. 98. in Caſe of Arden v. Darcy.——The Defendant ſhall ſhew all the Record, and demand Judgment if he ſhall be anſwer'd; per Earle Serj. Arg. Cart. 192. in Caſe of Richfield v. Udal.

4. Outlawries muſt be *pleaded all at one Time*, or otherwiſe compell'd to anſwer. Toth. 239. cites Mich. or Hill. 5 Car. Whitney v. Strachey.

5. Caſe

Keb. 642. pl. 13. S. C. It was not ſaid that the Defendant was outlaw'd ſuper breve illud; and

5. Caſe was brought againſt A. and B. upon a joint Contract. A. is outlaw'd. Before Declaration againſt B. it was enter'd on the Roll thus, viz. Et *ſciendum eſt quod A. is outlaw'd*; and then had Judgment againſt B. The Court held that this was not a ſufficient Averment of the Outlawry, and therefore Judgment was arreſted. Sid. 173. pl. 4. Hill. 15 & 16 Car. 2. B. R. Gye v. Goddard.

Twiſden ſaid, that if this Sciendum had been an expreſs Averment, as it was not, yet it muſt be put in its right Place, elſe it overthrows all, if demurr'd to; and per Cur. The Verdict will not help the Sciendum, which is only Recital, nor the Want of ſaying that the Outlawry was ſuper breve illud.

6. In *Aſſumpſit* the Defendant *pleaded Utlawry* of the Plaintiff *in Bar*, and *concluded* his Plea with *Hoc paratus eſt Verificare*; whereas it ſhould have been Prout patet per Recordum, which was held to be ill, and Judgment was given for the Plaintiff. 3 Lev. 29. Mich. 33 Car. 2. C. B. Hage [alias, Haye] v. Skinner.

Comb. 162. Mich. 1 W. & M. in B. R. the S. C. and the Plea was held ill for the Doubleneſs.—Show. 80. S. C. The Court

7. The Defendant *pleaded* 10 *Outlawries* in Diſability of the Plaintiff's Action, and pray'd Judgment if any Anſwer ought to be made while they remain'd unreverſed. The Plaintiff demurr'd for Duplicity. The Court ſaid there was a Difference between a Plea of an Outlawry in Diſability, and other Pleas in Abatement; and that this Plea was ill for Duplicity, becauſe the Plaintiff is diſabled as well by one Outlawry as by all the other 9, to which ſeveral Anſwers are required. And afterwards Judgment was given, that the Defendant ſhould anſwer over for Duplicity. Carth. 8, 9. Trin. 3 Jac. 2. B. R. Trevelian v. Seccomb.

ſeem'd clearly, that the Plea was ill. But adjornatur.

8. It ought to be ſet forth, that the Plaintiff *did not appear upon the Exigent, and upon that Waviata fuit*; but to ſay *in Exigendo poſita fuit de Debita Juris forma*, is too general. Arg. 2 Vent. 282. Hill. 2 & 3 W. & M. in C. B. Webb v. Moore, cites Fitzh. Account, 91. Traverſe, 31. Stamf. 148. And the Court doubted, and order'd to ſearch Precedents. Et adjornatur.

1 Salk. 178. pl. 3 Moor v. Green, S. C. ſays it was an Action of Debt on a Judgment; and the Court compared this to the

9. The *Declaration* was *in Trinity-Term*. The *Defendant imparl'd to Mich. Term*, and *in the Long Vacation the Plaintiff was outlaw'd*; and then *in Mich. Term the Defendant pleaded this Outlawry* in Bar; but did *not ſay* that it was *Puis darrein Continuance*. The Plaintiff demurr'd. Holt Ch. J. held the Plea good enough. The Court order'd it to ſtand over till next Term, becauſe the Action being juſt, the Plaintiff may in the mean time reverſe the Outlawry. 5 Mod. 11. Mich. 6 W. & M. Green v. Moor.

common Caſe of a Judgment confeſs'd by an Executor after an Action brought, which is never pleaded Puis darrein Continuance, but as this Caſe is. And in theſe Caſes the Time of the Outlawry, and the Time of the Judgment, and when it was, appear of themſelves.

10. When you plead Outlawry in *Abatement*, and you put your *Plea in the Office*, you *muſt ſhew a Capias*, *or* ſome *ſuch Matter*, *as may make the Outlawry appear*, and not conclude only *prout patet per Recordum*, as you do when you plead *it in Bar*, and have time to bring in the Record; per Holt. 12 Mod. 132. Trin. 9 W. 3. Anon.

(G. a) Plead-

(G. a) Pleadings. *Record ſhewn.* How and When.

1. IF *Diſſeiſor, who has nothing in the Tenancy, pleads Outlawry in the Plaintiff* to his Perſon, he *ſhall ſhew the Record immediately*; for it is a Dilatory. *Contrà* if the *Tenant pleads it* in Bar. Br. Nonability, pl. 48. cites 19 Aſſ. 10. 28 E. 3. 50.

2. If an Outlawry be pleaded *in Bar*, and it be denied, the Party ſhall have a Day to bring it in. Co. Litt. 128. b.

In Caſe for Goods ſold and deliver'd, the Defendant pleaded Outlawry in the Plaintiff, and *concluded his Plea in Bar*; but did not plead the Outlawry ſub pede Sigilli. The Court refuſed to ſet aſide the Plea, becauſe the Outlawry was pleaded in Bar. 2 Barnard. Rep. in B. R. 286. Trin. 6 Geo. 2. Huſt's Caſe.

3. A. recover'd in *Debt* againſt B.—A. brought a *Scire Facias*. B. pleaded that A. was outlaw'd. *If* in this Caſe, the *Money being in Court, the King's Serjeant prays to have it for the King*, he ought to ſhew the Outlawry ſub pede Sigilli, and the Party ought to confeſs that he is the Party. Noy 143. Anon.

4. If one pleads Outlawry, he ought to plead it ſub pede Sigilli, otherwiſe the *Plaintiff* may refuſe it; but *if he accepts the Plea*, he ſhall not afterwards demur for that Cauſe; for it is *well enough* if he allows it. Per Holt Ch. J. Salk. 217. Paſch. 4 W. & M. in B. R. in Caſe of Ferrer v. Miller.

S. P. Arg. Show. 387. in Caſe of Farrers v. Miller, S. C.

5. Where the *Record of the Outlawry* is *in the ſame Court*, it need not be pleaded *ſub pede Sigilli*; but *otherwiſe where* it is pleaded *in another* Court. Reſolved per Cur. Lutw. 40. Hill. 11 W. 3. Draycote v. Curſon.

Co. Litt. 128. a. — As this is a dilatory Plea, when it is *pleaded in another Court* than where the Outlawry iſſued, the Defendant *muſt bring it in immediately*; for this being in Delay, if the Court ſhould give time, and it ſhould not be brought in, then the Delay of Juſtice would be from the Court; and ſince there is a way of having it immediately, by producing it under the Great Seal, no time ſhall be given to bring it ſub pede Sigilli; but *otherwiſe when* it is *in the ſame Court*, for then the Record is already in Court. G. Hiſt. of C. B. 160. cap. 17.——3 New Abr. 762, 763. Tit. Outlawry, S. P. in the very ſame Words.

6. In pleading Outlawry in Diſability in another Court, the ancient Way was to have the Record of the Outlawry itſelf ſub pede Sigilli by Certiorari and Mittimus; but this being very expenſive, *it is now ſufficient to plead the Capias Utlagatum under the Seal of the Court from whence it iſſues*; for the iſſuing of the Execution could not be without the Judgment, and therefore ſuch Execution is a Proof to the Court that there is ſuch a Judgment, which is a Proof that the Defendant's Plea of Matter of Record is prov'd by Matter of Record, and therefore appears to the Court not to be meer dilatory; and therefore, on ſhewing ſuch Execution, if the Plaintiff will plead Nul tiel Record, the Court will give the Defendant a Day to bring it in. G. Hiſt. of C. B. 160. cap. 17.

3 New Abr. 763. Tit. Outlawry, in the very ſame Words.

(H. a) In what Caſes the Plea of Outlawry ſhall be *in Bar*, *or* in *Abatement*; *and to what.*

1. NOte per Moile in a Caſe of Eſtoppel, that *Outlawry in Action Perſonal goes but to the Perſon, but* Outlawry *in Felony* goes *to the Action.* Br. Utlagary, pl. 61. cites 33 H. 6. 19.

Ow. 22. Mich. 37 & 38 Eliz. B. R. Bernard's Caſe accordingly, and that as to Treſpaſs or Debt upon Contract the Outlawry is only in Abatement.

2. Outlawry is a good Plea in Bar *in Debt upon an Obligation*; for by the Outlawry in the Plaintiff, the Debt by Specialty is *veſted in the King. Contra* of Debt *by* * *Contract or Treſpaſs.* Br. Utlagary, pl. 54. cites 16 E. 4. 4.

* See (B. 2) pl. 6. and the Notes there, that this Point of Debts by Contract is ſince held contra.

S. P. Becauſe the Thing is forfeited, and the Plaintiff has no Right to recover. G. Hiſt. of C. B. 162. cap. 17.

3. 2 Lutw. 1604. in a Nota there, in the Caſe of **Powis v. Williams**, cites 11 H. 7. 11. pl. 27. that if in Debt againſt me I plead *in Abatement*, yet I may *afterwards* plead it *in Bar.*

S. P. G. Hiſt of C. B. 162. cap. 17. —S. P. But the proper way of pleading this is with a *Si reſponderi debeat quouſque* &c. Per Tracy J. 2 Ld Raym. Rep. 1056. Mich 3 Ann. in Caſe of Copley v. Delaunoy.

4. If the *Ground or Cauſe of the Action* be *forfeited* by the Outlawry, then may the Outlawry be pleaded in Bar of the Action, *as in* an Action of *Debt*, *Detinue* &c. Co. Litt. 128. b. (y)

Wherever Outlawry is pleaded, it *may always be pleaded in Abatement*, but not in Bar, unleſs the Ground or Cauſe of the Action be forfeited. G. Hiſt. of C. B. 162. cap. 17.

S. P. G. Hiſt of C. B. 162. cap 17. ——In ſuch Caſe the Outlawry can be only pleaded in Abatement, becauſe *tho' the Plaintiff is under a Diſability of ſuing, yet the Right of Action remains in him*; Per Tracy J. 2 Ld Raym. Rep. 1056. in Caſe of Copley v. Delaunoy.

5. *But in real Actions*, or in *Perſonal*, *where Damages be uncertain* (as in *Treſpaſs of Battery of Goods*, of *breaking his Cloſe*, and the like) and are not forfeited by the Outlawry, there Outlawry muſt be pleaded in Diſability of the Perſon. Co. Litt. 128. b. (y)

S. C. cited 2 Lutw. 1513. in the Caſe of Clerk v. Scroggs, Hill. 12 W. 3. Arg. ſays, That tho' the Action founded only in Damages, yet the Plaintiff had Judgment, becauſe the Plea was an intire Plea in Bar to the whole Cauſe of Action. And in this Caſe the Court ſaid, that as to the Caſe of the Quantum meruit *the Foundation of this Action was a Duty*, tho' to be recover'd by way of Damages.

6. In an *Indebitatus Aſſumpſit & Quantum meruit for Meat, Drink* &c. the Defendant pleaded an Outlawry in Bar. It was inſiſted on Demurrer that Outlawry could not be pleaded in Bar in this Action; for that there is *no Certainty of the Debt* appearing *till the Thing comes to be valued*, and ſo cannot be forfeited. But reſolv'd that the Outlawry was a good Plea in Bar; for the Conſideration created a Debt or Duty, tho' that Debt was not reduc'd to a certain Sum. 2 Vent. 282. Hill. 2 & 3 W. & M. in C. B. Webb v. Moore.

7. *Caſe* was brought *by an Executor for Monies received by the Defendant to the Uſe of the Teſtator.* The Defendant *pleaded* in Abatement *that the Teſtator was outlaw'd in a Plea of Debt.* Upon Demurrer Treby Ch. J. was of Opinion that the Debt was forfeited to the King, and veſted in him; and tho' the Diſability was gone by the Death of Teſtator, yet the

the Debt remains in the King, and an Action for the Money may be brought by the Attorney General by way of Information; and therefore was of Opinion that the Plea ought to be concluded in Bar, and not in Abatement; And that as to Things executed, as Debts &c. the Outlawry remains, but as to Things Executory, the Outlawry after the Party's Death is gone. But Jo. Powell J. contra; and said it was in *Election of the Party to plead it either in Abatement or in Bar.* 2 Lutw. 1601. in the Appendix. Mich. 10 W. 3. Powys v. Williams.

8. In *Covenant upon a Lease* for Years, in which was a Covenant *to pay 40 l. a Year Rent, and also to repair, and not to do any Waste*, the *Breach was assign'd on all* 3. The Defendant *pleaded an Outlawry* sub pede Sigilli of the same Court, in Bar to the whole. Upon Demurrer it was objected, that the Outlawry was pleaded in Bar to the whole Declaration, which is ill; for the Damages to be recover'd for want of Repairs are not forfeited by the Outlawry, because these are intirely uncertain. But it was answer'd, that the Rent was forfeited to the King by the Outlawry, and therefore might well be pleaded in Bar of the Action. But adjudg'd for the Plaintiff, because *the Plea was an intire Plea in Bar to the whole Cause of Action*; and as to the Damages for want of Repairs, those are not forfeitable by the Outlawry any more than Damages for a Battery or other Trespass; and so the Plea being intire, and ill in Part is bad in the whole. It is true *before Imparlance it might have been pleaded in Abatement of all the Writ, or in Bar to the Rent*, (because that is a certain Duty) *and in Abatement as to the Repairs.* 2 Lutw. 1510. 1513. Hill. 12 W. 3. Clerk v. Scroggs.

9. Outlawry may be pleaded in Abatement of the Plaintiff's Writ, for till this is reversed, or the King has granted his Charter of Pardon, he is *out of the Protection of the Law, because he would not be amenable and attendant* to it, and ought not to have any Privilege from it. G. Hist. of C. B. 159. cap. 17.

10. Outlawry *for Felony may be pleaded in Bar to all Actions* concerning Lands and Tenements, as well as Goods and Chattels, for all his Lands are forfeited by the Felony. G. Hist of C. B. 162. cap. 17.

(I. a) Pleadings. *At what Time.*

1. IT seems that *in Plea of Land* if the *Demandant is outlaw'd of Trespass*, and the Tenant has lost the Time of the Pleading, and if the *Demandant has Judgment to recover Seisin*, the Land shall be seised into the Hands of the King. Theloal's Dig. of Writs, Lib. 1. cap. 15. S. 6. cites Mich. 14 H. 4. fol. 15.

In this Case the Tenant appear'd, and then made Default after Default, and but it being then would have pleaded Outlawry in the Plaintiff, and alleg'd the Record in certain; after the last Continuance, the Plea was disallowed. 14 H. 4. 15. a. pl. 6.

A Man may plead Outlawry *Puis darrein Continuance*; for it is upon the Prerogative that the Debt is forfeited to the King, and by Virtue of the Prerogative Nullum tempus occurrit Regi; and therefore he may plead it, tho' a Continuance has happen'd after the Outlawry. G. Hist of C. B. 83. cap. 9.

2. *Attaint by* 2; upon Issue passed against them, *one of the Petit Jury pleaded Outlawry in one of the Plaintiffs before the Date of the Assise*, and it was held that he could not; for it is Dilatory; and the *Tenant shall not have the Plea, because he did not plead it in the Assise*, but admitted both of the Plaintiff's to be able. Br. Nonabilitie, pl. 27. cites 2 H. 7. 7.

In *Trover* &c. the *Defendant after Imparlance pleaded an Outlawry* of the Plaintiff; and held by ſome to be a good Bar, and therefore may be pleaded after Imparlance. 3 Le. 205. pl. 261. Trin. 30 Eliz. B. R. Markham v. Pitts.——S. C. cited Arg. 2 Vent. 282. in Caſe of Webb v. Moor.——S. C. cited 2 Lutw. 1513. Arg. in Caſe of Clerk v. Scroggs; and there the Court ſaid that it was an Action of Property, and the Thing itſelf is forfeited by the Outlawry.

3. In Caſe of *Debt or Treſpaſs de Bonis aſportatis*, Outlawry may well be pleaded in Bar *after Imparlance*; for this Debt and Goods belong to the King. But it is otherwiſe *in Treſpaſs of Battery, and Clauſo Fracto*; for it is uncertain what Damages, if any, ſhall be recover'd. Jenk. 130. pl. 64.

4. In *Replevin*, there was *Judgment by Default*, and a *Writ of Enquiry* of Damages; *upon the Return* of which Writ, the *Defendant pleaded that the Plaintiff was outlawed at the Time of the Action brought*. Adjudg'd, that now he had no Day to plead this Plea, becauſe it was after Judgment in the ſame Action. Bendl. 206. pl. 242. Paſch. 14 Eliz. Puttenham v. Morris.

5. A. recover'd in *Debt* againſt B.——A. brought a *Scire Facias*. B. pleads that A. is outlaw'd &c. That is a good Plea, if he be *outlaw'd after the Plea in Bar* pleaded *in the Action of Debt*. But otherwiſe 'tis, if he be outlaw'd before; for then B. might have pleaded that in Bar in the firſt Action. Noy 143. Anon.

(K. a) Pleadings of Outlawry. *In what Courts.*

Br. Utlagary, pl. 52. cites S. C.—Outlawry *in a County Palatine cannot be pleaded in any of the Courts of Weſtminſter*; for he is only ouſted of his Law within that Juriſdiction, and it ſhall not extend to diſable a Man in another County where they have no Power; for the County Palatine being a Royal Juriſdiction within Bounds, the Loſing the Privileges of Law within that Juriſdiction can be no Diſadvantage to him in another County; and if he does not live within the Palatine Juriſdiction, he is not obliged to attend there. G. Hiſt. of C. B. 161, 162. cap. 17.

1. Outlawry *in Durham* or *Cheſter* ſhall not ſerve in Bank; for they have only a private Juriſdiction, which extends only in their Precinct; per Brian J. which Littleton J. agreed; but the Serjeants held * contra, and that it ſhall ſerve here. Per Littleton, A Man outlaw'd in † Bank ſhall be by this diſabled here; for they have their Authority by Parliament, Tempore Edw. 3. but Cheſter and Durham *are by Preſcription*. Br. Nonability, pl. 33. cites 12 E. 4. 15.

* This Plea, after the Words (but the Serjeants held,) is not agreeable to the Year-Book, where the Words are, "But the Serjeants held, that one outlaw'd in Lancaſter ſhall be diſabled here;" and then gives the Reaſon mention'd in the Plea in Brooke. But all the Editions of Brooke have theſe Words, viz. (Contra, and that it ſhall ſerve here. Littleton, A Man outlaw'd in † Bank ſhall be diſabled here; for &c.) which cannot be right. See 12 E. 4. 16. a. pl. 18.——G. Hiſt of C. B 162. cap. 17. is according to the Year-Book.——[The Word (Bank) ſeems miſprinted for (Lank.) as an Abbreviation of Lancaſter.]

(L. a) Pleadings. *Where Strangers Goods are taken.*

Ld. Raym. Rep. 307. S. C. accordingly.—If ſuch Leaſe

1. If the *Cattle of a Stranger* be ſeiſed, by virtue of a Levari Facias, on the Lands of the Outlaw, and the Outlaw had made a *Leaſe* of ſuch Lands *before the Exigent return'd*, the Party muſt plead that the Leaſe was made before the Outlawry; per Cur. 5 Mod. 117. Mich. 7 W. 3. by

by Holt Ch. J. in delivering the Judgment of the Court, in Caſe of Britton v. Cole.

afterwards allow'd in the Exchequer, he cannot have an Action of Treſpaſs; for if it be not found by the Inquiſition, or muſt go into the Exchequer by way of Monſtrans de Droit, and plead it there; for he ſhall not falſify the King's Title in an Action. 12 Mod. 177. S. C.——Comb. 470. S. C. accordingly.——Carth. 442. S.C. accordingly.

2. If the *Owner of the Soil* is outlaw'd, and the *Cattle of a Commoner* are taken as Iſſues, he muſt plead his Title in the Exchequer, unleſs his Right of Common is found by Inquiſition on the Outlawry. Carth. 442. in Caſe of Britton v. Cole.

3. Where the Plaintiff in Outlawry would juſtify the taking the Cattle of a Stranger levant and couchant on the Land, by virtue of a *Levari* in Action of Treſpaſs brought againſt him, he ought to *begin with the Outlawry, and ſet forth all the Proceedings*; and not to begin ſhort with the Proceſs of Levari only. Arg. And per Holt Ch. J. All *Strangers* who juſtify under Proceſs of Execution (except *Officers*) ought to ſet forth the Judgment; and ſo muſt the Plaintiff, if he juſtifies. Carth. 443. Hill. 9 W. 3. B. R. Britton v. Cole.

12 Mod. 179. Britton v. Cole. He ought to ſhew the Outlawry to be in Being *Prout patet per Recordum in C. B.* and that being omitted, the Plea was ill.

(M. a) Pleadings. *By Officers. In Juſtification.*

1. IN Treſpaſs for taking the Plaintiff's Cattle, Defendants juſtified by a Levari Facias on an Outlawry. It was held that *pleading* only the Writ of *Levari Facias*, and the Execution thereof, is ſufficient to *juſtify* the Officer, but not a Stranger, (as the Plaintiff in the Outlawry) who commands or requeſts the Bailiff to do Execution; for he ought to *ſet forth the Record of the Outlawry* &c. Cumb. 471. Hill. 10 W. 3. B. R. Britton v. Cole.

(N. a) Pleadings. Outlawry. *To whoſe Suit it ſhall be a Bar.*

1. IN *Debt againſt Executors*, it is a good *Plea that the Teſtator was outlaw'd, and died outlaw'd*; for they are charged of the Goods to the King in this Caſe; ſo to ſay that he was outlaw'd of Felony &c. per Littleton, Young, and Pigot. But per Jenney, It is only argumentative that they have nothing. Br. Dette, pl. 156. cites 8 E. 4. 6. Br. Utlagary, pl. 49. cites S. C.

2. Outlawry is no Bar to the Suit of an *Executor* in Chancery, becauſe he ſues En auter Droit; per Ld. Keeper North. Vern. 184. pl. 183. Trin. 1683. Killigrew v. Killigrew.

(O. a) Replication to Pleas of Outlawry.

Br. Utlagary, pl. 50. cites S. C — *So* in *Debt on Bond* the Defendant *pleaded* an Outlawry in Bar, and ſhew'd it in certain, *that the Plaintiff was outlaw'd by the Name of J. S. of D. in the County of &c.* The Plaintiff *replied, that* at the Time the Suit was commenced againſt J. S. upon whom this Outlawry was had, *the ſaid J. S. now Plaintiff, was living at B.* &c. and *traverſed that he was living at D.* And it was held a good Replication to avoid the Outlawry without a Writ of Error; for if he were not dwelling at D. he cannot be intended the ſame Perſon. Le. 87. pl. 108. Mich. 29 & 30 Eliz. C. B. Anon. cites 10 E. 4. 12. and 39 H. 6. 1.

1. *Treſpaſs by J. S. of D.* The *Defendant ſaid, that at another Time A. brought Treſpaſs againſt the Plaintiff by Name of J. S. of S. in the County of N. Yeoman, and Proceſs thereof continued till he was outlaw'd.* Judgment if he ſhall be anſwer'd. The *Plaintiff ſaid, that the Day of the Writ purchaſed, and all Times after, and at the Time of the Outlawry pronounced, he was dwelling at D. abſque hoc that he was dwelling at S.* And it was held a good Plea; for if the Plaintiff was not then dwelling at S. he cannot be intended the ſame Perſon who is outlaw'd. Br. Non-abilitie, pl. 32. cites 10 E. 4. 12.

* All the Editions are (Vers;) but according to the Year-Book it ſhould be (Per.)

† 2 Hawk. Pl. C. 460. cap. 50. S. 9. in the Note (m) ſays, it ſeems this Opinion is not warranted by the Year-Book.

2. *Debt* * againſt [by] J. S. The *Defendant pleaded Outlawry in him, and ſhew'd Record by Name of J. S. of S.* The Plaintiff ſaid, that at the Time of the Suit taken, in which the Outlawry was had, he was dwelling at D. abſque hoc that he was dwelling at S. &c. at the Time of the Suit in which the Outlawry was, or ever after. And by the Opinion of the Court this was a good Plea, and that he ſhall not be put to Writ of Error. Per Rede, True it is; for now he leaves the Outlawry good againſt J. S. of S. But he ſhall not ſay † No ſuch Vill as S. without ſuing Writ of Error; for this diſaffirms the Outlawry; nor ſhall he ſay that there is another Perſon of the ſame Name, but ſhall be put to Writ of Error. Br. Utlagary, pl. 29. cites 21 H. 7. 18.

Mo. 63. pl. 175. S. C. but S. P. does not appear. — Dal. 66. pl. 30. S. C. but S. P. does not appear. — D. 227. pl. 45. S. C. but not exactly S. P. — The Defendant pleaded Outlawry. The Plaintiff replied Nul tiel Record. At the Time of the Plea the Plaintiff was outlaw'd, but he reverſed it before the Day of the bringing in of the Record, and a Reſpondeas Ouſter was awarded. Cro. J. 484. pl. 2. Trin. 16 Jac. B. R. Iſon v. Grey. — D. 227. b. 228. a. pl. 45. Hill. 6 Eliz. Anon. S. P.

3. *In an Action popular* &c. the Defendant pleaded, that the Plaintiff was outlaw'd, and demanded Judgment if he ſhould be anſwer'd. The Plaintiff *replied that he had reverſed the Outlawry by Error.* And Judgment that the Defendant ſhould anſwer over. And. 30. pl. 71. Paſch. 6 Eliz. Palmer's Caſe.

4. *But* if *in Debt upon Bond* the Defendant had pleaded an Outlawry, and the *Plaintiff* had *replied a Pardon*, the Writ ſhall abate. But in a popular Action, if a Pardon be pleaded, quære; becauſe a Moiety is given to him who will ſue for it, and when once the Suit is begun, then it becomes the Plaintiff's own Suit; which if it be his proper Suit to all Reſpects, it is like a Debt on a Bond. And. 30. pl. 71. Palmer's Caſe.

5. In *Debt on a Contract* the Defendant, *after Imparlance, pleaded Outlawry in Bar.* The Plaintiff *replied Nul tiel Record.* The Defendant did *not bring the Record in at the Day.* Judgment abſolute ſhall be given, and not a Reſpondeas Ouſter. But per Berkley J. The Plaintiff might pray, if he would that the Defendant anſwer over; for it is Delay only,

ly, and no Error. Cro. C. 566. pl. 2. Hill. 15 Car. B. R. Dawſon v. Lee.

(P. a) Pleadings *in Avoidance* of Outlawry; *As No ſuch Vill* &c. or, *Dwelling at* &c.

See (O. a) pl. 12.

1. W. *B. of D. Butcher, came by Capias Utlagatum and ſaid, that the Day of the Writ &c. he was dwelling at S. and was Husbandman, and never appear'd in Perſon, nor by Attorney; abſque hoc that he was dwelling at D. or was Butcher*; and *the other averr'd the contrary*, being warn'd by Scire Facias, viz. the Plaintiff. And it was held ill Iſſue; for *where the Plaintiff averr'd that he appear'd by P. W. his Attorney*, per Paſton, if he ſhall have this Iſſue, *he ought to ſhew that it was another Perſon that made P. W. his Attorney, and give Name to him, abſque hoc that he is the ſame Perſon who made the Attorney.* By which the Court demanded the Defendant, and he appear'd, and the Court awarded him to replead; and it was ſaid that if he had not now appear'd, other Ca. Sa. ſhould be awarded, and he ſhould never have Advantage of theſe Matters &c. Quære Cauſam. And note that this Perſon was outlaw'd upon a Ca. Sa. upon Condemnation after Plea by Attorney found againſt him. Br. Utlagary, pl. 25. cites 22 H. 6. 16.

S. P. Br. Travers per Sans, pl. 96. cites 22 H. 6. 16,

2. If a Man *outlawed by Name of J. S. of D. comes in by Return of the Sheriff upon Writ or Precept, he may ſay that there are in the ſame County two D's, viz. Over D. and Nether D. abſque hoc, that there is in the ſame County any D. without Addition, or any Place or Hamlet known by this Name.* Br. Utlagary, pl. 26. (bis) cites 22 H. 6. 23.

3. *But if he comes in* * *Gratis, he ſhall not have the Plea*, nor ſhall the King's Serjeants maintain it againſt him; for it does not appear, whether he be the ſame Perſon, *and if he be in the Hall, and is arreſted by an Officer without Writ by Command of the Court, he ſhall be examined, whether he be the ſame Perſon or not*, and if he denies that he was dwelling at this Vill, or that he was dwelling at a Vill of the ſame Name with an Addition, as in Nether D. the Court can do nothing but let him go; For no Averment can be taken by the King's Serjeants in this Caſe; and after he came in by Return of the Sheriff, and had the Plea Supra. Br. Utlagary, pl. 26. (bis) cites 22 H. 6. 23.

* A *Capias Utlagatum in Debt iſſued againſt B. by the Name of B. of London*, which was *return'd Non inventus.* At the Day of Return *B. came in Gratis* in proper Perſon, and *would have pleaded* that he was *commorant at C. in the County of G. at the Day of the Writ purchaſed, and always after pending the ſaid Writ, and not at London* &c. It ſeems he ſhall not have the Plea; For he is not grieved by the Outlawry, and coming in Gratis, and not in Ward of the Sheriff Non conſtat Curiæ, that he is the ſame Perſon as was outlaw'd; and here the Plaintiff at whoſe Suit the Outlawry was, is out of Court. And at length the Court held *the Plea not receivable, unleſs he comes in in Ward by Return of Cepi Corpus.* D. 192. b. pl. 25. Mich. 2 & 3 Eliz. Milna v. Brown.

4. A Man was outlaw'd *by Name of J. S. late of D.* who *ſaid that the Day of the Writ purchaſed, he was dwelling at S.* And no Plea unleſs he ſays *Abſque hoc, that he was dwelling at D.* Br. Utlagary, pl. 48. cites 2 E. 4. 1.

5. In B. R. a Man was *outlaw'd upon Capias pro fine*, becauſe he was *Mainpernor of W. N. by the Name of R. B. of D. in the County of M. Gent.* and *the Outlawry was accordingly*; and a Man was taken by Capias Utlagatum at the Bar, who *ſaid that the Day of the Outlawry* pronounced, *he was dwelling at M. in the County of E. abſque hoc, that he was ever Main-*

Mainpernor; and per Cur. he ſhall not have this Traverſe, becauſe he did not deny but that he was the ſame Perſon; but he may traverſe thus, viz. to ſay Ut ſupra, abſque hoc, that he was ever dwelling at D. in the County of M. or that he was Gent. and not Yeoman, or that there are two of the ſame Name in the ſame Vill, and that the one is Gent. and the other Yeoman, and that R. B. Yeoman was Mainpernour, abſque hoc, that He was Mainpernour &c. Br. Utlagary, pl. 58. cites 21 E. 4. 78, 79.

6. A Man was taken in Weſtminſter-Hall, becauſe he was *outlawed in* Action of *Account by Name of J. B. of F. in the County of S.* who *ſaid that he was dwelling at C. in the County of D. the Day of the Writ purchaſed, and always after, and not at F.* And a good Plea, per tot. Cur. For he cannot be intended the ſame Perſon; by which the other ſhall aver, that he was dwelling at F. prout &c. tempore &c. Br. Utlagary, pl. 73. cites 10 H. 6. 4.

7. Upon an Outlawry in Debt, the *Defendant in the original Writ was named A. B. de C. in Com. Denbigh*; he came in by Cepi Corpus, and *ſaid that he was dwelling at D. the Day of the Writ purchaſed, and not at C.* The Opinion of the Court was that he *ſhould ſay*, that he was not dwelling at C. the Day of the Writ iſſued forth, *nor at any Time afterwards.* For if he comes to C. after the Writ purchaſed, the Writ is good enough. Moor. 70. pl. 189. Trin. 6 Eliz. 3. Anon.

(Q. a) Pleadings in Avoidance of Outlawry; As *Miſnoſmer, or Wrong Addition.*

* Miſprinted for (Utlagarie.)

1. ONE *G. de R. was outlawed by Exigent* where there was not any Original againſt him; in *the Original* it *was Jo. de A.* by which G. was diſcharg'd. Theloal's Dig. of Writs, lib. 11. cap. 4. S. 4. cites M. 44 E. 3. * Villeinage, 41.

2. One *Jo. Dale of G. was outlawed*, and one came by Capias Utlagatum, and *ſaid that his Name is Jo. Stile of York, and not Jo. Dale of G.* and pray'd Remedy; and had Scire facias againſt the Plaintiff to know if it be ſo or not; but he was not let to Mainpriſe. Theloal's Dig. of Writs, lib. 11. cap. 4. S. 28. cites Trin. 1 H. 5. 5.

One *Jo. B. Brewer*, was outlaw'd, and he came in by Capias Utlagatum, and *ſaid that he was Yeoman the Day*

3. *John Page, Dyer*, was outlaw'd, and Jo. Page came by Capias Utlagatum, and *ſaid that he was a Brewer*, and not a Dyer; upon which a Writ iſſued to the Sheriff to inquire if he was a Dyer or not. But the Opinion was, that he ought to ſue his Pardon, becauſe he is the ſame Perſon. Theloal's Dig. of Writs, lib. 11. cap. 4. S. 8. cites Hill. 5 H. 5. 8. and 12 H. 6. 8.

of the Original Writ purchaſed, *and not Brewer*; upon which Iſſue was taken. Theloal's Dig. of Writs, lib. 11. cap. 4. S. 19. cites Mich. 1 E. 4. 2. 21 H. 6. 55. 12 H. 6. 8.——— But Hill. 5 H. 7. 16. in ſuch a Caſe he adjoin'd to his Plea, And So he is not the ſame Perſon who is outlaw'd. Ibid.

4. One *John Den de M.* in ſuch a County, Butcher, was outlaw'd, and one Jo. Den de M. in the ſame County came by Capias Utlagatum, and *ſaid that there is in the ſame Vill one Jo. Den Butcher, againſt whom the Suit was, and that he is Jo. Den Husbandman, and not Butcher* &c. *And ſo* that he is *not the ſame Perſon*; *and* it was held a good Plea to be diſmiſſed, he adjoining to his Plea, *that he never appear'd to this Suit.* Theloal's Dig. of Writs, Lib. 11. cap. 4. S. 12. cites Hill. 19 H. 6. 58. 20 H. 6.

H. 6. 20. And ſo agrees Mich. 22 H. 6. 18. and ſee Hill. 21 E. 4. 94. accordingly.

5. *J. S. Knight came by Capias Utlagatum*, and *ſaid that he was not converſant nor dwelling at D.* &c. *the Day of the Writ purchaſed nor ever after*, and *the contrary was maintain'd for the King and he put to Mainpriſe*, and *one N. ſurmiſed that he was outlaw'd at another's Suit, and prayed that he may remain in Priſon*, the *Defendant ſaid that, No ſuch Record*, and the *Verdict was, that there was ſuch Exigent returned ſerved, but was not enter'd, and the Clerk enter'd it now*, and well; and the Exigent is recorded, tho' it be not enter'd in the Roll; quod nota; and the Defendant demanded Oyer of the Record, and had it; and becauſe he *came in by Capias Utlagatum, by Name of J. S. Knight, and by the Outlawry he is named J. S. Eſq; and he alleged that he was Knight 20 Years paſt*, and for this Variance, and becauſe he had no Day in Court by the other Exigent now alleged, therefore he went without Day by Award, without trying whether he was the ſame Perſon or not. Br. Utlagary, pl. 32. cites 38 H. 6. 1.

6. Where a Man appears, and ſays, that whereas Outlawry is pleaded againſt him *as a Mainpernor by Name of J. S. of L. Gent.* he at the Time of the Mainpriſe, and always after was J. S. *Yeoman, abſque hoc, that he was the ſame Perſon who was Mainpernor, and does not traverſe that he was not Gent.* inaſmuch as he appears, he is eſtopped by his Mainpriſe; but *contra where he is outlawed upon the Original* &c. *or he does not appear*, there he ſhall traverſe Ut ſupra, that he was Yeoman and not Gent. Br. Utlagary, pl. 51. cites 10 E. 4. 16. Br. Traverſe per Sauns &c. pl. 236. cites S. C. — Br. Nonability, pl. 50. cites S. C. but cites 7 E. 4. 1. that upon ſuch Plea, the Plaintiff *ſaid that he was Gent. and not Yeoman*, and the Iſſue received; for now it ſeems that he is not the ſame Perſon. ——— Br. Utlagary, pl. 51. cites S. C.

7. *Treſpaſs againſt two* who were outlaw'd, and were *taken by Capias Utlagatum*, and the *one ſaid, that where he is outlawed by Name of J. Stoke*, his Name is and was the Day of the Writ purchaſed *J. Stockes, and not J. Stoke*, and pray'd Scire facias againſt the Plaintiff, and had it; who came, and ſaid that he is known by the one Name and by the other; and he was let to Mainpriſe. Br. Utlagary, pl. 53. cites 14 E. 4. 6.

(R. a) Pleading *other Pleas* than No ſuch Vill &c. Miſnoſmer &c.

1. IT was admitted that where a Man is outlaw'd he may *ſay, Quod ipſe tam languidus fuit tempore* utlagariæ, *that he cannot appear propter periculum mortis*. Br. Utlagary, pl. 75. cites 4 H. 5. S. P. Ibid. pl. 77. cites 4 H. 4. B. R.

2. Where Outlawry is pleaded in the Plaintiff in Debt, he *ſhall not ſay that there are two of his Name, the one elder and the other younger, and the eldeſt is outlaw'd, and this Plaintiff is youngeſt*, but ſhall be put to his Identitate Nominis; for dilatory; contra upon Plea in Bar. Br. Utlagary, pl. 55. cites 21 E. 4. 15. Br. Idemptitate Nominis, pl. 7. cites S. C. — S. P. in Præcipe quod reddat; Per tot. Cur. Ibid. pl. 56. cites 21 E. 4. 54. ——— Br. Idemptitate Nominis, pl. 8. cites S. C.

3. A Man *outlaw'd of Felony, as Acceſſary, ſaid that before the Outlawry the Principal was dead, and pray'd Writ to the Sheriff to reſtore him to his Goods*; Theloal's Dig. of Writs, lib.

11. cap. 4. S. 22. cites S. C.

Goods; and the King's Attorney averr'd that he was alive at the Time, and he ſhall not have the Writ before this tried. Br. Utlagary, pl. 30. cites 21 H. 7. 31.

(S. a) Outlawry. The Effect thereof.

G. Hiſt. of C. B. 163. cap. 17. ſays, that Outlawry does *not abate the Writ*, but *is only a temporary Impediment* that diſables the Plaintiff from proceeding; for upon obtaining a Charter of Pardon, or reverſing the Outlawry, he is reſtor'd to his Law, and ſhall oblige the Defendant to plead to the ſame Writ. ——3 New Abr. 763. Tit. Outlawry, S. P. in the ſame Words.

1. THE Diſability by Outlawry *abates not the Writ*, but diſenables the Plaintiff, until he obtains a Charter of Pardon. Co. Litt. 128. b. (x)

2. By the Outlawry the *Original is determined*. See Le. 30. pl. 37. Watts v. Jordan.——See 3 Le. 202. pl. 255. in Caſe of Pye v. Grunway.

Cro. E. 706. pl. 28. S. C.

3. If one *at Common Law* had *Judgment in Debt, and after* the Judgment he had *outlaw'd the Defendant*, the Plaintiff was at the End of his Suit as to any Proceſs to be ſued by himſelf; for he could not have Sci. fa. nor any other Proceſs upon the Judgment, but *was put to his new Original*; and tho' before the 25 E. 3. Capias lay not in Debt, nor was the Body liable to Execution for Debt, yet if Defendant be taken by Cap. Utlag. at the King's Suit, no Laches being in the Party in continuing his Proceſs, he ſhall be in Execution for the Plaintiff, if he will; for as the King is intitled to the Goods, Chattels, and Profits of the Lands &c. it is reaſonable that if the Defendant be taken at the King's Suit, and the King has Benefit by the Party's Suit, the Party ſhall have Benefit at the King's Suit. Reſolved 5 Rep. 88. a. Hill. 40 Eliz. B. R. Garnon's Caſe.

By the Outlawry on meſne Proceſs, the Plaintiff is at the End of his Suit.

4. When the Party is outlaw'd on *an Original* and meſne Proceſs before Judgment, if he be after taken by *Capias Utlagatum*, the Party cannot declare againſt him, but he ought to have a *new Action of Debt*. Cro. E. 706. pl. 28. Mich. 41 & 42 Eliz. C. B. in Caſe of Leighton v. Garnon.

Arg. Gibb. 265. cites 13 H. 4. 1. and admitted Per Cur.

5. The *Party at whoſe Suit* a Perſon is outlaw'd, *has an Intereſt* by the Outlawry, as well as the King. Sic dictum fuit. Sti. 348. in Caſe of Ellis v. Pippin.

6. Every Outlawry *is a Judgment*. Chan. Rep. 10. in the Earl of Oxford's Caſe, cites Doct. and Stud. lib. 2. cap. 21. 21 H. 7. 7. 9 H. 6. 20.

7. Outlawry on a Bond upon *meſne Proceſs* before Judgment, does not alter the Nature of the Debt, nor create *a Lien upon the Land*. But where there is an Outlawry, *and a Seiſure* thereupon, the Debt attaches upon the Land, and ſhall be *prefer'd* to a Judgment, tho' prior to the Outlawry. But it is the Seiſure that gives the Preference. 1 Salk. 80. Trin. 1714. in Canc. Erby v. Erby.

8. The *Nature of the Debt* is *not chang'd* by the Outlawry. Arg. and admitted by the Court. Gib. 265. Paſch. 4 Geo. 2. B. R. in Caſe of Cooke v. Champneſs.

(T. a) Discharg'd by *Pardon*.

1. 5 E. 3. 12. ENacts, That *where the Plaintiff recovers Damages, and the Defendant is thereupon outlaw'd at the King's Suit, no Pardon shall be granted, except the Chancellor be certified that the Plaintiff is satisfied his Damages.* *At the Common Law before this Statute, if the Defendant had been outlaw'd* the *Plaintiff had been put to a new Original.* Br. Dett, pl. 128. —— One outlaw'd *upon a Ca. Sa. at the Suit of Executors*, was in Prison in the Fleet. *One of the Executors releas'd* to him *all Actions and Executions.* Whereupon he prayed a Sci. fa. against the Executors, to answer the Deed. The Justices were in Doubt if he should have Sci. fa. first, or his Charter of Pardon first, and then Sci. fa. At length *Sci. fa. was granted* by Advice of the Justices, by reason of these Words of the Statute; and if upon the Return of the Sci. fa. they cannot deny the Deed, then it is prov'd that Gree is made upon this Recovery; and thereupon he shall have his Charter of Pardon. Fitzh. Tit. Scire facias, pl. 150. cites H. 13 H. 4. —— And Ibid. Tit. Charter, pl. 28. cites 13 H. 4. That if one be outlaw'd *upon a Capias ad Satisfaciendum* &c. he shall not have Charter of Pardon till the Chancellor be certified that he has made Gree &c.

And where one is outlaw'd by Process before Appearance, no Pardon shall be granted, except the Chancellor be certified that the Person outlaw'd hath *yielded himself to Prison before the Justices of the Place from whence the Exigent issued; that is to say, if from the King's Bench, then he shall yield himself there; and if from the Common Bench, then he shall yield himself there: And if from the Justices of Oyer and Terminer, whilst they sit, he shall yield him before them. And if they be risen, then he shall yield him in the King's Bench; and the Record with the Process shall be removed before them by Writ.* * If a Man be *outlaw'd in Action Personal*, and *brings Writ of Error*, by which the *Record is remov'd, and he obtains Pardon and brings Scire facias*, the *Plaintiff may now declare in B. R.* notwithstanding the Statute [of 5 E. 3. 12.] is, *that he shall render himself to the Prison of the Court where the Exigent issues*; Per Fairfax, quod non negatur. Br. Error, pl. 133. cites 1 H. 7. 12.

And the Justices before whom they shall so yield them, shall cause the Party Plaintiff to be warn'd to appear before them at a certain Day; at which Day, if the Warning be duly witnessed, and the Plaintiff appear, then shall they * *plead upon the first original Writ as tho' no Outlawry had been; but if he come not, the outlaw'd Person shall be deliver'd by Virtue of his Charter. And note, that all such Charters are of the King's Grace, as before they have been.* *In Trespass the *Defendant was outlaw'd, and sued Charter of Pardon and Scire facias against the Plaintiff, who appear'd and counted against him*, and the *Defendant alleged Discontinuance of Process.* Quære if he shall have Advantage thereof; for the *Statute is that he shall plead upon the Original, as if no such Outlawry was.* And per Skip. if the mesne Process be discontinued, the Original is discontinued. And per Greene, if the Defendant will have Advantage thereof, he ought to have Writ of Error, as at the Common Law; *but when he sues Charter of Pardon by Scire facias, he affirms the Process good*, and shall answer as if he had appeared upon the Original. Quære. Br. Utlagary, pl. 27. cites 24 E. 3. 42.

If a *Man* be *outlaw'd*, and *sues Charter of Pardon, and has Scire facias* against the Party, in this Case *the Plaintiff ought to declare* against *him*, because by the Charter the Original is determined. Br. Nonsuit, pl. 29. cites 21 H. 6. 50. —— Br. Count, pl. 37. cites S. C. For this Statute wills, that they plead upon the Original, which cannot be without Count. *Contra* where he is outlaw'd, and upon *Capias Utlagatum comes and pleads Misnosmer*, and has Scire facias against the *Plaintiff*, who *comes and maintains the Original*, there the Plaintiff shall not count; for *the Original is determined by the Outlawry*, but in the first Case it is reviv'd, and there he shall recover or shall be barr'd, and in the other he shall not recover, but the Defendant shall be awarded to the Fleet. Nota diversitatem inde, quia bona.

2. Theloal's Dig. of Writs, lib. 1. cap. 15. S. 3. says, it seems the Opinion of the Book of Mich. 13 E. 3. Utlary 49. is, That *Outlawry at the Suit of the Party in Oyer and Terminer de Uxore rapta, & abducta cum Bonis viri*, is only as an Outlawry in Trespass, and that after Charter of Pardon had of such Outlawry, such Person outlaw'd shall maintain Assise upon such Title before &c. *But if the Outlawry had been of Felony,* he Br. Utlagary, pl 36. cites 13 Ass. 5. That in *Assise Outlawry in Trespass was pleaded in*

Bar, and the *Plaintiff ſhew'd Charter of Pardon, and had Aſſiſe without Title ſhewn after the Pardon.*

he could not have Aſſiſe without ſhewing Title of later Time after the Outlawry, notwithſtanding his Charter of Pardon.

3. In *Appeal of Death by one outlaw'd of Treſpaſs*, the Defendant paſs'd quit without being arraign'd at the Suit of the King. Theloal's Dig. of Writs, lib. 1. cap. 15. S. 7. cites Mich. 18 E. 3. 35. Utlar. 47.

* One outlaw'd ſhall be anſwer'd in Debt, if he *has his Charter* of Pardon *before the Day of the Return of his Writ of Debt*, notwithſtanding that he be outlaw'd the Day of the Writ purchas'd. Theloal's Dig. of Writs, lib. 1. cap. 15. S. 14. cites Paſch. 9 H. 5. 1. Per Huls.

4. One outlaw'd of Treſpaſs may, after Charter of Pardon purchas'd, have *Action for Falſe Impriſonment*, [tho'] made *before the Outlawry*. But it was ſaid that he ſhall *not* have * Action *of Debt, nor of Goods carried away before* &c. becauſe Action of them is given to the King. Theloal's Dig. of Writs, lib. 1. cap. 15. S. 8. cites it as adjudg'd H. 20 E. 3. 45. & 29 Aſſ. 63.

5. In Suit of *Execution* out *of a Recognizance in Chancery*, Execution was awarded, *and the Land* of the Defendant *put in Execution*; upon which the *Defendant brought Writ of Error*, againſt which it was pleaded that he was outlaw'd in Treſpaſs, *and he ſhew'd his Charter* of Pardon, *and that he had ſued Scire Facias according to the Statute* &c. where it was ſaid that his Action was determin'd and extinct by the Outlawry. But *becauſe he was to diſcharge his Franktenement by the ſaid Writ of* Error, and that the King ſhould not have Advantage by this Suit, it was adjudged that he ſhould well have this Suit by Writ of Error &c. Theloal's Dig. of Writs, Lib. 1. cap. 15. S. 7. cites Paſch. 21 E. 3. 17 & 29 Aſſ. 47.

But in Formedon, where the Charter of Pardon was purchaſed after the Outlawry pleaded, the Opinion of Thorp was that the Outlaw *need not to allege* that he had ſued the Scire Facias, becauſe by his Charter he is reſtored to the Law. Theloal's Dig. of Writs, Lib. 1. cap. 15. S. 4. cites Mich. 44 E. 3. 27.

6. One *outlaw'd of Treſpaſs* at the Suit of the Party, ſhall not be anſwer'd after his Charter of Pardon had, if he does not *allege that he has ſued Scire Facias againſt the Plaintiff* according to the Statute, notwithſtanding that the *Exception* be *taken by a Stranger to the firſt Suit*. Theloal's Dig. of Writs, Lib. 1. cap. 15. S. 4. cites Paſch. 21 E. 3. 55. Nonability 6 & 8. and Paſch. 20 E. 3. Charter 19.

7. *Three were outlaw'd in Treſpaſs*. They got a Charter of Pardon, and *ſued Scire Facias* againſt the Plaintiff. The *Writ was return'd tardy*, and the *Plaintiff* in Treſpaſs came, and *counted againſt* 2, notwithſtanding the Writ was not return'd, *and he had Capias Utlagatum againſt the* 3d who did not come, *and* [*Capias*] *againſt his Mainpernors*; and his Charter loſt its Force, notwithſtanding the Writ was not ſerved, becauſe he found *Mainpriſe to be de Die in Diem*. Fitzh. Tit. Reſponder, pl. 85. cites Paſch. 27 E. 3. 77.—[Paſch. 27 E. 3. 1. a. pl. 3.]

8. In *Attaint upon Verdict in Aſſiſe*, if *Outlawry* be *alleg'd in the Plaintiff for the Damages in the ſame Aſſiſe*, and he *brings his Charter* of Pardon, *he ſhall be anſwer'd before Gree* made to the Defendant *of the Damages* recover'd *in the firſt Action*. Theloal's Dig. of Writs, Lib. 1. cap. 15. S. 28. cites 30 Aſſ. 20.

Fitzh. Tit. Reſponder, pl. 24. cites S. C.

9. In *Debt* the Defendant was outlaw'd, and ſued Charter of Pardon, and *Scire Facias returnable* at ſuch a Day, *but* the ſame was *not return'd*. The *Plaintiff* in the Action *came at the Day, and pray'd that the Defendant be demanded*. But *Thorpe denied it, unleſs the Plaintiff came in by Proceſs*. To which it was ſaid for the Plaintiff, that he had Day by the Roll, and that at this Rate the Defendant might delay him for ever.

But

But Thorpe ſaid he was at no Miſchief, *and that if he would aid himſelf, he might ſue the ſame Writ by which he was warn'd; and ſo he did.* Paſch. 39 E. 3. 7. b.

10. If a Man be *diſabled by Outlawry* pleaded in a Real Action, and he *brings Pardon bearing Date pending the Writ and after the Plea pleaded*, yet this is good, and the Tenant ſhall anſwer; and yet the Demandant was once diſabled pending the Writ. Quod nota. Br. Nonabilitie, pl. 6. cites 44 E. 3. 27.

S. P. Br. Utlagary, pl. 3. cites S. C. Theloal's Dig. of Writs, Lib. 1. cap. 15. S. 14. cites S. C. That the *Demandant at the Day* given *by Imparlance*, after the Outlawry pleaded, *brought in his Charter* of Pardon, *and was anſwer'd.*

11. One outlaw'd purchaſed a Charter, and *ſhew'd that the Plaintiff was ready at the Bar, and pray'd that he count againſt him without ſuing Scire Facias*; but becauſe the *Plaintiff had no Day in Court*, it was commanded the Defendant to ſue Sci. Fa. againſt the Plaintiff &c. Fitzh. Tit. Reſponder, pl. 39. cites Trin. 46 E. 3. 15.

12. If a Man is *outlaw'd in Debt*, and the *Defendant purchaſes Charter of Pardon*, and *Scire Facias againſt the Plaintiff, and he makes Default*, this is peremptory, and the Defendant ſhall go quit. Br. Default, pl. 87. cites 22 H. 6. 7.

And *the ſame* Law, *if the Plaintiff, after Cap. Utl.* againſt the Defendant, *does not maintain his Writ.* Ibid.

13. He who is convicted, outlaw'd, or by any lawful manner is attainted of Felony, ſhall not have any Action, Real or Perſonal, in any manner before the Charter of Pardon obtain'd. But *after the Charter* obtain'd, *he may have Action upon Right, Title, or other Cauſe commenced* or accrued *after the Charter had*, and *not before.* Theloal's Dig. of Writs, Lib. 1. cap. 15. S. 24. ſays this appears by the Books there before noted.

14. One *outlaw'd after Judgment in Debt came gratis and render'd* himſelf in Bank, where he was condemn'd, *and was committed to the Fleet*, (as he ought, tho' it be not uſual to do ſo) *and then ſued a Certiorari* to the Ch. J. of C. B. *to remove the Tenor of the Record* of the Outlawry into Chancery, *and to certify his Render, and being in Priſon*; which was done; but *without ſaying whether the Plaintiff was ſatisfied or not*; and thereupon he had his *Pardon, Ita quod ſtet rectus in Curia* &c. where it ſhould be, *Ita quod ſatisfaceret Querenti.* And upon 2 Scire Facias's againſt the Plaintiff, and 2 Nihils return'd, the Pardon was allow'd, and the Outlawry diſcharged; whereas *he had not, in Truth, ſatisfied the Plaintiff.* D. 172. a. pl. 10. Mich. 1 & 2 Eliz. Anon.

The Reporter ſays, Quære what Remedy for the Plaintiff; and cites the Statute 5 *E.* 3. *cap.* 12. but ſays the Statute *ſays nothing of Outlawry after Judgment in other Actions*, but only where Outlawry is upon Proceſs before Appearance; and in this Caſe no Charter ſhall be granted, till it appears to the Chancellor by Certificate &c. that the Outlaw has render'd himſelf to Priſon in the Court where the Exigent iſſued; and he ſhall not be deliver'd till the Party be warn'd, and the Warning witneſs'd, and to make the Plaintiff to plead upon the Original, if he will &c. And notwithſtanding thoſe Words, 2 *Nihils in Scire Facias have always countervail'd a Scire Feci.* But he ſays it appears by Fitzh. Tit. Charter, cap. ultimo, viz. 13 H. 4. that after Condemnation in Debt, if the Defendant be outlaw'd, he ſhall not have Charter till the Chancellor be ſatisfied. And the Form of Pardons of Outlawry after Judgment is, That the Plaintiff is ſatisfied, or that per debit' Proceſſus coram Juſticiariis habit' conſiderat' exiſtat, quod idem defendens verſus dictum querentem iret quietus &c. and no Clauſe of *Ita quod ſtet rectus* &c. For this Clauſe *is in Pardon of Outlawry before Judgment, or where he is* in Caſe *to make Anſwer to the Plaintiff.*

Richardſon Ch. J. acquainted the Court, that a *Certiorari* came to him *out of Chancery to certify the Tenor of a Record of Outlawry*, to get a Charter of Pardon; that the *Clerk of the Outlawries* ingroſs'd it, and *indorſed that the Party reddidit ſe to Priſon*, (the Outlawry being before Judgment;) *whereas he really never did appear, nor render'd himſelf*; that the Party, at whoſe Suit, complain'd thereof to him, who upon examining the Clerk and Prothonotaries found, that upon all Outlawries the *Clerks enter'd upon the Roll of courſe*, That the Outlaw *reddidit ſe, and are always certified, tho' falſe*; and this Courſe was allow'd by the Court. But *to ſatisfy the Statute* of 5 E. 3. and for the Benefit of the Party who ſues, they *ordered that no Scire Facias ſhall be upon ſuch Pardon till the Party, who ſues the Pardon, has appear'd to the Party's Action.* And this Order was commanded to be obſerved, and enter'd in every Office of the Court; and

the Reaſon of the Entry and Courſe quod reddidit ſe, where he had not, is for the Eaſe of the Subject, becauſe it would be great Inconvenience that Subjects in the remote Parts of the Kingdom, being outlaw'd, cannot have Pardon thereof, without making perſonal Appearance in Court. D. 172. a. Marg. pl. 11. cites 5 Car. C. B. Molineux's Caſe.

15. In *Debt* it was agreed, that if A. be *outlaw'd* in Debt, *and obtains a Releaſe* of the Party *of that Debt*; and after *by Act of Parliament all Outlawries are pardon'd.* When the Party is ſatisfied, then the Outlawry is diſcharged; for the Releaſe is a Satisfaction in Law. Noy 5. Albany v. Manny.

16. In a Suit by Husband and Wife, the Defendant pleaded *Outlawry of the Husband in Bar*; and upon Demurrer it was inſiſted, that the Outlawry, ſo far as the Crown was concern'd, was pardon'd by the *General Pardon.* But per Cur. The *Plaintiff ought to have replied*, and ſhewn that he was not a *Perſon excepted.* Hard. 60. pl. 1. Trin. 1656. in the Exchequer. Swan & Ux' v. Porter.

17. Outlawry cannot be diſcharged on an Act of *Oblivion*, till the Party has brought his *Scire Facias on the Act of Parliament*; per Cur. Sti. 348. Ellis v. Pippin.

18. The *King cannot pardon* an Outlawry at the Suit of a private Perſon. Arg. Show. Parl. Caſes, 72. in the Caſe of the King v. Baden, cites 5 E. 3. 12.

(U. a) *Diſability* of whom, and How far, *as to Actions.*

1. OUtlawry alleged *before the Coroners, and not return'd*, ſhall not diſable the Plaintiff in Aſſiſe. Theolal's Dig. of Writs, Lib. 1. cap. 15. S. 20. cites 28 Aſſ. 4. 9.

Theloall's Dig. of Writs, lib. 1. cap. 15. S. 18. ſays it ſeems that

2. Where a Man brings Writ *of Error to reverſe an Outlawry*, there *the ſame Outlawry is no Plea in Diſability* of his Perſon, becauſe he by the ſame Suit is to reverſe the ſame Outlawry. Br. Utlagary, pl. 69. cites 30 Aſſ. 20.

the Opinion of the Book of Paſch. 7 H. 4. fol. 40. is, That in Writ of Error to reverſe Outlawry, it is *no Plea to ſay that the Plaintiff is outlawed in another Suit* or Action, and ſo diſabled to ſue this Writ of Error; for otherwiſe it will follow that he ſhall be infinitely delay'd.——Br. Utlagary, pl. 6. cites 7 H. 4. 39. S. C.——S. P. Tho' there are 20 Outlawries againſt him. Br. Nonability, pl. 12. cites S. C.——S. P. 2 Le. 211. pl. 243. in Moulton's Caſe, cites 7 H. 4. 107.——And G. Hiſt. of C. B. 159. cap. 17. ſays, That when one brings a *Writ of Error* to reverſe an Outlawry, *Outlawry in that Suit, nor at any Stranger's, ſhall not diſable him*; for if he were outlaw'd at ſeveral Men's Suits, and one ſhould be a Bar to another, he could never reverſe any of them. The Outlawry itſelf is no Objection, for that would be *Exceptio ejuſdem rei cujus petitur Diſſolutio*: Nor is another Outlawry pleadable in Bar to ſuch Writ of Error, for then 2 erroneous Outlawries would be irreverſable; and therefore that is Tantamount to Exceptio ejuſdem rei cujus petitur Diſſolutio. So if there be an Attaint brought on a Verdict, Outlawry grounded on that Verdict ſhall not be pleaded in Bar, for the Reaſon above.—3 New Abr. 762. Tit. Outlawry, S. P. in the ſelf-ſame Words.

So of an *Adminiſtrator.* Br. Nonability, pl. 18. cites 21 H. 6. 30.

3. It was adjudged that an *Executor outlaw'd* may maintain Action for the Death of the Teſtator. Theloal's Dig. of Writs, lib. 1. cap. 15. S. 16. cites 14 H. 6. 14. and Hill. 21 H. 6. 30. and Mich. 21 E. 4. 49. accordingly.

by all the Juſtices.——S. P. Becauſe the Suit is *en auter Droit*, viz. in the Right of the Teſtator, and not in his own Right. Co. Litt. 128. a.—S. P. And alſo becauſe *the Perſon whom he repreſents has the Privilege of the Law*; and not ſuing for himſelf, where he has the Advantage of another, where that is no Objection to his Repreſentation, it is no Objection but he ſhould be anſwered. G. Hiſt. of C. B. 159. cap. 17.

4. It

4. It was held, that one outlaw'd *ſhall not have Traverſe to an Office* found *for the King*, which griev'd him *before the Outlawry*. Theloal's Dig. of Writs, lib. 1. cap. 15. S. 22. cites Paſch. 21 H. 6. fol. 1.

He who is *outlaw'd cannot traverſe an Office*; for it is in Lieu of Action againſt the King. Quod nota. * Quære of Petition or Monſtrans de Droit. Br. Nonability, pl. 1. cites 26 H. 8. 1.

* The Origiual is (Car.)

5. He who is *outlaw'd for Felony ſhall not anſwer to any*; Per Markham, which Watman denied, and that he ſhall anſwer to another's Suit, but none ſhall anſwer to him, nor to his Suit; which the Reporter agreed for Law. Br. Utlagary, pl. 47. cites 2 E. 4. 1.

Men *outlaw'd ſhall* be put to *anſwer in any Action againſt them*, becauſe it is to their Prejudice, and by Reaſon of the Poſſibility of their being pardon'd. *But in an Action* brought *by them, they ſhall not be anſwer'd*, becauſe it is to their Benefit. Noy 1. adjudg'd. Haſtings v. Blake.——The Reporter ſays, Note that this Judgment was much againſt the Opinion of Walmſley, who ſaid it was in vain to put any Man to anſwer in an Action Real or Perſonal, who has in Truth nothing to be taken in Execution.

6. Outlawry *in the Mayor* is no Diſability; Per Nele J. Br. Corporations, pl. 63. cites 21 E. 4. 7. 12. 27. 67.

7. If the Defendant pleads an Outlawry in the Plaintiff in Diſability of his Perſon, and the *Plaintiff after that Plea* pleaded *purchaſes a Charter of Pardon*, becauſe the Charter hath reſtored him to the Law, the Defendant ſhall anſwer. So note the Diſability abates not the Writ, but diſinableth the Plaintiff until he obtain a Charter of Pardon; and ſo it appears here by Littleton. Co. Litt. 128. b. (x)

Holt Ch. J. ſaid that Co. Litt. 128. b. and 135. b. is to be underſtood upon this *Diverſity*, when the *Cauſe of Action accrues* to the Plaintiff at a Time at which he is *under the Diſability of an Outlawry*, there the Plea of Outlawry in Abatement ſhall quite overthrow the Writ, and after Removal thereof he muſt begin de novo; but where the Diſability of Outlawry *comes after the Cauſe of Action accrued*, there the Plea of Outlawry is only a temporary Diſability, which does not abate the Writ, but is only Quouſque; and after Removal thereof he may re-continue the Action by Reſummons &c. 12 Mod. 400. Paſch. 12 W. 3. 1700. in Caſe of Lady Faulkland v. Stanion.

8. If the Ground or *Cauſe of the Action* be *forfeited by the Outlawry*, *then may* the Outlawry *be pleaded in Bar* of the Action, *as in* an Action of *Debt*, *Detinue* &c. *But in real Actions*, *or* in *Perſonal*, *where Damages be incertain* (*as* in *Treſpaſs of Battery*, of *Goods*, of *breaking his Cloſe*, and the like) and are not forfeited by the Outlawry, there Outlawry *muſt be pleaded in Diſability of the Perſon*. Co. Litt. 128. b. (y)

9. The Plaintiff being outlaw'd, was not admitted to ſue. Toth. 239. cites 4 Ja. lib. B. fol. 69. Grevill v. Banks.

10. An Outlawry being pleaded *at the Defendant's own Suit*, was overrul'd. Toth. 240. cites 8 Car. Hemmings v. Davers.

(W. a) Diſability as to Actions. How far the Diſability *of one* ſhall *diſable another*.

1. IN *Writ of Account* by two, it was held that if *one is outlaw'd of Felony*, the other ſhall not be anſwer'd. Theloal's Dig. of Writs, lib. 1. cap. 15. S. 5. cites Trin. 9 E. 3. 461.

2. Outlawry *in Treſpaſs* in one of the Demandants in Præcipe quod reddat, is a Diſability of both during this Outlawry; *but* where one of the Demandants is outlaw'd *of Felony* the Tenant ſhall anſwer to the other who ſhall ſue alone; for this is a Severance in Law. Theloal's Dig. of Writs &c. lib. 1. cap. 15. S. 2. cites H. 33 E. 3. Utlawry 5. and Trin. 30 E. 3. 7.

3. *Mon-*

3. *Monſtraverunt* ſhall not abate by the Outlawry of one of the Plaintiffs. Theloal's Dig. of Writs, lib. 1. cap. 15. S. 23. cites Mich. 1 H. 5. 14.

4. It was held that *in Perſonal Action* brought by two, Outlawry in the one is a Bar to both. Theloall's Dig. of Writs, lib. 1. cap. 15. S. 15. cites 14 H. 6. 14.

5. Debt by *two Executors*; *Outlawry was alleged in* Diſability of *the one*; Judgment if he ſhall be anſwered, and becauſe he is not to recover to his own Uſe but to the Uſe of the Teſtator, therefore the Defendant was awarded to anſwer; quod nota. Br. Nonability, pl. 20. cites 19 H. 6. 14.

6. Outlawry in an *Attorney*, or *Prochein Amy who ſues for an Infant*, is no Diſability. Br. Nonability, pl. 18. cites 21 H. 6. 30.

Husband and Wife *ſued as Adminiſtrators*. The Defendant pleaded Outlawry. But per Cur. the Plea is ill to allege Outlawry in the Husband, when he and his Wife ſue as Adminiſtrators. Hardr. 60. pl. 1. Trin. 1656. in the Exchequer. Swan & Ux' v. Porter.

7. Baron and Feme ſhall not have Action, if the *Feme is waived*. Theloal's Dig. of Writs, Lib. 1. cap. 15. S. 21. cites Hill. 21 H. 6. 30, 31. and Trin. 8. fol. 2. Utlawry 17.

S. P. Co. Litt 128. a. becauſe the Suit is En auter Droit.

8. It was held, that a *Mayor and Commonalty* ſhall have Action, notwithſtanding that the *Mayor* be *outlaw'd*. Theloal's Dig. of Writs, Lib. 1. cap. 15. S. 17. cites Trin. 12 E. 4. 10.

But it was agreed that *if 2 Plaintiffs in Debt be barr'd, and bring Error*, the Outlawry againſt one is a good Bar againſt the other for purſuing the Error, becauſe they are to recover. Ibid. in the S. C.

9. *Judgment in Ejectment againſt 6 Defendants, who brought* a Writ of *Error*. The Defendant in Error *pleads an Outlawry againſt one* of them; and upon Demurrer it was held by 3, contra Haughton, That becauſe this Suit is only by way of Diſcharge, wherein he ſhall recover nothing, but only to be reſtored to what they had loſt, and being inforced to join, becauſe that Plaintiff was Defendant in the former Action. They agreed it was no good Plea, and *awarded that he ſhould anſwer to the Error*. Cro. J. 616. pl. 1. Trin. 10 Jac. B. R. Bythall v. Harris.

10. If 2 *Tenants in Common* are *of a Rectory* for Years, and one of them is outlaw'd; yet the other, upon ſhewing the Matter, may have Debt for the Moiety; per Twiſden J. Sid. 49. pl. 11. Mich. 13 Car. 2. B. R. in Caſe of Cole v. Banbury.

(X. a) Action. Outlawry. Diſability. *What Actions the Outlaw cannot bring.*

Br. Appeal, pl. 118. S. P. —Br. Appeal, pl. 57. S. P. cites 17 Aſſ. 26.—2 Hawk. Pl. C. 162. cap. 23. S. 32. ſays that one outlaw'd in a perſonal Action, (ſo long as the Outlawry continues in Force) cannot bring any Appeal whatſoever.

1. IN *Appeal of Death* the Defendant pleaded Outlawry in the Plaintiff. The Defendant went quit without being arraign'd at the Suit of the King upon the Declaration; for if the Plaintiff gets Pardon, or reverſes the Outlawry after, he may have another Appeal. Br. Appeal, pl. 146. cites 18 E. 3. and Fitzh. Utlawry 47. And Brooke ſays, and ſo ſee that this Award is not peremptory.

2. A Man

2. A Man *condemn'd upon a Recognizance, where he pleaded ſufficient Bar by Defeaſance, bearing Date before the Recognizance, and deliver'd after, brought thereof Error*; and in the Writ of Error the *Defendant, who had Execution, pleaded Outlawry in Treſpaſs in* Diſability of *the Plaintiff*; and becauſe the Plaintiff in this Suit is not to re-have any thing but a *Diſcharge* of the Recognizance, therefore it was awarded no Plea, and they proceeded to reverſe the firſt Judgment; for the Party was pardon'd of the Outlawry after, and the King cannot have this Suit by the Outlawry, which goes to have Diſcharge, as he may have Debt upon an Obligation which is to recover Debt. Quod nota ibidem. Br. Nonabilitie, pl. 26. cites 29 Aſſ. 47.

3. It was held, that if *Tenant by Statute-Merchant* be outlaw'd in Treſpaſs, he ſhall be barr'd in *Aſſiſe*. Theloal's Dig. of Writs, Lib. 1. cap. 15. S. 11. cites Mich. 11 H. 6. 7.

4. If the Demandant in a *Ceſſavit* be outlaw'd in a perſonal Action, this Outlawry may be pleaded in Bar of the Action, becauſe the Arrearages are due to the King. 2 Inſt. 298.

5. In *Audita Querela to avoid a Statute* for Uſury, the Defendant pleaded an Outlawry in Bar. It was objected upon Demurrer, that it is not pleadable in this Suit, which is only by way of Diſcharge, and not to recover any thing. And the Ld. Ch. J. held accordingly; for one outlaw'd cannot ſue in any Court, unleſs to reverſe his own Outlawry; and where the Action is Ad Lucrandum, there ought to be Ability in the Perſon; and that it is all one to gain by way of Diſcharge, as by way of Perquiſition. And Judgment that Plaintiff take nothing by his Writ. Cro. J. 425. Paſch. 15 Jac. B. R. Griffith v. Middleton.

S. C. cited Palm. 191. Trin. 10 Jac. B. R. in Caſe of Bethel v. Parry, to have been adjudg'd that the Plea was good —— Lea Ch. J. Dodderidge and Chamberlain J. contra. Houghton J. held that it would be very miſchievous upon an Outlawry in Caſe of Error, Attaint, or Audita Querela, which are only by way of Diſcharge, if it ſhould be any Bar, this Writ being only a Commiſſion. Cro. J. 616. Trin. 19 Jac. B R. in Caſe of Bythal & al' v. Harris.

One is *outlawd in Debt*, and taken upon the Capias, and committed to the Fleet; and the Warden of the Fleet permits him to go at large voluntarily, and after the *Executor of the Plaintiff in Debt* takes him in Execution again upon a new Writ; and upon this taking he brought an Audita Querela, and ſhew'd this Matter. To which *Outlawry in the Plaintiff* (*in Audita Querela*) was pleaded; upon which Plea he demurr'd. And per tot. Cur. after ſeveral Arguments at Bar, it was reſolv'd that Outlawry was a good Plea in Diſability of the Plaintiff in this Caſe, becauſe this Writ *is not directly for reverſing the Outlawry* (as Error) *but is founded upon a Tort*, (viz.) upon the *Eſcape*, and not upon the Record. And for Authority in this Point, the Ch. J. cited 6 E. 4. 9. b. 10 a. Sid. 43. Mich. 12 Car. 2. C. B. Jaſon v. Kete. —— Note, That Bridgman Ch. J. well obſerv'd, that Audita Querela does not lie for other *Reaſon than becauſe when any Priſoner is taken here, he is brought to the Bar, and it is demanded of him what he can ſay why he ſhould not be committed to the Fleet*; at which Time the Plaintiff here ought to have pleaded this Matter before; and therefore he ſhall not have this Writ, for one ſhall never have Audita Querela for any Matter which he might have pleaded before. Sid. 43. Trin. 13 Car. 2. C. B. Jaſon v. Kete.

In *Audita Querela* the Plaintiff *declared that he and one P. were bound to D. the Teſtator to pay* 100 *l. That in an Action brought againſt him he was outlaw'd*; That *afterwards D brought another Action againſt P. upon the ſame Bond, and had Judgment*; *and* that *P. was taken by a Ca. Sa. and diſcharg'd by D's Conſent*; and ſo prays to be reliev'd againſt this Judgment and Outlawry. The *Defendant proteſtando that the Debt was not ſatisfied, pleads the Outlawry in Diſability*. And upon Demurrer the Court agreed that if the Judgment had been erroneous, and Error brought, the Outlawry, which is only a Superſtructure on it, would fall by Conſequence; but an *Audita Querela meddles not with the Judgment, but admits it good*; *but only upon ſome equitable Matter ariſing ſince, prays that no Execution may be made upon it*; and the Plaintiff has no Remedy here but to ſue out his Charter of Pardon. Mod. 224. pl. 13. Mich. 28 Car. 2. C. B. Higden v. Whitchurch.

6. It was agreed by all, That *in Error or Attaint* Outlawry in the Plaintiff is no Plea in Diſability; and they ſaid that there is no Difference where the Outlawry was *at the Suit of the Defendant*, and where at the Suit of a *Stranger*; for Non admittitur ejuſdem rei exceptio cujus petitur diſſolutio. Sid. 43. Mich. 12 Car. 2. C. B. Jaſon v. Kete.

7. In an *Information qui tam* &c. the Defendant *pleaded Outlawry of the Informer* in Diſability. Upon a Demurrer it was inſiſted that the Plea was not good, becauſe the King is intereſted qui tam &c. and therefore

Freem. Rep. 235. pl. 246. Mich. 1677. S. C. by

Name of Juſtice Bayle's Caſe, That it was a good Plea to bar the Informer, ſo that he could not proceed; but that the King might notwithſtanding proceed for his Share.

therefore if the Informer dies, the Attorney General may proceed. Sed per Cur. Tho' the King is intereſted, yet the Informer only is Plaintiff, and intitled to the Benefit; and tho' he was diſabled by the Outlawry to ſue for himſelf, yet he might ſue for the King; and therefore the Plea was adjudged good. 2 Mod. 267. Mich. 29 Car. 2. C. B. Atkins v. Bayles.

Carth. 199. The King v. Rowe, S. C.

8. Outlawry diſables a Man from bringing a *Mandamus* to reſtore him to an Office in a Corporation. Show. 288. Mich. 3 W. & M. The King v. Mayor of Briſtol.

9. A Parker outlaw'd cannot bring a Writ of *Aſſiſe*. Show. 288. per Cur. in Caſe of the King v. the Mayor of Briſtol.

(Y. a) Diſability. *As to other Matters than Actions.*

1. ONE outlaw'd in a Perſonal Action (as ſome ſay) *cannot be an Approver*, becauſe by his Outlawry he is out of the Law, and his Accuſation ſhall not be of ſuch Credit as to put any Perſon upon his Trial. 2 Hawk. Pl. C. 205. cap. 24. S. 4. cites in Marg. Br. Appeal, pl. 57. and Fitzh. Corone, 175.

2. An outlaw'd Perſon *cannot be an Auditor*. Co. Litt. 6. b.

3. Outlaws in Debt, Treſpaſs or the like *may be Heirs*. Co. Litt. 8. a. (f).

4. The *Wife* of one outlaw'd in Felony or Treſpaſs ſhall be *indow'd*. Co. Litt. 31. a.

5. One outlaw'd may be *Attorney to deliver Seiſin*. Co. Litt. 52. a.

Ow. 116. S. C. accordingly.

6. A Man outlaw'd is *capable of taking a Leaſe from the Queen as Farmer to her*, by Reaſon of the Render of the Rent, which makes him capable. Mo. 237. pl. 371. Paſch. 29 Eliz. in the Exchequer, Knowles v. Powell.

7. If a Man *pawns Goods* and after is outlaw'd, he *cannot redeem* them during this his Outlawry; Per Williams J. Bulſt. 29. Trin. 8 Jac. in Caſe of Ratcliffe v. Davis.

8. Perſons outlaw'd are diſabled *to be Jurors*. See Tit. Trial (H. d. 4)

9. In what Caſes an outlaw'd Perſon may be a *Witneſs*. See Tit. Evidence.

(Z. a) *Charged in Cuſtodia.* In what Caſes one outlaw'd for Crimes may be.

1. A Man was *outlaw'd of Felony*, and *taken by Capias utlagatum, and detain'd in B. R. and divers Bills were brought againſt him in Cuſtod' Mareſcalli*, and the Court would not ſuffer it; for his Body, Lands and Goods are to the King, and therefore the Plaintiff cannot have the Effect of his Suit againſt the one before the Outlawry; but if he obtains Pardon, the Plaintiff ſhall be anſwer'd. Br. Utlagary, pl. 26. cites 4 E. 4. 8. 9.

(A. b) *Creditors* of Outlaw. How far *favour'd, or affected.*

1. LAND was purchaſed of *Tenant for Life*, who was outlaw'd and abſconded, but the Purchaſe was ſet aſide in Favour of *Creditors*, it being made at an Undervalue, and pending a Proſecution at Law againſt the Outlaw by the Creditors, and with Notice thereof, and the Purchaſor being alſo a Truſtee in the Marriage Settlement. Vern. 465. pl. 448. Trin. 1687.

2. Upon an Engliſh Bill in the Exchequer the Barons pray'd the Opinion of the Judges of C. B. the Caſe was H. was a *Bankrupt*, and *long after was outlaw'd*; the *King made a Leaſe of the Profits of his Lands, and granted his Chattels*; afterwards a *Commiſſion of Bankruptcy was taken out.* Reſolved, that the Creditors are not hurt by the Outlawry, it being his own Act and by his own Default, and the voluntary permitting himſelf to be outlaw'd ſhall not prejudice them. And alſo that the *Aſſignee of the King's Leaſe*, having *paid* 37 *l. for it is a Purchaſor* within the 21 Jac. cap. 19. not to be impeach'd by the Commiſſion, which was ſued out 5 Years after the Bankruptcy. 1 Salk. 108, 109. pl. 2. Hill. 2 W. & M. in C. B. Pain. v. Teap & al'.

(B. b) *Reverſed. What muſt be done* in Order to get an Outlawry reverſed.

1. 31 *Eliz.* 3. S. 3. ENacts, That *before Allowance of a Writ of Error, or reverſing of an Outlawry by Plea or otherwiſe, for want of any Proclamation according to this Statute, the Defendant in the Original Action ſhall put in Bail to appear and anſwer the Plaintiff, and alſo to ſatisfy the Condemnation, if the Plaintiff ſhall begin his Suit before the End of 2 Terms next after the Allowance of the ſaid Writ, or avoiding the Outlawry.* The Defendant was *outlaw'd before Judgment*, and *procured a Charter of* Pardon, and the Queſtion was, Whether he ſhould put in Bail. And it was agreed by the Court, that he ſhould *put in Bail*; For altho' the Statute of 5 E. 1. cap. 12. goes only to a Charter of Pardon, not to the Reverſal; yet by the Equity of that Statute, he muſt put in Bail; For it is that he ſtand right in Court, which is, that he appear, and put in Bail. And altho' the Uſe of the Court has been otherwiſe, yet, perhaps, in ſome Caſes, the Plaintiff never required Bail. Cites New Entries, Title Pardon, pl. 1. So if an Outlawry be reverſed by 31 Eliz. for Want of Proclamation, the Defendant puts in Bail at the Common Law. Het. 146. Mich. 5 Car. C B. Hide's Caſe.

The Plaintiff in Error may *proceed in Order to reverſe* an Outlawry againſt him *without entring an Appearance* to the Original Action; *but he muſt appear to the Original Action before the Outlawry ſhall be reverſed.* 2 Barnard. Rep. in B. R. 286. Trin. 6 Geo. 2. Martin v. Muſfield.

It was ſaid by the Court that upon or before the Allowance of any Writ of Error, or reverſing any Outlawry, the Defendant muſt ſtill *enter into a Recognizance* with Condition *to ſatisfy the Condemnation Money*, according to the Statute 31 Eliz. cap. 3. S. 3. Rep. of Pract. in C. B. 29. Mich. 12 Geo. 1. Anon.

2. The Court will not reverſe an Outlawry, tho' *both* the *Parties conſent* to it, viz. The Party outlaw'd, and the Party at whoſe Suit he is outlaw'd, *except* there be *Error aſſigned* in the Outlawry. L. P. R. tit. Outlawry, cites Mich. 22 Car. B. R. For Matters of Record are not to be deſtroy'd without ſufficient Cauſe; and the Outlawry concerns the King as well as the Parties.

3. 4 & 5 *W. & M. cap.* 18. *Enables Perſons to reverſe Outlawry without Bail, unleſs where Special Bail ſhall be order'd by the Court.*

Error to Reverſe an Outlawry in Cheſter. The Defendant pleaded, that no Bail was put in before the Allowance of the Writ of Error, and the Statute of 31 Eliz. cap. 3. for Error in reverſing Outlawries.

4. A. *Bail Bond* was given on a *Capias Utlagatum according to the new Statute*, and Defendant had put in Special Bail in the Country before the Outlawry reverſed, which Northey urged was regular. For by the new Statute, he muſt give Bail at the Return of the Writ, which muſt be before the Outlawry reverſed, otherwiſe it is impracticable. Holt, ſaid He did not underſtand the new Statute very well, but ſaid the firſt Original is determined by the Outlawry, which muſt therefore be reverſed before the Defendant can be heard, and he would not now determine, *whether Special Bail might not be given in the Country after the Reverſal* of the Outlawry. Cumb. 345. Mich. 7 W. 3. B. R. Wilſon v. Crablington.

Per Cur. This is no Plea; for it is *well enough, if Bail be put in at any Time before the Reverſal.* Rep. 605. Mich. 12 Will. 3 Wilbraham v. Doyley.

The Reporter ſays, Nota, This was a very good Project to get Bail from a Foreigner. —— Ld. Raym. Rep. 349. S C. but ſays not that he never was in England, but that he was an Alien Merchant, and lived beyond Sea, and was commorant there during all the Time that the Plaintiff proceeded to Outlaw him. But the whole Court denied to ſet aſide Execution, [his Ship being ſeiſed by a Special Capias Utlagatum] becauſe by this means any Perſon may contract Debts, and then go beyond Sea, and then he will be out of the Reach of the Law; but that he might bring Error, and reverſe the Outlawry, if he pleaſes.

5. A *Foreigner that never was in England was outlawed* in an Action of ſeveral Promiſes for Goods ſold and delivered; and upon a Special Cap. Utlag. a Ship and other Effects belonging to the Foreigner, were *ſeiſed* as forfeited. Per. Cur. This Outlawry ſhall not be *vacated on Affidavits* of his never having been in England. But Defendant may bring a *Writ of Error*; which he was compelled to do, and thereupon to put in *Bail* to the Action, according to the new Statute. And then Plaintiff conſented to the Reverſal of the Outlawry. Carth. 459. Mich. 10 W. 3. B. R. Matthews v. Erbo.

Raym. Rep. 605. Mich. 12 W. 3. S. C.

6. In Error to reverſe Outlawry *for Error in Law*, Bail need not be given to the original Action, as it muſt be for *Want of Proclamations.* 12 Mod. 545. Trin. 13 W. 3. Wilbraham v. Doley.

7. Note Per Holt, Special Bail to reverſe an Outlawry, *muſt be ſimply to anſwer the Condemnation*; but other ſpecial Bail is to anſwer Condemnation, or render his Body; and it was agreed if the Party were *taken* up *upon the Cap. Utlagat.* he muſt give Bail to reverſe the Outlawry; and they further ſaid the Sheriff was *fineable* for leaving *ſuch Errors in Outlawries.* 12 Mod. 545. 546. Trin. 13 W. 3. Anon.

8. He who reverſes an Outlawry by Motion, muſt have an *Attorney* of Record *preſent to undertake an Appearance* to a new Original. He muſt alſo put in *ſpecial Bail*, if the Debt or Damage amount to 20 l. or above. 3 R. S. L. 165. 166.

9. An *Outlawry after Judgment* cannot be revers'd till the Plaintiff hath *acknowleged Satisfaction on Record*, or the Defendant hath *brought the Money into Court.* 3 R. S. L. 166.

The Defendant in a *civil Action* may *appear before he is return'd outlaw'd*, and *ſuperſede the Exigent* without putting in Bail, be the Debt

10. If the Party outlaw'd *comes in gratis upon the Return of the Exigent, Alias or Pluries*, he may be admitted by Motion to reverſe the Outlawry for any other Cauſe but want of Proclamations, *without putting in Bail.* If he comes in by *Cepi Corpus*, then he ſhall not be admitted to reverſe the Outlawry without *appearing in Perſon*, as in ſuch Caſe he was obliged to do at Common Law, *or putting in Bail* with the Sheriff for his Appearance upon the Return of the Cepi Corpus, and for doing what the Court ſhall order. Appearing by Attorney is an Indulgence by 4 & 5 *W. & M.* and the Bail is to be Special or Common in this Caſe, as in other

other Caſes. 2 Salk. 496. pl. 7. Paſch. 4 Ann. B. R. in Caſe of Simmons v. Bingoe and Cook.

never ſo great; and ſo he may after he is returned Outlaw'd upon a *Quare clauſum fregit*, as the uſual Courſe is, *paying Coſts*. 3 R. S. L. 168.

11. *Two* were *outlaw'd*. *One* of them *mov'd that upon filing common Bail, he might have Leave to reverſe the Outlawry*. Per Cur. The *Writ of Error* to reverſe it, *muſt be* brought *in the Name of both* the Defendants; and *if one only appears, the other may be ſummon'd and ſever'd*, and then it may be revers'd as to him who appears only; but before it can be revers'd for *Want of Proclamations*, he muſt give *Bail* to appear and anſwer the Action. 2 Salk. 496. pl. 7. Paſch. 7 Ann. B. R. Symmons v. Bingoe and Cook.

12. The Party outlaw'd cannot have his Outlawry *revers'd* without firſt giving *Security to appear to a new Original*. Arg. and admitted Per Cur. Gibb. 265. 266. Paſch. 4 Geo. 2. B. R. in Caſe of Cook v. Champneſs.

13. Error was aſſign'd to reverſe an Outlawry; and the Court held the ſame good, but at preſent would not reverſe it, becauſe the Defendant had *not given ſufficient Notice of his Bail to the original Action*, the Notice being given but laſt Night, whereas the Court ſaid there *ought to have been one whole Day* from the Time of giving Notice; and therefore ordered this Matter to ſtand over till To-morrow, that the other Side might have an Opportunity of inquiring into the Circumſtances of the Bail. The next Day the Defendant's Bail juſtified themſelves, and upon that the Outlawry was revers'd. 2 Barnard. Rep. B. R. 298. 299. Trin. 6 Geo. 2. Martin v. Duffield.

14. If Defendant *comes in on the Capias* Utlagatum, where there is any *Debt mentioned in the Original*, there he *muſt put in Bail* to the Debt, becauſe being in Cuſtody, he ſhall not be diſcharg'd without Caution; *but* where there is *no Debt mention'd*, his Caution cannot be adjudg'd, there being no Quantum of the Plaintiff's Demand on the Record, and ſo they take *common Bail* only; but *if he comes in before the Exigent is returnable*, there he ſhall give *no Bail*, tho' the Original ſpecifies the Debt. G. Hiſt. of C. B. 16. cap. 2.

(C b) *What* muſt be *done in Perſon, or* may be done *by Attorney* as to Reverſal.

1. IT was agreed, that if a Man be outlaw'd *where a Capias is wanting*, he may reverſe this Outlawry by Attorney to anſwer to the Plaintiff, as if he had appeared to the Original or firſt Capias. Quod nota bene; for it was ſaid that the Proceſs after this is all diſcontinued. Br. Omiſſion, pl. 6. cites 3 H. 4. 5.

2. Where *Matter of Fact is pleaded* in Avoidance of an Outlawry, it ought to be pleaded in Perſon; but a Matter of Record may be by Attorney. Per Manwood J. And Ford Prothonotary ſaid it was ſo agreed in Sir Thomas Chamberlain's Caſe, 7 Eliz. And ſo it was agreed in the principal Caſe. 4 Le. 22. pl. 71. Mich. 18 Eliz. C. B. Taylor's Caſe.

S. C. cited, and the Difference taken, that where it appears upon the Face of the Record, it may be aſſign'd per Attornatum. But no Opinion was given in the principal Caſe. Carth. 7. Trin. 3 Jac. B. R. Chorley v. Haſlewood.

3. In Error to reverſe an Outlawry againſt *Husband and Wife*, it was held that they muſt aſſign the Errors in Perſon; and becauſe the *Husband could not bring* in *the Feme*, it was held that they could not aſſign Error; for *he cannot aſſign it without her*. And ſo it was rul'd; and the Courſe of the Court is ſo. Cro. E. 611. pl. 17. Paſch. 40 Eliz. B. R. Wade & Uxor' v. Smith.

Cro. J. 616. pl. 2. S. C. ſays the Court conferr'd how to admit him to do it by Attorney, but at Length reſolved it could not be done, being againſt the Courſe of the Court; and doubted whether the King's Privy Seal would help him.—But Cro. J. 462. pl. 8. Hill. 15 Jac. B. R. Anon. has a Nota, that one Outlaw'd prayed to appear by Attorney; and upon Affidavit made of his Sickneſs, the Court Ex gratia ſpeciali, allow'd him to appear by Attorney; but the Clerk was commanded to enter it Quod venit in propria Perſona, the Law being clear that he ought to appear in Perſon.—Dodderidge J. ſaid that Sir Wm. Read was brought to the Bar in a Litter to reverſe an Outlawry; but that otherwiſe it is in C. B. 1 Roll Rep. 490. Hill. 22 Jac. B. R. in the Caſe of Cumpling & al'.

4. Sir William Read was *outlaw'd upon an Indictment for not repairing a Bridge*; and *being at leaſt* 80 *Years of Age*, *living in Devonſhire*, *and of a great Eſtate*, and this Outlawry *had againſt him without his Privity*, it was moved that he might purſue his Writ of Error to reverſe it by Attorney; To which the Court inclined, but afterwards he *was brought in a Horſe-litter through the Hall to the Bar*, and his Writ of Error allow'd, and the Outlawry thereupon revers'd. Palm. 194. Trid. 19 Jac. B. R. Sir William Read's Caſe.

5. R. was *outlaw'd in Treſpaſs*, and *died*. His *Executors prayed that they might proſecute a Writ of Error by Attorney*. Twiſden and Rainsford inclin'd that Executors could not have Error, but that if they might, they ought firſt to appear in Perſon; But afterwards, when the Court was full, it was agreed that *having once appear'd in Perſon*, all the Reſidue of the Proceedings may be by Attorney; and becauſe *the Writ* of Error here *was ſhewn forth under Seal*, they allow'd it by Attorney, and left the Parties againſt whom it was brought to demur &c. 2 Keb. 507. pl. 83. Paſch. 21 Car. 2. B. R. Newman's Caſe.

6. The Court refus'd to reverſe Outlawry on Writ of Error, in *Indictment of Perjury*, without *Preſence of the Party*, being a criminal Cauſe; but in civil Actions, on Affidavit of Sickneſs, they may reverſe it in Abſence. 2 Keb. 809. pl. 5. Mich. 23 Car. 2. B. R. The King v. Johnſon.

7. 4 & 5 *W. & M. cap.* 18. Enacts, That *no Perſon who ſhall be outlaw'd in the Court of King's Bench for any Matter, Cauſe, or Thing (Treaſon and Felony excepted) ſhall be compell'd to appear in Perſon to reverſe ſuch Outlawry, but may appear by Attorney, and reverſe the ſame without Bail, unleſs where Special Bail ſhall be ordered by the ſaid Court.*

And if any Perſon outlaw'd in the ſaid Court (other than for Treaſon or Felony) ſhall be arreſted upon a Capias Utlagatum, *it ſhall be lawful for the Sheriff in all Caſes where Special Bail is not required by the ſaid Court, to take an Attorney's Engagement under his Hand, to appear for the Defendant, and reverſe the Outlawry; and where Special Bail is required by the ſaid Court, the Sheriff ſhall take Security by Bond, with one or more Sureties, in double the Sum for which Special Bail is requir'd, and no more, for his Appearance by Attorney, and to perform ſuch Things as ſhall be required by the ſaid Court; and afterwards ſhall diſcharge the ſaid Defendant from the Arreſt.*

And if any Perſon outlaw'd and arreſted by a Capias Utlagatum, *ſhall not be able within the Return of the Writ to give Security as aforeſaid, but is committed to Goal for Default thereof, then whenever ſuch Priſoner ſhall find Security for his Appearance by Attorney at ſome Return in the Term next following, to reverſe the ſaid Outlawry &c. it ſhall be lawful for the Sheriff, after ſuch Security taken, to diſcharge the ſaid Priſoner.*

(D. b) *Revers'd*, in what Caſes. *At* the *Plaintiff's own Charge.*

1. A Motion was upon an Affidavit, that *Plaintiff* in the Action, being *an Attorney of this Court*, had *ſued the Defendant to an Outlawry in London, tho' they both liv'd in the ſame Town, and* the *Defendant never abſconded, but was conſtantly at Market every Market-day.* Upon the Plaintiff's appearing on a Rule for that Purpoſe, all this Matter was found true upon Examination, and he was order'd to reverſe the Outlawry at his own Charge, and to pay the Defendant the Coſts of this Complaint, as the Maſter ſhould tax, and to accept of the Defendant's Appearance upon common Bail. 2 Jo. 211. Trin. 34 Car. 2. B. R. Seabrooke and Howkin, alias, Howkins v. Seabrooke.

Where it appeared to the Court plainly, that W. had got H. outlaw'd when he was viſible, and *to his Knowledge eaſily might be ſerv'd with Proceſs*, he was ordered to reverſe it at his own Charges. 12 Mod. 413. Trin. 12 W. 3. Hill v. Wilks.

2. It was mov'd in C. B. that the *Plaintiff* might *reverſe an Outlawry at his own Charge*, upon *Affidavit that* the Defendant *was actually* in the Fleet *in Execution for the Plaintiff in another Suit*, and he knew it; and it was granted, becauſe the Plaintiff ſhould have brought him to the Bar by Habeas Corpus, and there have charg'd him with a new Declaration. 2 Salk. 495. pl. 3. Paſch. 8 W. 3. C. B. Adlame v. Colebatch.

2 Vent. 46. Paſch. 1 W. & M. Anon. ſeems to be S. C. and granted accordingly, it appearing to be an Abuſe.

3. A Motion was that the Plaintiff ſhould reverſe an Outlawry at his ownExpence, upon *Affidavit that the Defendant being viſible, and daily to be arreſted*, or ſerv'd with Proceſs, *and living in London, was outlaw'd there*: The Motion was, after great Debate, denied; *but* the Court ſaid *if* the Defendant had been *outlaw'd in another County*, they would have order'd the Plaintiff to reverſe the Outlawry, and pay Coſts. Sed quære; for the Writ of Proclamation, which by the Statute 31 Eliz. cap. 3. muſt be awarded to the Sheriff of the County where the Defendant dwelt at the Time of the Exigent, was intended to remedy any Surprize of this Sort upon the Defendant. Several Caſes in B. R. were cited, where Perſons being outlaw'd, tho' in the ſame County, yet it appearing that they were viſible, and eaſy to be arreſted or ſerv'd with Proceſs, the Plaintiffs were ordered to pay Coſts, and reverſe the Outlawry at their own Expence. Rep. of Pract. in C. B. 61. Mich. 4 Geo. 2. Hayes v. Longbotham.

4. It was moved, that the Plaintiff might reverſe an Outlawry at his own Expence, *upon Affidavits that the Defendant*, at the Time he was return'd outlaw'd and long before and after, *was abroad in Parts beyond the Seas.* Denied, per Cur. becauſe *this is Error*, and not proper to be conſider'd as an Irregularity. Barnes's Notes in C. B. 224. Mich. 7 Geo. 2. North v. Chambers.

S. P. Ibid. 225. Paſch. 11 Geo. 2. Blunt v. Beale.

(E. b) Re-

See (X. a) pl. 5 the Note.

(E. b) Revers'd in what Caſes, *by reverſing the Judgment &c.* on which &c.

So if the *firſt Verdict and Record* be revers'd *by Attaint*, the Outlawry upon it is gone, and no Eſtoppel for any to plead after. Br. Ibid.

1. IF the *firſt Judgment* be revers'd, the *Execution*, viz. the Outlawry, is by this void alſo. Br. Error, pl. 70. cites 7 H. 6. 44.

2. By *Audita Querela* ſued *upon a Releaſe after Outlawry upon Capias ad Satisfaciendum*, the Outlawry by this is not revers'd, but ſhall ſtand. Br. Error, pl. 193. cites 6 E. 4. 9. 10.

Ow. 30. S. C. accordingly.

3. If the principal Record [of a *Judgment in Debt* obtained by the Plaintiff] be *revers'd*, the Outlawry which is grounded upon it, ſhall be revers'd alſo. Godb. 119. pl. 138. Hill 29 Eliz. B. R. Warren's Caſe.

(F. b) Reverſal. *By whom* it may be. Executor, Heir &c.

Br. Error, pl. 51. cites S. C.——S. C. cited Arg. But ſaid it did not appear there that it was upon an Indictment of Felony.

1. EXecutors brought a *Writ of Error* of an Outlawry pronounced againſt their Teſtator in his Life-time, and for diverſe Errors it was reverſed at their Suit. Br. Executors, pl. 55. cites 11 H. 4. 65. Le. 326. pl. 359. Trin. 31 Eliz. B. R. **Marſh's Caſe**, in which an Outlawry in Felony, had againſt the Teſtator, was reverſed by a Writ of Error brought by the Executor.——Cro. E. 225. pl. 10. Paſch. 33 Eliz. B. R. S. C. adjornatur.—Ibid. 273. pl. 2. Paſch. 34 Eliz. B. R. S. C. argued, but no Judgment.——Ow. 147. S. C. argued, but no Judgment.——5 Rep. 111. a. in **Forley's** Caſe, cites S. C. as reſolved, that in ſuch Caſe the Executors or Adminiſtrators may have a Writ of Error to reverſe the Award of the Exigent.——S. C. cited by the Name of **Nicholſon's** Caſe, [who was the Teſtator.] Cro. E. 558. in Caſe of **Williams v. Williams**, That an Executor ſhall maintain a Writ of Error to reverſe an Attainder againſt his Teſtator, to the Intent to be reſtored to the Teſtator's Goods, tho' by his Attainder he had loſt his Land, which is the Principal; which Caſe Fenner ſaid he remember'd, and that it was ſo ruled by the Opinion of 3 Juſtices againſt 1.——Godb 380. pl. 465. in **Brooker's** Caſe, Paſch. 3 Car. B. R. Jones J. ſaid that Marſh's Caſe, 5 Rep. 111. was never adjudged, There an Executor could not reverſe an Attainder by Outlawry, becauſe it reſtores the Blood. An Executor ſhall have a General Writ to reverſe an Outlawry.——2 Keb. 507. pl. 83. Paſch. 21 Car. 2. B. R. in **Newman's** Caſe, Twiſden J. cited this Opinion of Juſtice Jones.

2. *A. ſeiſed* in Fee *of the Manor of S. had Iſſue B. who was indicted of Felony, and* afterwards *outlaw'd* thereupon. *A died ſeiſed. B. entred as Heir, and deviſed it to C. in Fee and died. C. conveyed the Manor to D. who brought a Writ of Error to reverſe the Outlawry of B.* The Queſtion was, whether D. the *Feoffee of C. the Deviſee*, might have a Writ of Error in this Caſe. The Caſe was argued, and Doderidge J. ſaid, that to ſay where a Feoffee ſhall have a Writ of Error, is a large Field; If this Feoffee brings Error and reverſes the Judgment, he muſt reſtore the Heir in Blood; And asked, who can have a Writ of Error to reſtore Blood, but he who is privy in Blood, and that is the Heir. The Caſe was adjourn'd. Godb. 376. pl. 465. Paſch. 3 Car. B. R. Brooker's Caſe.

S.C. in 7. Cha. Rep. Mſs. Rep. 47. very much at length.

3. R.

3. R. was *outlawed for Felony.* Afterwards a *General Pardon* came out which *pardoned Outlawry and Felony.* If the Outlaw had died, the Heir might reverſe it. Freem. Rep. 369. pl. 476. Trin. 1674. The King v. Richards.

(G. b) Revers'd *by* Writ of *Error*, *or* by *Plea.* In what Caſes.

1. WHere one is *in Priſon at the Time* of the Outlawry, notwithſtanding it be *apparent by Record*, yet he ought to ſue Writ of Error. Theloal's Dig. of Writs, lib. 11. cap. 4. S. 3. cites Hill. 18 E. 3. Villeinage 47.

It was agreed by Aſhton and Moyle, that a Man cannot avoid an Outlawry by ſaying that at the Time of the Outlawry he was in Priſon, without ſuing Writ of Error Ibid. S. 16. cites 33 H. 6. 45.—S. P. Fitzh. Tit Error, pl. 23. cites 15 H. 6.—But Theloal's Dig of Writs, lib. 11. cap. 4. S. 6. cites Mich. 3 H. 5. Utlagary 11. Contra that where one is in Priſon at the Time of the Outlawry, he may avoid it by Plea without Writ of Error. Per Hank.——S. P. of one outlaw'd of *Felony.* Ibid. S. 20. citesPaſch. 7 H. 6. 27.—*But* where one *outlaw'd of Felony* was brought to the Bar, and it was demanded what he had to ſay why he ſhould not be put to Death, who *ſaid that at the Time of the Outlawry he was impriſoned at D.* &c. and it was held that he ſhall not have it for Anſwer; but in favorem Vitæ the Court gave him Reſpite to ſue Writ of Error. Br. Utlagary, pl. 57. cites 21 E. 4. 73.—— See pl. 13.

2. If a Man *finds Mainpriſe, and has Superſedeas*, and after is outlaw'd, he ſhall be diſcharg'd without Writ of Error. Theloal's Dig. of Writs, lib. 11. cap. 4. S. 5. cites Mich. 4 H. 4. 19. 19 H. 6. 44. and 39 H. 6. 29.

Where a Man has Superſedeas, and yet is outlaw'd, he ſhall reverſe it by Plea. Br Utlagary, pl. 11 cites 11 H. 4. 34. —— S.P. Theloal's Dig of Writs, lib. 11. cap. 4. S. 11. cites Paſch. 37 H. 6. 19.——S. P. Ibid. S. 10. cites 8 H. 6. 38. 11 H 6 67. 35 H. 6. 45. and 37 H. 6. 19.

In B. R. one had *ſued Superſedeas*, but after at the Day of the Exigent he was returned Outlaw'd, and after he *came into Court, and brought his Superſedeas* in his Purſe ſeal'd, and a Writ of Error alſo, which was dated before the Outlawry pronounc'd upon which the Outlawry was annull'd. Theloal's Dig. of Writs, lib. 11. cap. 4. S. 7. cites Mich. 8 H. 4 7.

Where a *Man is outlaw'd notwithſtanding Superſedeas, and appears and pleads* in C. B. the Outlawry ſhall be reverſed by the ſame Court, tho' it be *in another Term.* But *contra if* it be in another Term, and the *Defendant does not appear and plead*, there he is put to his Writ of Error; by 3 Juſtices. But by Aſcue, There is no Diverſity; for he is put to his Writ of Error in the one Caſe and the other. Br. Error, pl. 97. cites 37 H. 6. 17. ——Per Moile, By the Appearance of the Defendant the Outlawry is diſcharged, and becauſe by the Pleading the Original yet pends, therefore we may aid the Defendant; for the Original is pending. Contra per Davers; and that the Defendant is put to his Writ of Error, and 'tis now in another Term; but *if it was in the ſame Term, this Court may amend it*; but as here the Outlawry is good, notwithſtanding the Superſedeas; *and it is the Folly of the Defendant that he did not ſhew it to the Sheriff before the Outlawry.* Per Aſcue, This Court may aid the Matter, by Reaſon of the Appearance of the Defendant, and otherwiſe not, but ſhall be put to his Writ of Error. Br. Utlagary, pl. 28. cites 37 H. 6. 17.——*And if the Defendant appears, and no Exigent is returned, and the Defendant pleads, and after Exigent is returned*, we may reverſe it; and ſo here. Ibid ——But Per Moile, where the *Defendant pleads, and has Superſedeas before*, there we cannot write to certify the Exigent; for it ſhall be void. Ibid.——Per Danby, if *Superſedeas comes to the Sheriff after* 4 *Exactus*, and after the *Sheriff demands him at another County, and outlaws him*, this ſhall be revers'd in this Court of C. B. and ſo here; and if the *Party ſhews the Superſedeas, and prays Remedy*, it ſhall be amended. Ibid.——One was return'd Outlaw'd upon an Exigent, and yet he had purchas'd a *Superſedeas of Record*; he did not come at the Day of the Return of the ſaid Exigent, but *in another Term after he came, and pleaded this Matter*; and thereupon the Outlawry was revers'd without ſuing a Writ of Error. And. 36. pl. 93. Hill. 4 Eliz. Anon. and ſays ſuch Record was Mich. 6 H. 8. Rot. 243. in Bank, by one John Skewis.

One was outlaw'd in Debt, where a *Superſedeas of Record was deliver'd to the Sheriff before the awarding of the Exigent*; it was held that the Party ſhould avoid the ſame by Plea.——4 Le. 22. pl. 71. Mich. 18 Eliz. C. B. Taylor's Caſe.——4 Le. 186. pl. 289. S. C. in the ſame Words.—Ibid 209. pl. 337. Mich. 19 Eliz. S. C. in the ſame Words.

Theloal's Dig. of Writs, lib. 11. cap. 4. S. 5. cites S. C.

3. A Man is *outlawed at the Suit of the Party*, which *Party ſued by Attorney who had no Warrant*; this is Error, and ſhall be reverſed by Writ of Error, and not by Plea; for he may have Warrant in the Chancery, which cannot appear of Record in Bank. Br. Utlagary, pl. 11. cites 11 H. 4. 34.

S. P. in C. B. Theloal's Dig. of Writs, lib. 11. cap 4. S. 5. cites Mich. 4 H. 4. 19. 19 H. 6. 44. and 39 H. 6. 29.

4. *If the Exigent bears Teſte before the 4th Day of the Pluries Capias*, this may be reverſed in Banco *by Plea upon the View of the Records without Writ of Error*. Br. Utlagary, pl. 11. cites 11 H. 4. 34.

5. An *Infant* outlaw'd, and he who was *not within the 4 Seas* at the Time of the Outlawry, may avoid it by Plea without Writ of Error; Per Hank. Theloal's Dig. of Writs, lib. 11. cap. 4. S. 6. cites Mich. 3 H. 5. Utlagary 11.

6. It was held per Cur. except Babington, That where one is outlawed, and it *appears of Record that there were but two Capias's awarded*, if he comes the *ſame Term* that the Exigent is return'd, the Outlawry ſhall be annull'd without Writ of Error. Theloal's Dig. of Writs, lib. 11. cap. 4. S. 10. cites H. 8 H. 6. 38. and 11 H. 6. 67. 33 H. 6. 45. and 37 H. 6. 19. but cites Mich. 5 E. 4. 116. contra.

S. P. Fitzh. Tit. Error, pl. 23. cites 15 H. 6.— Br. Utlagary pl. 34 cites 39 H. 6. 1. contra per Littleton and Choke, That if one comes by Capias Utlagatum and is outlaw'd in one County where he dwells in another County, and no Proclamation is made in the County where he inhabits, the Outlawry is void; and yet it ſhall not be reverſed without Writ of Error. —— S. P. Theloal's Dig. of Writs, lib. 11. cap. 4. S. 18. cites 11 H. 6. and 12 H. 6. 8 and ſays it was agreed by the Court. —— But it was held by Huſſey and Jenny, in B. R. That one *outlaw'd of Felony* upon the Capias Utlagatum, may *ſay that he was abiding in another Vill in the ſame County, abſque hoc, that there is any ſuch Vill in the ſame County as is ſuppoſed by the Indictment*, without being put to ſue Writ of Error. Theloal's Dig. of Writs, lib. 11. cap. 4. S. 21. cites Mich. 22 E. 4. 37 —— S. P. Ibid. S. 15. cites 39 H. 6. 1.

7. If one be *indicted* and *outlaw'd in one County*, and is *ſuppoſed by the Indictment to be abiding in another County*, and *no Capias iſſues into the County where he is abiding*, the Outlawry ſhall be annull'd without Writ of Error. Theloal's Dig. of Writs, lib. 11. cap. 4 S. 11. cites Trin. 11 H. 6. 67. 19. but cites 39 H. 6. contra, and that the Words of the Statute of 8 H. 6. cap. 10. ſhall be ſo intended.

8. But in B. R. *in Appeal, one ſuppoſed to be dwelling at Cheſter and outlawed*, was *not admitted to ſay that no Capias iſſued* againſt him *in the County of Cheſter*, and ſo to avoid the Outlawry without Writ of Error. Theloal's Dig. of Writs, lib. 11. cap. 4. S. 11. cites Mich. 19 H. 6. 2.

S. P. Br. Utlagary, pl. 34. cites 39 H. 6. 1.

9. He who is *outlawed by Name of J. Prior of C. in the County of K. ſhall not ſay that there is no ſuch Prior* in the County of K. *but may ſay that he is J. Prior of C. in the County of S. abſque hoc*, that he is Prior of C. in the County of K. Br. Error, pl. 106. cites 19 H. 6. 1. [39 H. 6. 1. b. pl. 2.]

10. One was *return'd Quinto exactus*, who came, and *ſaid that he had render'd himſelf in the Hall before the fifth County*, and *this Render was found in the Roll*, by which the Plaintiff was put to Count againſt him, and he was not put to Writ of Error. Theloal's Dig. of Writs, lib. 11. cap. 4. S. 13. Mich. 21 H. 6. Utlarie 36.

But Forteſcue is of Opinion, that where one W. D. of ſuch a Pariſh, in ſuch a County, Gent. is outlaw'd, it is no Plea for him to *ſay, that there are diverſe Vills in the ſame Pariſh, and that he is abiding in one of them*, to avoid the Outlawry without Writ of Error; For he ſhall be intended the ſame Perſon, and becauſe the Outlawry ſhall be reverſed againſt all, he ought to have Writ of Error. Theloal's Dig. of Writs, lib. 11. cap. 4 S. 15. cites 30 H. 6. 2.

11. One who *comes in by Capias Utlagatum*, may *ſay that there are two Dales, and none without Addition* &c. to avoid the Outlawry without Writ of Error. Theloal's Dig. of Writs, lib. 11. cap. 4. S. 14. cites Mich. 22 H. 6. 26.

12. Note,

12. Note, per Aſhton and Moile J. that he who *comes in* upon Outlawry *at the Day of the Return of the Writ*, ſhall reverſe it by Plea in *Matters apparent*, as *Superſedeas*, *Omiſſion of Proceſs* &c. Br. Utlagary, pl. 2. cites 33 H. 6. 1. 45.

S. P. Ibid. pl. 67. cites 4 E. 4. 43.— S. P. So for other *Matter apparent in the Record*; And yet in ſome Caſes ſome hold that in another Term the Defendant is driven to his Writ of Error. Co. Litt. 259. b.

13. *Contra of Matter in Fact*, as *Death*, *Miſnoſmer*, *Impriſonment*, at the Time of the Outlawry &c. For of theſe he is put to his Writ of Error; but *otherwiſe* it is *in* * *B. R.* as it is ſaid there. Br. Utlagary, pl. 2. cites 33 H. 6. 1. 45.

S. P. Unleſs it be in Caſe of Felony; and there *in Favorem Vitæ*, he may plead it. Co. Litt. 259. b. ——It ſeems generally agreed, that by the Common Law in Favorem Vitæ, an Outlawry of Treaſon or Felony might be avoided by Plea that the Defendant was in Priſon, or in the King's Service beyond Sea &c. at the Time of the Outlawry pronounced againſt him. 2 Hawk. Pl. C. 460. cap. 50. S. 6. But the Serjeant ſays, he takes it to be generally agreed, that no Outlawry for any other Crime (againſt a Party rightly deſcribed) can be avoided by the Plea of any Matter of Fact whatſoever.

But it was ſaid, that *upon Capias Utlagatum*, he ſhall have the Matters in Fact by Way of Plea in Reverſal of the Outlawry; Quære inde; for it was doubted the ſame Year, fo. 51. per Aſhton and Moile, and that of being *beyond Sea*, he ſhall not allege it by Plea, and ſay that he was beyond Sea &c. and pray the Seal of his Captain to certify it; for this is Matter in Fact. Br. Utlagary, pl. 2. cites 33 H. 6. 1. 45.

* S. P. Br. Utlagary, pl. 67. cites 4 E. 4. 43.

14. It was agreed by Aſhton and Moyle, that a Man cannot avoid an Outlawry by ſaying, that at the Time of the Outlawry he *was in the Service of the King, or that the Plaintiff was then dead* &c. without Writ of Error. Theloal's Dig. of Writs, Lib. 11. cap. 4. S. 16. cites 33 H. 6. 45.

15. A Man may ſay that *Nul tiel Vill*, without Writ of Error. Theloal's Dig. of Writs, lib. 11. cap. 4. S. 15. cites 33 H. 6. 51. contra M. 39 H. 6. 1.

16. The *Original was againſt Jo. E. nuper de C. in Com. H. Gent. al' dictus Jo. E. nuper de Parochia Sancti Clementis extra Barram Gent.* and the *Exigent was Jo. E. nuper de Parochia Sancti Clementis extra Barram Gent. al' dictus Jo. E. nuper de C. in Com. H. Gent.* for which prepoſterous Variance it was held that the Outlawry ſhould be reverſed without Writ of Error. Theloal's Dig of Writs, lib. 11. cap. 4 S. 24. cites Mich. 38 H. 6. 3.

17. In the Return of the Sheriff, it appear'd that the *5th County was held Monday the 14th Day of October*, where there *was not any ſuch Monday* 14 of October, by which the Outlawry was reverſed by Priſot, without any Writ of Error. Theloal's Dig. of Writs, lib. 11. cap. 4. S. 25. cites 39 H. 6. Error 41.

18. It was agreed per Cur. That a *Man ſhall not have any Plea upon Capias Utlagatum, which ſhall avoid clearly the Outlawry againſt all Perſons*; and therefore where Parcel of the *Addition* given by the Statute of 1 H. 5. is *omitted*, the Party is put to his Writ of Error. Theloal's Dig. of Writs, Lib. 11. cap. 4. S. 18. cites Mich. *39 H. 6. 1. and 12 H. 6. 8. and ſays this Caſe was agreed by the Court.

S. P. Ibid. S. 11. cites 4 E. 4. 45. * Br. Utlagary, pl. 34. cites S. C.— S. P. Br. Error, pl. 106. cites 19 H. 6. 1. but ſays a Man may have Plea which does not diſprove the Outlawry clearly, as to ſay that there is another Perſon of the ſame Name &c.—— If the County be omitted in the Addition, and he comes the ſame Term that the Exigent is return'd, the Outlawry ſhall be annull'd without Writ of Error. Theloal's Dig. of Writs, Lib. 11. cap. 4. S. 10. cites Hill. 8 H. 6. 38. and 11 H. 6. 67. 33 H. 6. 45. and 37 H. 6. 19. but cites Mich. 5 E. 4. 116. contra.

19. *Certiorari* iſſued *to the Coroners* of the County &c. *to certify if any Outlawry was againſt T. C. and to certify what, when, and how*; and Matter of Outlawry was certified, and this was ſent into C. B. by Mittimus, which was that the ſaid T. C. at the 5th County of &c. held at ſuch

For if a Man be *outlaw'd upon Pluries Capias and Exi-*

gent, without more Proceſs, and does not come at the Day of the Return of the Exigent, but after, he ſhall not reverſe it, but by Writ of Error, and not by way of Anſwer; For *this is good for the King*. Ibid.

ſuch a Place in the County aforeſaid, was demanded in Action upon the Statute of 8 H. 6. in C. B. by A. B. and he did not appear, by which it was awarded that he ſhould be outlaw'd, and Capias Utlagatum was awarded; and after came Jenney, and ſaid that the Outlawry is not good; for *it does not appear when the 4th County was held, nor in what Action the Outlawry was pronounced, nor that Exigent was awarded*; therefore it ſhall be intended that no Exigent was awarded, and pray'd Superſedeas, becauſe Erronice emanavit. And by the beſt Opinion, *it ſhall be taken the beſt for the King, and that Exigent was awarded, and that the 4 Counties were held, and he demanded* at them, and that it was upon a certain Original; and if it was otherwiſe, yet it is *good till it be reverſed by Error*; for it cannot be otherwiſe redreſs'd than by Writ of Error. Br. Utlagary, pl. 45. cites 5 E. 4. 116.

20. If a Man by Exigent be *demanded twice in the Time of one King, and three times in the Time of another* King, and thereupon outlaw'd, this is reverſible by Writ of Error, becauſe the Writ was abated in Fact by the Death of the King; but not by Plea. Theloal's Dig. of Writs, Lib. 11. cap. 4. S. 26. cites Mich. 7 H. 7. 5.

21. Note that if a Man be *outlaw'd in B. R. without Original*, this may be *reverſed there the ſame Term*, and *contra in another* Term; for there the *Party is put to his Writ of Error*, for the Outlawry is not void. Br. Utlagary, pl. 78. cites 11 H. 7. 4.

S. C. cited 11 Rep. 41. a. in Metcalf's Caſe, ſays it was adjudged that the Writ of Error well lies, becauſe by the Award of Exigent his Goods and Chattels were forfeited, tho' the principal Judgment never was given.

22. An *Indictment for Murder* was found againſt E. and an *Exigent awarded*, but *he died*; ſo that he was not convicted or attainted. His Executors brought a Writ of Error to reverſe the Award of the Exigent, becauſe the King being intitled by Matter of Record, the Exigent muſt be avoided by Matter of as high a Nature; and ſince the Words of the General Writ of Error are (Si Judicium inde redditum ſit) which it was not in this Caſe, they ſhall have *Special Writ reciting all the Special Matter*, as by the Precedent appears. 5 Rep. 111. a. in Foxley's Caſe, cites 18 H. 7. B. R. Eaton's Caſe.

Theloal's Dig. of Writs, Lib. 11. cap. 4. S. 23. cites S. C.—— Judgment in Outlawry was *Ideo per Judicium A. B. & C. Armiger'* but *omits Coronator' and* alſo the Words *Comitatus prædicti*. The Court held clearly that both were Error; but the Doubt was, if it ſhould be reverſed before Writ of Error brought. Mountague thought it ſhould, becauſe there is not any Judgment; for Armigeri cannot pronounce an Outlawry, and there cannot be Error in Judgment where no Judgment is. But Doderidge and the Prothonotary ſaid it ought to be avoided by Writ of Error by the Courſe of the Court, tho' Judgment be void; and ſo a Superſedeas was brought to ſtay the Execution till Error be brought and the Judgment avoided. Palm. 43. Mich. 17 Jac. B. R. Anon.

23. If a *Man is return'd outlaw'd*, and it *does not appear that it was per Judicium Coronat'* the Defendant ſhall avoid it by way of Plea, without Writ of Error; and yet in London the Recorder gives the Judgment upon the Outlawry by Cuſtom, and the Coroner often is not preſent. Br. Utlagary, pl. 31. cites 21 H. 7. 33.

24. An Outlawry *in B. R.* cannot be reverſed by Plea, but ought to be by Writ of Error. It was ſo held by the Juſtices; and the Clerks ſaid that ſo was the Courſe always. Cro. E. 274. pl. 2. Hill. 34 Eliz. B. R. in Marſh's Caſe.

25. When one is maliciouſly and *vexatiouſly outlaw'd in private*, who appears daily, and may be taken, we uſually reverſe the Outlawry upon Motion; per Wythens. Comb. 19. Paſch. 2 Jac. 2. B. R. Anon.

26. Exceptions were taken to an Outlawry *of Baron and Feme*; 1ſt, becauſe the Wife cannot be outlaw'd, but waived. 2dly, becauſe it *was*

Comparut

Comparuit for Comparuerunt. It was doubted whether this Outlawry might be *ſet aſide* by way of Exceptions *on* a *Motion.* The Clerks of the Court affirm'd that by the Courſe of the Court in *the ſame Term* it might, but not in another, without a Writ of Error. The Court bail'd him; but ſaid he muſt appear in Perſon next Term, and ſo aſſign his Errors. 3 Bulſt. 212, 213. Trin. 14 Jac. Anon.

27. R. was outlaw'd *for Felony before the General Pardon, which par-don'd both the Outlawry and the Felony.* The *Lord enter'd* upon his Lands *for an Eſcheat,* (it ſeems it was before the Pardon) ſo that he was fain to bring a Writ of Error to reverſe the Outlawry, that he might be reſtor'd to his Lands. Freem. Rep. 369. pl. 476. Trin. 1674. The King v. Richards.

28. In *Dower* &c. the Tenant *pleaded in Abatement, that* in ſuch a Term *he ſued the Demandant, per nomen de Jana Draycote tunc nuper de L. in Com. D. and* ſhe not appearing, *ſhe was waived &c. unde petit Judicium* &c. The Demandant *replied,* that Die impetrationis brevis Originalis, upon which the Outlawry was had, *She was commorant at S. in Oxford-ſhire,* and *traverſed that ſhe was commorant then at L.* aforeſaid. And upon a Demurrer to this Replication it was inſiſted for the Tenant, that tho' the Outlawry might for this Reaſon be erroneous, yet it was not void, nor voidable, but by Writ of Error, or by Averment upon the Outlaw-ry Roll by the Party, who ought to come in in Cuſtody, and not by the Plea of the Party in this *Collateral Action.* And the Court held the Re-plication not good, and that the Matter of it was not pleadable in this Collateral Action, and that the Outlawry ſhall be in Force till reverſed in a proper Manner. Lutw. 39. Hill. 11 W. 3. Draycote v. Curſon.

(H. b) Reverſed. In reſpect of *Appearance* or *Superſedeas.*

1. *MAinpernor in Appeal was put in Exigent by Default of the Party, who render'd himſelf, and made Fine, and it was not inroll'd;* and after the Exigent was *return'd outlaw'd,* and the Defendant brought *Superſedeas ſeal'd, and Writ of Error* to annul the Outlawry, and the *Seal was broken, and bore Date in the ſame Term in which he was outlaw'd, but* it was *before the Outlawry pronounced,* and the Writing well known, and the Seal in Part of the Point well known, and therefore the Outlawry was reverſed, and he reſtored, and ſo it ſeems the *Superſedeas was never deliver'd to the Sheriff.* Br. Error, pl. 40. cites 8 H. 4. 7. Br. Utlagary, pl. 8. cites S. C. Br. Superſedeas, pl. 9. cites S. C.

2. If a Man be outlaw'd *where he has Superſedeas,* it is Error. Br. Error, pl. 48. cites 11 H. 4. 34. S. P. where the Outlawry was the 20 of July, and the Superſedeas bore Date the 13 July, and pray'd that the Oulawry be annull'd, and the Plaintiff being demanded, and making Default, the Court awarded that he take nothing by his Writ, and Defendant had Reſtitution of his Goods. Br. Utlawry, pl. 5 cites 7 H. 4. 1.

In ſuch Caſe he ſhall anſwer, and the Outlawry ſhall be held as null. Br. Utlagary, pl. 14. cites 12 H. 4. 18. Per Hanke.——S. P. Br. Utlagary, pl. 21. cites 19 H. 6. 44.

3. In Treſpaſs it was in a manner agreed, that where *Exigent iſſues,* and the *Defendant ſues Superſedeas, and does not deliver it to the Sheriff,* and he is outlaw'd after, yet this ſhall not grieve him, by reaſon of the Superſedeas. Br. Utlagary, pl. 15. cites 14 H. 4. 27. If *before the Return of the Exigent* &c. the Defendant purchaſes a Superſedeas, but does not deliver it to the Sheriff before the Quinto Exactus; yet if he is return'd outlaw'd, it ſhall be reverſed for that Reaſon. Mo. 73. pl. 199. Trin. 6 Eliz. Anon.

4. Error was assign'd, that where 2 *Capias's ad Satisfaciendum issued against J. S.* and upon this 2 *Exigents*, and the *Defendant was outlaw'd, notwithstanding Supersedeas of Record*, and the *Sheriff return'd that the Supersedeas was deliver'd to him before the 5th County*; *and* also it was *alleged by Matter in Fact, that the Supersedeas was deliver'd to the Sheriff before the 5th County*; and for this Cause the Outlawry was reversed. Quod nota. Br. Error, pl. 155. cites 5 E. 4. 5.

5. The *Sheriff return'd upon the Exigent* before the 5th County, *that* the *Defendant had delivered* him *a Supersedeas*; and thereupon a Certiorari issued to the Coroners, who return'd that the Defendant had not appear'd, nor produc'd any Supersedeas, but was outlaw'd; yet the Supersedeas being of Record, the Justices held the Outlawry void. Mo. 73. pl. 199. Trin. 6 Eliz. Anon.

6. *Plaintiff* having *commenc'd a Proceeding to Outlawry* against Defendant, *Defendant gave Notice to Plaintiff that he had appeared, and obtained a Supersedeas* to the Exigent. *Plaintiff search'd at the Compter, and no Supersedeas being allowed there, Defendant was return'd Outlaw'd*, who moved to set aside the Outlawry. On shewing Cause Defendant alleged he had entred an Appearance with the Exigenter; but that appeared to be unnecessary, and a Novel Imposition by the Exigenter, whose Appearance-book is two Years old only. The Court held that the *Supersedeas is in itself an Appearance, if delivered to the Sheriff before the Return of the Exigent*; but that not having been done in this Case, Defendant is regularly outlaw'd. Barnes's Notes in C. B. 224. 225. Mich. 11 Geo. 2. Peach v. Wadland.

(I. b) Revers'd for what. *Variance.*

S. P. Theloal's Dig. of Writs, lib. 11. cap. 4. S 29. cites Mich. 12 H. 6. 8.

1. PORt. said that an Outlawry was revers'd lately, because it was *Dockwra*, instead of *Dockawre*. Br. Variance, pl. 90. cites 21 H. 6. 7.

2. A Man was *nam'd A. in the Original, and B. in the Exigent*; wherefore, by Opinion of the Court, it is Error, because there was not any Original which warranted the Exigent against B. Brook says it seems to him that this was in the *Name of Baptism*, and not in the Sirname, and therefore clear Matter. Br. Error, pl. 172. cites 16 E. 4. 9.

3. In the Original the Person outlaw'd was named *Launcelot*, and in the Exigent *Lancelot*. The Outlawry was revers'd. Cro. E. 50. Mich. 28 & 26 Eliz. B. R. Lancelot v. Johns.

4. In *Trespass* by G. against S. the *original Writ, and all the judicial Process thereupon, are directed Vice-Com. Wigorn.* and *in the Filacer's Roll in the Margin, it is Hereford*; and in the Body of the Roll it is Et prædict. G. obtulit se quarto Die post. Et vicecomes modo mandat quod prædict. S. non est inventus &c. Ideo præceptum est Vicecom' &c. and at the *Capias returned*, it *is entred in the Roll* as before, viz. *Hereford*; whereas the Capias is directed Vicecom' Wigorn' as it ought to be. Day was given to maintain the Outlawry, and a Recordatur of what Estate the Roll was in then, for Doubt of Amendment by Rasure &c. was made at the Prayer of the Defendant's Counsel. 2 Le. 120. pl. 166. Hill 30 Eliz. C. B. Grove v. Sparre.

5. Error to reverse an Outlawry in Trespass. 1st. The *Plaintiff in the Original was* named *Barnes*, and in the *Exigent*, *Bernes*; so an (*e*) for (*a*) Gawdy held it no Error, because it was in the Name of the Plaintiff.

tiff. Fenner contra; for the Exigent iſſued at the Suit of a wrong Perſon. 2dly. The *Original was Blaba* ſua, and the *Exigent was Blada*; and this was held a plain Variance, and the Outlawry revers'd. Cro. Eliz. 240. pl. 10. Trin. 33 Eliz. B. R. Elſden and Page v. Barnes.

6. The Defendant was *indicted by the Name of W. J. George*, and in the *Exigent* he *was* named *W. George*, leaving out J. And upon a Writ of Error to reverſe this Outlawry, Coke Ch. J. held it apparent Error. Roll Rep. 313. pl. 23. Hill. 13 Jac. B. R. The King v. George.

7. Error aſſign'd was, becauſe in the original Writ, and all the Proceedings, ſhe is *named Agnes Gargrave of Kingſley* in Comitat. Ebor. And in the Exigent ſhe is named *Nuper de Kingſley*. This was held to be Cauſe of Reverſal. Cro. J. 576. pl. 4. Trin. 18 Jac. B. R. Gargrave v. Markham. Palm. 122. S. C. ſays the Exigent was Gargrave de *Kinſly* inſtead of *Kingſly*; and that this Variation in the Letter (g) made it Error, and for that Reaſon it was revers'd.

(K. b) Revers'd for what. *Wrong Abbreviation.*

1. ONE outlaw'd moved to reverſe the Outlawry upon theſe Exceptions. 1ſt. Inſtead of *Proxim.* there is uſed *Px.* for an Abbreviation of it, *without any Daſh.* 2dly, Inſtead of *Infra ſcr.* the Abbreviation of Infra ſcriptam, there is uſed *Infra ſr.* And for theſe Exceptions it was quaſh'd. Sty. 182. Mich. 1649. Coſwell's Caſe.

2. W. was outlaw'd in an Action of Treſpaſs. It was moved to reverſe the Outlawry, becauſe in the Exigent it was *Utleſt.* being put for an Abbreviation of *Utlagatus eſt*; and upon this Exception it was revers'd Sty. 227. Trin. 1650. Cuſtodes Libert. &c. v. White.

See the Statute of 4 Geo. 2. cap. 26. and 6 Geo. 2. cap. 14. as to Abbreviations.

(L. b) Revers'd for what. *Falſe Latin.*

1. ERror to reverſe an Outlawry. The Error aſſign'd was, becauſe the Capias was *Eſte Edmundo Anderſon*, ſo as *T. was wanting*; for the *Teſte* is the Warrant of the Writ; and ſo it is of judicial Writs; and therefore the Outlawry was revers'd. Cro. Eliz. 592. pl. 31. Mich. 39 & 40 Eliz. C. B. Grondy v. Iſcharn.

2. Error to reverſe an Outlawry *in Debt after Judgment.* The firſt Error aſſign'd was, becauſe the *Writ* of Exigent being *directed to the Sheriffs of the City of Lincoln*, the Writ *is* Quod *Capias* corpus ejus, ita quod *Habeas* Corpus ejus; whereas they being 2 Sheriffs, the Writ ought to have been *Capiatis & Habeatis.* Sed non allocatur; for they both be but one Officer to the Court; and altho' *in the End of the Writ it is Ita quod Habeatis* ibi hoc breve, yet there is no Repugnancy; for it is good both Ways. Cro. J. 576. pl. 4. Trin. 18 Jac. B. R. Gargrave v. Markham. Palm. 122. S. C. and S. P.

3. Another Error aſſign'd was, becauſe the Writ mentions *Quas recuperavit verſus eum*, where it ought to have been *eam*: And it was held that this was ſufficient Cauſe to reverſe the Outlawry. Cro. J. 576. 577. pl. 4. Trin. 18 Jac. B. R. Gargrave v. Markham.

4. And

4. And another Error aſſign'd was, that it was *Infra noninata*, inſtead of Infra *nominata*, [an N. for an M.] and therefore it was revers'd. Palm. 122. S. C.

5. And another Error was *Wamata* for *Waviata*; and therefore it was revers'd. Ibid. S. C.

Litt. Rep. 150. S. C. 6. An Outlawry was revers'd, becauſe the Writ was *Præcipimus tibi*, where it ſhould be Præcipimus *vobis*, it being to the Sheriffs of London. Het. 93. Paſch. 4 Car. C. B. Anon.

7. One was outlaw'd after Judgment in Debt; Exception was taken, that the Writ to the Sheriff was *Præcipipimus vobis*, inſtead of *Præcipimus vobis*, and the *Year of the Lord is in Figures*. Roll Ch. J. ſaid, If the Word be Præcipipimus, then there is *no Command to the Sheriff*; for that Word ſignifies nothing; therefore let the Outlawry be revers'd, and Judgment affirmed. Sty. 334. Trin. 1652. Griffith v. Thomas.

And ibid. ſays that another was reverſed for the ſame between the King and Plepter; and another alſo between the King and Comp, for the ſame Cauſe. 8. Outlawry for Treſpaſs was revers'd, becauſe it was *Utlegatus eſt* for Utlagatus. Lev. 164. Paſch. 17 Car. 2. B. R. The King v. Worms.

See the Statute of 4 Geo. 2. cap. 26. and 6 Geo. 2. cap. 14. for Proceedings to be in Engliſh.

(M. b) Reverſed for what. *Error in the Proceſs and Proceedings.*

1. IN Treſpaſs, it was agreed that if a Man be *outlaw'd* where *a Capias is wanting*, he ſhall reverſe the Outlawry by this Omiſſion of Proceſs, Br. Omiſſion, pl. 6. cites 3 H. 4. 5.

2. *Want of Warrant of Attorney of the Plaintiff* in a Suit in which the Defendant is outlaw'd is Error. Br. Error, pl. 48. cites 11 H. 4. 34.

Outlawry *after the firſt Day of the Exigent, and before the 4th Day* is Error. 3. Where the *Exigent bears Teſte before the 4th Day of the Pluries Capias* it is Error. Br. Error, pl. 48. cites 11 H. 4. 34. Br. Jours, pl. 7. cites 33 H. 6 42.

4. *Treſpaſs againſt two*, the *one came by Diſtreſs and pleaded Not Guilty, and was found Guilty*, and *the other is outlaw'd* upon Exigent *where no Pluries Capias is return'd*; this was held Error by Radford. Br. Error, pl. 54. cites 9 H. 5. 9.

5. Debt againſt two who were outlaw'd, and brought Writ of Error, becauſe *the Premiſſes of the Original* was *Præcipe both quod Reddant* 40l. by joint Præcipe, and all the Reſt was Præcipe the one quod reddat 20 l. and Præcipe the other qnod reddat 20 l. and therefore the Outlawry was reverſed. Br. Error, pl. 67. cites 7 H. 6. 27.

6. A Man was *indicted of Treſpaſs by the Name of J. N. of D.* &c. of Treſpaſs *done Die Jovis proximo poſt diem Pentecoſtes*; and it was aſſigned for Error that the *Day is not certain, for all the Week is Pentecoſt*. Et non allocatur; for the Day of Pentecoſt is the Lord's Day only; by which he *ſaid that in the County are D. magna, and D. parva, abſque hoc that there is any D. in the ſame County without Addition*; Priſt. And the Opinion of the Court was, that it ſhould be reverſed. It ſeems that the Party was outlaw'd upon the Indictment; for ſuch Exception of the Vill is not good: If a Man appears and pleads, and be condemned, he cannot aſſign it for Error after, as it ſeems; for of Matter in Fact, if he appears he ought to plead it. Contra where he is outlaw'd, or loſes by Default.

Note

Note a Diverſity as it ſeems, but in this Point 35 H. 6. and 5 E. 4. vary. Br. Error, pl. 69. cites 7 H. 6. 39.

7. In *Debt* the *Exigent was return'd Oct. Trinit.* and the *Defendant return'd outlaw'd at the 5th County held the 11th Day of July, where the firſt Day of the Return was the 10th Day of July, and ſo Outlawry after the firſt Day paſſed and before the 3d Day*, at which it is uſed to certify the Return; and yet ill, and therefore the Outlawry was reverſed for this Default. Br. Jours, pl. 84. cites 31 H. 6. 6.

8. *Capias* was *return'd* Non eſt inventus without more, and *no Name of the Sheriff put to the Writ*, and upon this the Defendant was outlaw'd, and therefore, per Cur. it is Error, and ſhall be reverſed. Br. Error, pl. 2. cites 26 H. 8. 3.

9. In the Writ of Exigent *no Place* was *mention'd where the Sheriff was to have the Body*, ſo that he cannot know into what Court to bring the Body. And upon this being aſſign'd for Error a Judgment was reverſed. Cro. E. 104. pl. 11. Trin. 30 Eliz. B. R. Cæſar v. Stone.

S. C. cited Win 73. in Caſe of Ferrers v. Engliſh, and ſtates it that a Capias iſſued out of C. B. in this Form, viz. Ita quod habeas Corpus ejus Coram Juſticiariis, omitting (apud Weſtmonaſterium) and this was reverſed for Error.

10. *Judgment* was given *in Debt againſt A. and B. and a Ca. Sa. iſſued againſt A. only*, and he was outlaw'd, and afterwards brought Error to reverſe the Outlawry; and becauſe it ought to have been awarded againſt both, the Court reverſed the Outlawry. Cro. E. 648. pl. 3. Hill. 41 Eliz. B. R. Beverly v. Beverly.

11. *Judgment in Debt for* 80 *l.* the *Sheriff levied* 20 *l.* part *by Fi. fa.* on the Goods of the Defendant, *and return'd the ſame on Record*, but non Conſtat by the Record, whether the Plaintiff had received it, or no; *afterwards* the *Plaintiff ſued* forth a *Ca. Sa. for the whole* 80 *l.* upon which the Defendant was outlaw'd; but it was reverſed by a Writ of Error, becauſe it appear'd on the Record, that the Execution was already made for 20 l. part of the 80 l. ſo that the Ca. Sa. ſhould have been but for the 60 l. Goldsb. 148. pl. 70. Hill. 43 Eliz. Anon.

12. One outlaw'd for not repairing a Bridge, was named in the Indictment and Exigent W. R. Miles *de Comitatu Middleſex*, whereas it ſhould have been *de (ſuch a Place) in Comitatu Middleſex*, and ſo allege ſome Place certain within the County; and for that Cauſe the Outlawry was revers'd. Cro. J. 616. pl. 2. Trin. 19 Jac. B. R. Sir William Read's Caſe.

13. Error was aſſign'd to reverſe an Outlawry, for that the *Exigent* was *returned on the ſame Day it bears Date*, which ought not to be; and for this Cauſe it was revers'd. Cro. J. 660. pl. 10. Hill. 20 Jac. B. R. Archer v. Dalbie.

Palm. 278. 280. S. C. ſays this appeared in the Record, and is Error, becauſe the Party has all the Day to come in upon the Exigent, and render himſelf; and the Outlawry was revers'd by Agreement of all the Juſtices.

14. An Outlawry for High Treaſon was revers'd, upon the Exception that it did *not appear where the firſt Court was held.* 12 Mod. 542. Trin. 13 W. 3. The King v. Yates.

15. The Error aſſign'd to reverſe an Outlawry was, becauſe *in the Secundo Exact.* it does *not appear where the County Court was held*; and for that Reaſon it was revers'd. 11 Mod. 173. pl. 15. Eaſt. 7 Ann. in B. R. The Queen v. Cope.

(N. b) Revers'd for what. Error in the *Proclamations.*

This ſeems to be the Caſe in Bendl. 14. pl. 15. Mich. 26 H. 8. Baniſter v. Godley.

1. AN Outlawry was revers'd, becauſe the Writ of *Proclamation did not mention to what Sheriff the Defendant ſhould render himſelf.* D. 206. a. pl. 10. Mich. 3 & 4 Eliz. in Caſe of Belly v. Alger, ſays ſuch Precedent was ſhewn in H. 8th's Time.

D. 206 a. pl. 10. Mich. 3 & 4 Eliz. S. P. Belly v. Algor, where the Outlawry was revers'd without Writ of Error, becauſe thoſe Words (Fact' tribus ſeparalibus Diebus, unde una Proclamatio &c.) were omitted by the Negligence of the Exigenter; ſo that the Writ did not bear any Senſe according to the Intent of the Statute of H. 6.——Bendl. 88. pl. 137. Hill. 3 Eliz. S. C. the Pleadings, and Outlawry revers'd.

2. A *Proclamation* was directed to the Sheriff againſt J. H. and the Writ was *returned tali Die ad Comitatum meum tentum in the Shirehall &c. Proclamationem feci, ac eodem Die ad Generalem Seſſionem &c. Proclamationem feci* &c. This was pleaded in Reverſal of the Outlawry, becauſe theſe Proclamations were made at one Day, whereas the Writ was (tribus ſeparalibus Diebus &c.) And the Sheriff was amerc'd 40 s. for his ill Return. Goldsb. 111. pl. 17. Mich. 30 & 31 Eliz. Anon.

3. Error aſſign'd was, becauſe there was *not any Proclamation in the County where ſhe inhabited:* Sed non allocatur; for it is *not neceſſary* in an Exigent *after Judgment*, when ſhe once appeared, but upon the firſt Proceſs only. Cro. J. 576. 577. pl. 4. Trin. 8 Jac. in B. R. Lady Gargrave v. Gervaſe Markham.

(O. b) Revers'd for what. *In general.*

1. 5 *E.* 3. *cap.* 13. ENacts, That *none ſhall avoid an Outlawry by the Sheriff's untruly certifying Impriſonment.*

Br. Error, pl. 56. cites S. C.

2. Outlawry was revers'd, becauſe the Defendant was *outlaw'd upon Indictment after Charter of Pardon granted to him* by the King; and therefore the Outlawry upon Indictment revers'd. Quod nota. Br. Utlagary, pl. 16. cites 9 H. 5. 14. 15.

3. Judgment in Outlawry was *Ideo per Judicium A. B. and C. Armiger'*, but *omits Coronator'*, *and* alſo the Words *Comitatus prædicti*, the Court held clearly that both were Error. Palm. 43. Mich. 17 Jac. B. R. Anon.

4. An Outlawry was revers'd, becauſe *the Time when the Court was ſaid to be held was in Figures.* 2 Keb. 128. pl. 83. Mich. 18 Car. 2. B. R. The King v. Tufton.

5. Error was aſſign'd of an Outlawry, that it was *Per Judicium Coronatorum*, and doth *not ſay Domini Regis:* Sed non allocatur. 2dly. It was 4*to. exact. ad Com. meum apud Weſtminſter*, and doth *not ſay ad Com. meum Middleſex*; which Per Cur. is Error. 2 Keb. 157. pl. 43. Hill. 18 & 19 Car. 2. B. R. The King v. Abrahall.

6. On a Motion to ſet aſide an Outlawry, the Court held that the *Defendant's own Affidavit of his being a viſible Perſon, without a like Affi-*

davit

davit by his Neighbours, is not a ſufficient Foundation to ſet aſide an Outlawry. Rep. of Pract. in C. B. 151. Trin. 11 & 12 Geo. 2. Bennet v. Skinner and Sydenham.

(P. b) Reverſal *againſt one. In what Caſes another ſhall take Advantage* thereof, and How.

1. FOur *were outlawed in Treſpaſs*, and the *Exigent was not returned*, and *one* came and *had Writ to certify the Outlawry, and had it certified, and had Charter of Pardon* and *Scire facias againſt the Plaintiff*; and the *Sheriff return'd him dead, and* he went quit, by which the *others came after with Pardon, and went quit by this Return of Death*, without Scire facias againſt the Plaintiff. Quod nota; but this Caſe is not in the printed Book. Br. Utlagary, pl. 66. cites 7 H. 4. 30. and 9 H. 4. 1. 3. 7. Ibid. pl. 7. cites S. C.

2. *Aſſiſe by* 2 *againſt* 2, *who were outlaw'd upon Capias pro Fine*, and Exigent upon it, *where the Diſſeiſin was found with Force*; and *one Deſendant brought Error, becauſe Diſſeiſin with Force was pardon'd by Parliament; and it was not inquired whether the Diſſeiſin was after the Pardon, or not*, therefore Error, and the *Party Plaintiff warn'd*, & *nil dicit*; and therefore the *Outlawry was revers'd*; and after the *other Defendant brought other Writ of Error upon the ſame Error*, and the *Outlawry was revers'd without warning the Plaintiff*; for *he is eſtopp'd by the Nihil dicit againſt the firſt*, becauſe it is of one and the ſame Diſſeiſin; and alſo the Outlawry is but the * Suit of the King; Quod nota. Br. Eſtoppel, pl. 57. cites 7 H. 4. 40. Br. Error, pl. 38. cites 7 H. 4. 39.—S. P. by Gaſcoigne. But Brook ſays Quære inde; For it ſeems they are ſeveral Outlawries in themſelves, but it is but upon one and the ſame Diſſeiſin, and they at the firſt did not maintain the Diſſeiſin to be after the Pardon, and ſo cannot maintain it now. Br. Utlagary, pl. 6. cites S. C.

* Where the Writ of Error is of the Outlawry only, it is the Suit of the King only; and therefore the Party ſhall not be warn'd. But *where the Writ of Error is of the Outlawry, and of the Judgment*, the Party ſhall be warn'd. Br. Utlagary, pl. 6. cites S. C.

3. It was adjudg'd, that where 3 *are outlaw'd in the ſame Suit jointly*, if the Outlawry be reverſed for Matter apparent at the Suit of any of them, the others ſhall take Advantage of this Reverſal. Theloal's Dig. of Writs, Lib. 1. cap. 15. S. 21. cites Hill. 21 H. 6. fol. 30 & 31. and T. 8. fol. 2. Utlawry 17.

4. *Debt againſt* 2 *by ſeveral Præcipes, naming them of D.* and they *were outlaw'd*, and *the one* was taken, and *pleaded that No ſuch Vill*, and had Scire Facias againſt the *Plaintiff*, who *ſaid that there is ſuch a Vill*, and *found againſt the Plaintiff*, and *Defendant went quit*. And after *the other Defendant* was taken, and *pleaded the ſame Plea*, and had Scire Facias againſt the *Plaintiff*, who *made Default*, by which the Defendant would have had Advantage of the firſt Record. Per Priſot, The *King ſhall not be concluded by the firſt Verdict*; *for* the King *was not Party* to it; nor this Defendant ſhall not have Advantage of it, for he is a Stranger. And Laicon accorded; for by them the *Plaintiff may reverſe the firſt Record by Attaint*, and therefore it is not Reaſon that the other Defendant, who was not Party, ſhall have Advantage of this Record. Br. Eſtoppel, pl. 223. cites 33 H. 6. 51, 52.

(Q. b) *Proceedings and Pleadings after* the *Outlawry reverſed.* How.

Br. Impriſonment, pl. 17. cites S. C

1. HE *who is in the Fleet upon Capias Utlagatum, at the Suit of J. N. ſhall remain* there *till he has found Mainpriſe upon other Outlawry at the Suit of W. N.* if he prays it, notwithſtanding he has Charter of Pardon. Br. Utlagary, pl. 17. cites 38 E. 3. 21.

But where in *Debt againſt* 4, *they were outlaw'd, and ſued* their Charter of *Pardon and Scire Facias*, and afterwards *were received to abate the Writ, becauſe it was againſt* 4 *by a joint Præcipe, and it appear'd that another was bound with them, not named in the Writ* &c. For the Court ſaid they ſhould have the ſame Advantage now, as they ought to have before the Outlawry &c. Theloal's Dig of Writs, Lib. 14. cap. 11 S. 3. cites Paſch. 12 H. 4. 21.

2. In *Debt*, if the *Defendant is outlaw'd, and* afterwards *purchaſes Charter of Pardon, and Scire Facias againſt the Plaintiff, and pleads* with the Plaintiff to the Action, *he ſhall not be received afterwards to ſhew that Proceſs was diſcontinued*, for that there were only 2 Capias's before the Exigent; per Opinionem. Theloal's Dig. of Writs, Lib. 14. cap. 11. S. 2. cites Hill. 3 H. 4. 10.

Br. Utlawry, pl. 10. cites S. C.—— Br. Corone, pl. 164. cites 18 E. 4. 9.

3. He that reverſes an Outlawry of Felony ſhall *plead to the Felony*, and ſhall not go quit by the Reverſal of the Outlawry; for the *Indictment remains good*, notwithſtanding the Reverſal. Br. Corone, pl. 27. cites 9 H. 4. 3.

That he ſhall be arraign'd upon the Indictment.——Ibid. pl. 143. cites 7 H. 7. 5. S. P.——Br. Utlagary, pl. 44. cites S. C.——He ſhall *anſwer to the Felony, becauſe it is the Suit of the King.* Br. Reſponder, pl. 53. cites S. C.——Cro. J. 464. pl. 12. Hill. 15 Jac. B. R. Carter's Caſe, S. P.——2 Hawk. Pl. C. 462. cap. 50 S. 17. ſays it is agreed, That after an Outlawry of Treaſon or Felony reverſed, the Party ſhall be put to plead to the Indictment, for that ſtill remains good.

But where J. C. was return'd outlaw'd, who *came in upon the Exigent return'd, and ſhew'd How he had Superſedeas* &c. *and had found Mainpriſe, and this notwithſtanding the Sheriff had return'd him outlaw'd*, and pray'd that the Outlawry be reverſed, and ſo it was, and *was not compell'd to anſwer to the other Suit, pending in the ſame Court, as Priſoner*; for it was taken there, that *he who goes by Mainpriſe is no Priſoner*; per Cur. Quod nota. Br. Utlagary, pl. 35. cites 39 H. 6. 27.

4. A Man was outlaw'd notwithſtanding a *Superſedeas* which he had *before Outlawry pronounced*, and came in Perſon, and pray'd that the Outlawry be reverſed, and ſo it was. Quod nota. And upon this the Plaintiff declared, and the Defendant imparl'd. And ſo ſee, that upon the Reverſal of the Outlawry the *Original remains good*, and the Parties ſhall proceed. Br. Utlagary, pl. 74. cites 30 H. 6. 3.

Br. Utlagary, pl. 44. cites S. C. That where Outlawry is reverſed in a perſonal Action, the Defendant ſhall not anſwer. ——*But upon a Charter of Pardon* he ſhall anſwer upon the Original, by the Statute of 5 *E.* 3. *cap.* 12. upon a Scire Facias. Contra at the Common Law, and this Caſe of Reverſal is at the Common Law. Quod nota. Br. Reſponder, pl. 53. cites 7 H. 7. 5.

5. If a Man be outlaw'd *in Debt or Treſpaſs at the Suit of the Party*, and reverſes the Outlawry, he ſhall not be compell'd to anſwer. Br. Reſponder, pl. 53. cites 7 H. 7. 5.

6. 21 *Jac.* 1. *cap.* 16. Enacts, That *in all ſuch Actions as are directed by this Act to be brought within certain Times therein limited, if the Defendant be outlaw'd in the Suit, and after reverſe the Outlawry, the Plaintiff, his Heirs, Executors, or Adminiſtrators may commence a new Action within a Year after ſuch Outlawry ſo reverſed, and not after.*

7. Action

7. Action was laid, and Outlawry was *in London*. Upon *Reverſal* the Plaintiff may declare in *any other County*, be the Action local or tranſitory. 3 Lev. 245. Mich. 1 Jac. 2. C. B. Whitwick v. Hovenden.

8. If one be *outlaw'd by Proceſs in an Information*, and comes in and reverſes the Outlawry, he *muſt plead Inſtanter* to the Information. 1 Salk. 371. pl. 10. Mich. 7 W. 3. The King v. Hill. S. P. by Holt Ch. J. and alſo by Aſtry. 5 Mod. 141.

S. C. which was an Outlawry in an Information for ſending Children beyond Sea, to be bred Papiſts.

9. H. was *outlaw'd in two Actions, one of* 10*l.* and *the other of* 40*s.* and upon Reverſal of the Outlawry, the Court took *Special Bail for the firſt*, and an *Appearance for the other*, upon 4 & 5 W. & M. cap. 18. 2 Salk. 496. pl. 6. Mich. 10 W. 3. B. R. Anon. Ibid. ſays, Note the Recognizance was taken purſuant to 31 Eliz. cap. 3.

10. If Outlawry be pleaded either in Bar or Abatement, and the Plaintiff *replies Nul tiel Record*, and the *Defendant has a Day* given him *to bring in the Record*, and *in the Interim the Plaintiff removes the Record by Writ of Error, and reverſes the Outlawry*, tho' the *Defendant fails* in bringing in the Record, yet this ſhall not be fatal and peremptory on him; for in the firſt Caſe, *he ſhall have Liberty to plead a new Bar*; and in the ſecond, the *Judgment ſhall be only Reſpondeas Ouſter*, becauſe his Plea was a true Plea at the Time of pleading it, and the Plaintiff was actually diſabled from ſuing, not having then his Liberam Legem. G. Hiſt. of C. B. 162, 163. cap. 17. 3 New Abr. 763. Tit. Outlawry, in the very identical Words.

(R. b) *Pleadings* in Support of the Outlawry, *in Advantage of the King*, and his Intereſt.

1. W. S. of S. was taken by Capias Utlagatum at the Suit of H. who *ſaid that the Day of the Writ purchaſed he was dwelling at D. and not at S.* and *pray'd Scire Facias againſt H.* and had it, and the *Sheriff return'd him dead*; by which it was *maintain'd for the King, that he was converſant at S. prout* &c. and yet *Scire Facias was awarded againſt the Executor of the ſaid H.* And the Prothonotary ſaid, that it is the firſt Scire Facias that ever was awarded in this Caſe; For per Brian Clerk, if the Party Plaintiff had been Party to the Plea ſupra, and it had been found for the Defendant, the King had been concluded; and the ſame Law of the Plaintiff, by his Intendment, if he pleads againſt the King; and in this Caſe the Plaintiff ſhall not be nonſuited for the Advantage of the King; and that if the Plea ſupra had been tried upon the Original, nothing ſhould be but to abate the Writ; Per Brown, But here, after Outlawry upon ſuch Plea, they ſhall recover all, or ſhall be barr'd. And P. 15 E. 3. the Defendant was outlaw'd, and came by Capias Utlagatum, and pleaded Miſnoſmer of himſelf, and the Plaintiff confeſs'd it, and nothing was done upon the Conuſance, becauſe it was *in Diſadvantage of the King*. Br. Utlagary, pl. 23. cites 21 H. 6. 21. Br. Scire Facias, pl. 114. cites S. C. and ſays that in ſuch a Caſe, 22 H. 6. 7. the Defendant pray'd Scire Facias, and had it, and the Scire Facias and the Alias were return'd Nihil; and the King's Serjeant maintain'd the Exception for the King, that

he was dwelling at S. and the Juſtices ſaid that if he had purchaſed Charter of Pardon, and had Scire Facias, which was return'd Nihil, and the Alias ſimiliter, the Charter ſhould have been allow'd. But in the firſt Caſe, if the Plaintiff was preſent, and would confeſs the Exception that he was not of S. yet the Traverſe ſhould be accepted for the King.——Br. Charters de Pardon, pl. 20. cites 22 H. 6. 7.——Br. Utlagary, pl. 24. cites S. C.——Br. Prerogative, 24. cites 21 H. 6. 21.

2. Capias Utlagatum *againſt J. N. of Hale*, who came and *ſaid that there is Hale, alias Hales, and Bomerhale and Dovehale, and that he was dwelling at Dovehale, abſque hoc that he was dwelling at Hale aforeſaid*, and the *Plaintiff maintain'd his Writ*. And the *King's Serjeants would have demurr'd for the King, becauſe the Defendant did not traverſe that there is no Hale, only in the ſame County*. And per Laicon, The King has nothing to do to demur; for he is not intitled but by the Suit of the Party. And when the Party is content, the King has nothing to do; as in Decies tantum by W. M. the Defendant pleaded an ill Bar, and the Plaintiff repl ed, and would not demur; the King cannot demur; for he is intitled only by the Party. And the Reporter agreed the Decies tantum; for the King is not intitled before Judgment, but is intitled immediately by the Judgment upon the Outlawry, therefore by him the King may demur. But Laicon granted, that *if the Plaintiff will make Default, or confeſs*, there *the King may ſpeak in it*; but *contra where the Party does his Duty*; for in the one Caſe there may be Covin, and in the other not. Br. Utlagary, pl. 33. cites 38 H. 6. 1.

(S. b) *Scire Facias. Neceſſary* in what Caſes. *And Proceedings and Pleadings* thereupon.

Br. Scire Facias, pl. 157. cites S. C.

1. A Man *outlaw'd of Felony* ſaid, that he was impriſon'd at the Time of the Outlawry, and *it was averr'd contra for the King*, by which Scire Facias iſſued to *the Lords* Mediate and Immediate, who came and *averr'd the Impriſonment to be by Covin*, and the others e contra, and *Venire Facias iſſued*, and the *Jury did not come*, by which *Proceſs was continued* thus, viz. *Jurat' inter W. de T. & J. Def. qui ſequitur pro Domino regi ponitur in reſpectu*, making *no mention of the Lords*; and the *Inqueſt was taken between W. T. and J. of F. qui ſequitur &c. and one J. Attorney of the one of the Lords*; and it was *found* that he was impriſon'd *by Covin*, and the *Lords alleged Diſcontinuance of Proceſs*, and by Judgment was *awarded to commence at the firſt Venire Facias*, where this firſt iſſued out of the Court, becauſe the Lords were now Parties. Br. Utlagary, pl. 40. cites 38 Aſſ. 17.

2. In *Scire facias upon Charter of Pardon upon Outlawry*, the *Defendant cannot allege Diſcontinuance nor Miſcontinuance of Proceſs upon the Outlawry, in reverſing thereof*; for the Statute is, that they ſhall plead upon the Original, ſo that they ſhall not meddle with any Proceſs. Br. Diſcontinuance de Proceſs, pl 35. cites 3 H. 4. 10.

3. *Where a Writ of Error is of the Outlawry only, it is the Suit of the King only*, and therefore the *Party ſhall not be warned; but where* the Writ of Error *is of the Outlawry and of the Judgment*, the Party ſhall be warned. Br. Utlagary, pl. 6. cites 7 H. 4. 39.

4. *Four were outlaw'd in Treſpaſs* and the *Exigent was not return'd*, and *one* came and *had Writ to certify the Outlawry, and had it certified, and had Charter of Pardon*, and *Scire facias againſt the Plaintiff*; and the *Sheriff return'd him dead, and* he went quit, by which the *others came after with Pardon, and went quit by this Return of Death*, without Scire facias againſt the Plaintiff; Quod nota. Br. Utlagary, pl. 66. cites 7 H. 4 39. in the Written Book.

Br. Error, pl. 44, cites S. C.

5. Scire facias upon a Writ of Error to reverſe Outlawry, the *Sheriff return'd him, who recover'd, dead*, and the Outlawry was reverſed *without warning the Executor*; Quod nota. Br. Utlagary, pl. 9. cites 9 H. 4 1. 3.

Br. Scire facias, pl. 68.

6. A Man was outlaw'd of Felony, and *alleged that he was in the King's Service at Burdeux at the Time* of the Outlawry pronounced, and had

had Writ to the Mayor of B. to certify it, who certified accordingly; by which he pray'd to be arraign'd, and could not, till * *Scire facias* againſt the Lords mediate and immediate, which was *return'd that he had no Lord mediate nor immediate*, and after he was arraign'd of the Felony, and pleaded Not Guilty. Br. Utlagary, pl. 10. cites 9 H. 4. 3.

cites S. C.— * Outlawry of Felony ſhall not be reverſed till Scire facias *againſt the Lords mediate and immediate is return'd, whether the Party has Lands or not*; Quod nota; And it was return'd that there were no Lords; for he had not any Land. Br. Utlagary, pl. 44. cites 7 H. 7. 5.——Br. Scire facias, pl. 165. cites S. C.——S. P. Arg. Le. 326. in Marſh's Caſe.——S. P. Where the Outlawry was for *Murder*; Per Holt Ch. J. who ſaid that he had known Outlawries reverſed without ſuch Scire facias, but that it was a dangerous Courſe; for tho' the Lords mediate and immediate, when they are ſummon'd by ſuch Scire facias, could *not plead in Nullo eſt erratum*, nor bar the Reverſal of the Judgment, *yet they may plead Releaſes or Fines* levied to them by *the outlawed* Perſon after the Outlawry, in Bar of Reſtitution; but ſince they cannot maintain the Judgment, ſuch Scire Facias ſeems rather of Caution than of Neceſſity; Per Holt Ch. J. 12 Mod. 545. Trin. 13 W. 3. the King v. Young.—S. P. by Holt Ch. J. Comb. 372. Trin. 8 W. 3. B. R. the King v. Taylor, who brought a Writ of Error to reverſe an Outlawry of Murder committed 18 Years ago; and aſſign'd for Error that the County Court was not held for the County; and notwithſtanding the Fact was ſo long ago, the Court refuſed to bail him in the mean Time.

7. One was outlaw'd of Felony, and the Party reverſed it by Writ of Error, and it was ſurmiſed, that he had neither Land nor Tenement, and *the Attorney General confeſſed it*, by which he was *diſmiſſed without Scire facias* to be awarded againſt the Lords mediate and immediate. Br. Scire facias, pl. 194. cites 4 E. 4. 9.

A. was *outlaw'd upon five Indictments for Felony*, and brought five Writs of Error. Holt Ch. J. ſaid, if *he hath no Lands, and it is ſuggeſted on the Rolls* that he hath none, in ſuch Caſe the *Attorney General may confeſs Error without a Scire Facias to the Lords* mediate and immediate, to ſhew Cauſe why he ſhould not have Reſtitution; but if there are Lands, then there muſt be ſuch a Scire facias. 2 Salk. 495. pl. 5. Hill. 8 W. 3. B. R. Arthur's Caſe.——Ld. Raym. Rep. 154. S. C. accordingly.

Where one came to reverſe an Outlawry in a Caſe of Murder, upon *Confeſſion of the Attorney General that he had no Lands* or Tenements, which Confeſſion recited, that it ſo appear'd to him on Affidavits; the Outlawry was reverſed for the common Error, that the Court was not ſaid to have been held Pro Com' *without any Scire facias to the Lords* immediate and mediate; and he was ſent Priſoner to the Old Bailey. 12 Mod. 668. Hill. 13 W. 3. the King v. Biſhop——The Confeſſion muſt be on Record. Per Holt Ch. J. 12 Mod. 545. Trin. 13 W. 3. the King v. Young.

8. He who is *outlaw'd by Name of C. Falter*, where he ſays that his Name is *C. Walter*, and is taken by Capias Utlagatum ſhall go by Mainprize, and ſhall have *Scire facias to try his Name*. Br. Scire facias, pl. 2. cites 27 H. 8. 11.

Br. Miſnoſmer, pl. 1. cites S. C. — Br. Utlagary pl. 1. cites S. C. ——

Theloal's Dig. of Writs, lib. 11. cap. 4. S 3 cites S. C.—— So in Treſpaſs againſt J. Stoke, who was *outlaw'd* at the Suit of the Plaintiff, and taken by Cap. Utlag. and *ſaid that his Name is* and was *J. Stokes* and *not J. Stoke*, and had Scire facias againſt the *Plaintiff*, who came and *ſaid*, that he was *known by the one Name and by the other*; And ſo to Iſſue. Br. Scire facias, pl. 186. cites 14 E. 4. 16.

9. A Man was *taken by Capias Utlagatum in Felony by Name of J. S. Gent.* who *ſaid that* his Name *is Yeoman and not Gent. and ſo is not this Perſon who is outlaw'd*, and had the Plea; and becauſe it was *in Appeal*, Scire facias was awarded againſt the Appellant, if he had any thing to ſay againſt this Plea, and the Defendant *was let to Bail*. Br. Utlagary, pl. 42. cites 5 H. 7. 16.

Br. Scire facias, pl. 164. cites S. C.

10. *A. held* Land *of the Queen, and was outlaw'd for Murder*. The *Queen ſeiſed* the Land *and gave it to B. and his Heirs. A. brought Error and reverſed the Outlawry*. Upon Reference to the 2 Ch. Juſtices, they were of Opinion that A. might enter upon B. for there is not any Record now of the Attainder to inforce the Party to ſue by Petition, but the Record is utterly defeated; and cites 4 H. 7. 11. 12. and 8 H. 4. 21. And Manwood and Peryam, agreed with this; for *tho' an Office were found, he*

2 Hawk. Pl. C. 462. cap. 50. pl. 19. ſays, the S. P. has been adjudg'd both in the Caſe of Treaſon and Felony.

he ſhall not be put to his Scire facias to repeal the Patent before he enters. And. 188. pl. 223. Anon.

11. The Court was moved that an Outlawry might be diſcharged, becauſe it is now *pardon'd by the Act of Oblivion*; for notwithſtanding it were not pardon'd if it were an Outlawry after Judgment, except the Monies due, for which the Party is outlaw'd, be paid to the Party, as the Book of 6 H. 7. f. 21. is, yet Outlawries before Judgment are pardon'd; and beſides the Parties here did ſubmit to an Arbitrement touching the Matters in Difference between them, and an Award is made. But the Court anſwer'd, That *the Outlawry cannot be diſcharged until the Party have brought his Scire facias* upon the Act. Sti. 348. Mich. 1652. Ellis v. Pipin.

A. had been outlaw'd for *High Treaſon*, and obtain'd from the Crown a Writ of *Error to reverſe this Outlawry*; and the Attorney General had Orders to confeſs in Court the Error aſſign'd which was an Error in *Fact*, viz. That he was outlaw'd by a *wrong Addition*; which the Attorney did accordingly. The Court was therefore pray'd, that the Uutlawry might be reverſed. But Parker Ch. J. was of Opinion, that tho' in Outlawry for Treaſon there is no Need of Warning the Lords of whom the Lands are held by a Scire facias before the Outlawry be reverſed, as muſt be done in Caſe of *Felony*, becauſe in Treaſon the Forfeiture is to the Crown; yet he ſaw no Reaſon to diſtinguiſh between *Outlawry for Felony* and Outlawry for *Treaſon*; for in Caſe of Treaſon, where the Forfeiture is to the Crown, the Crown may grant theſe Lands to others, who ought to be heard, what they can ſay for themſelves before they loſe their Lands. He thought therefore there ſhould have been a Scire facias to the *Tertenants*, and grounded himſelf pretty much on a Caſe in H. 4. where there was a Scire facias to the Tertenants; and tho' this was an Outlawry for Felony, yet the King's being made immediate Lord, made it all one as if it had been an Outlawry for Treaſon; and the Entry in Caſe of Felony, as may be ſeen in Coke's Entries 318. mentions the ſuing out of a Scire facias, as a Thing of abſolute Neceſſity, without which the Judge could not reverſe the Outlawry. But on ſearching into Precedents, it was found, that in Fact in Outlawry for Treaſon there uſed to be no Scire facias; and the Precedents being ſo, and it being a Suppoſition not of Neceſſity, that the Crown ſhould grant theſe Lands and then oust the Patentees by ſuffering a Writ of Error to be brought, the Outlawry was reverſed. 10 Mod. 189. Mich. 12 Ann. B. R. the Queen v. Stafford.

13. If one be ſued to Outlawry *after Judgment*, there *needs no Scire facias to renew the Judgment* after the Year and Day, becauſe being outlaw'd you may have Execution on his Effects at any Time on Behalf of the King; and there is *no Occaſion to give a legal Notice to him, who is out of the King's Protection.* G. Hiſt. of C. B. 14, 15. cap. 2.

(T. b) Reverſal. *Reſtitution*, in what Caſes, and of what.

1. THE Opinion of the Court was that *one outlaw'd of Treſpaſs* ſhall *not*, after Charter had, *have* Action of *Account of Receipt after the Outlawry*. Theloal's Dig. of Writs, lib. 1. cap. 15. S. 9. Paſch. 28 E. 3. 92, and 93.

2. If a Man is *outlaw'd*, and the *King gives his Goods, and after* the King *pardons* and reſtores *him* to his Goods, he ſhall not have Reſtitution of the Goods, which the King gave Meſne between the Pardon and the Reſtitution. Br. Reſtitution, pl. 18. cites 29 Aſſ. 34.

3. A

3. A Man *outlawed* where he *has Superſedeas bearing Date before the Outlawry*, ſhall have Reſtitution of his Goods. Br. Reſtitution, pl. 2. cites * 7 H. 4. 1.

A Man *outlaw'd brought Superſedeas and Writ of Error in B.R.* and the *Seal of the Superſedeas was broke, and the Date was before the Outlawry pronounced*; and becauſe the *Writing and Hand was known, and the Print of the Seal* well known, he was reſtored, and the Outlawry annull'd. Br. Reſtitution, pl. 27. cites 8 H. 4. 7.

* Br. Utlagary, pl. 5. cites S. C.

4. The *Property of the Chattles* of one outlaw'd *ſhall be in the King by the Outlawry*, and he ſhall not have Reſtitution of theſe Goods by his *Charter of Pardon*, but ſhall be only reſtored to the Law; Per Rickhil. But there, becauſe ſhe was Covert when ſhe was outlaw'd with her Baron, who is now dead, ſhe had Writ of Reſtitution of her own Goods. Theloal's Dig. of Writs, lib. 1. cap. 15. S. 12. cites Mich. 7 H. 4. 76.

5. A Man *outlaw'd of Felony revers'd it by Error*, and had *Scire facias againſt the Lords mediate and immediate*, and againſt the Tertenants, and was reſtored per Judicium. Br. Reſtitution, pl. 28. cites 11 H. 4. 53.

6. In *Appeal*, if the *Defendant upon Exigent is returned Cepi Corpus where it ſhould be Exigi feci*, and *he appears and pleads Not guilty, and is acquitted*, there, by the Reporter, tho' he ſhall not recover Damages, becauſe the Original was good, notwithſtanding the Return was ill, yet he ſhall rehave his Goods, becauſe it is Error. Quære how; for it ſeems he ſhall not have Writ of Error, becauſe he appear'd and pleaded, and was not outlaw'd. Br. Reſtitution, pl. 8. cites 9 H. 5. 2.

7. A Man was *indicted of* the *Murder* of one T. N. and *Capias iſſued*, and the *King pardoned him all that in him was, and all his Goods and Poſſeſſions*, and *after this he was outlaw'd*, and the Outlawry revers'd by Writ of Error; and he prayed Reſtitution of his Goods, and could not have it, becauſe *it did not appear of Record that they were taken*, which was contrary to the Opinion of Hank. Br. Reſtitution, pl 9. cites 9 H. 5. 15.

Br. Error, pl. 56. cites S. C.

8. It was held that a Lord outlaw'd ſhall not after Charter had, have the *Rent* which was *Arrear before the Outlawry*. Theloal's Dig. of Writs, lib. 1. cap. 15. S. 10. cites Hill. 9 H. 6. 57.

9. Where the *Acceſſory is outlaw'd of Felony*, the Acceſſory ſhall be reſtored to his Goods after the Death of the Principal; for by the Death of the Principal the Acceſſory is diſcharged. Br. Reſtitution, pl. 13. cites 21 H. 7. 31.

10. *After the Reverſal* of an Outlawry, a *Writ of Reſtitution was awarded to reſtore the Goods*, the *Sheriff returned that he had ſold them for* 40 *l. and brought the Money into Court*, whereas *the Goods were worth* 100 *l.* But the Return was held ill; for the Capias Utlagatum &c. has not a Word of ſelling the Goods; ſo that it ſeems to be without Warrant. D. 223. b. pl. 26. Trin. 5 Eliz. in a Nota of the Reporter, at the End of the Caſe of **Lambert v. Proctor.** But he adds, viz. Nota theſe Words in the Writ, viz, "*Et ea quæ per inquiſitionem illam inveneris, in manus noſtras capias & ſalvo cuſtodias, ita quod de vero Valore & Exitibus eorundem nobis reſpondeas.*" Whence it ſeem'd to Catlyn, Saunders, and Whiddon, that the Sheriff might ſell them, or anſwer the Value to the King, and retain the Goods himſelf &c. Ideo quære bene.

S. P. accordingly Per Cur. Obiter in Dr. Drury's Caſe, 8 Rep. 143. a. Paſch. 8 Jac. and cites this Caſe of Proctor as agreeable thereto.——S. P. accordingly, and S. C. cited Per Cur. 5 Rep. 90. b. Trin. 42 Eliz in the Exchequer, in Hoe's Caſe.——D. 223. b. Marg. pl. 26. cites a Caſe Ex libro Magiſtri Noy, viz. Paſch. 22 R. 2. B. R. Rot. 50. that *W.* Baker *was outlaw'd*; whereupon H. Beauchamp produced the King's *Writ to the Eſcheator to pay* the ſaid H. 20 *l. of the Goods of the ſaid W. by Gift of the King.* Afterwards *W. revers'd the Outlawry for Error*, and had Judgment for his Goods loſt. Whereupon W. impleaded the Eſcheator for the ſaid 20 l. who produced the ſaid Writ, teſtifying his Payment thereof to the ſaid H. and that he is diſcharged thereof; and a Precept iſſued to the ſaid H. to anſwer and ſatisfy the ſaid 20 l. whereupon H. prayed Aid of the King, but *Judgment* was given *that he repay the ſaid Money*, and that W. have Execution.

Sav. 89. pl. 166. Trin. 29 Eliz. S. C. accordingly.—Goldsb. 103. pl. 9. Trin. 30 & 31 Eliz S. C. accordingly.——Mo. 270. pl 421. Mich. 30 & 31 Eliz. S. C. accordingly.——S. C. cited 2 Vern. 313. in Case of Peyton v. Ayliffe.

11. Pending a *Quare Impedit* the Plaintiff is outlaw'd. The King presents by Virtue of the Outlawry; the Presentee is admitted, instituted, and inducted. Upon *Reversal* of the Outlawry, after Judgment for him in the Quare Impedit, he may have Scire facias to have Execution of the Judgment, and remove the Incumbent. Cro. E. 44. Mich. 27 & 28 Eliz. C. B. Beverly v. Cornwall.

S. C. cited Mo. 293. in Case of Sir Moyle Finch v. Throgmorton, that it was adjudg'd that the Lessee could not recover his Term, because it was merg'd in the Reversion and Franktenement of the Queen.——Ow. 116. S.C. and Manwood said that the *Pardon with Restitution* is sufficient to revive the Term forfeited by the 2d Outlawry. 29 & 30 Eliz. in Scacc.

12. The *Queen* seised in Fee *makes Lease for Years to a Person outlaw'd*, and after he was outlaw'd twice more, and before any Seisure or Grant over by the Queen, a *general Pardon* by Parliament was made, which gives and grants all Goods and Chattels forfeited to them by whom they were forfeited. This was a good Lease, because the Render of the Rent made him capable as a Farmer; but upon the *2d Outlawry*, the Term is secondarily given to the Queen; and the Reversion being in the Queen, the Term seems extinguished in it, and so not *revived* by the Damus in the Pardon. Mo. 237. pl. 371. Pasch. 29 Eliz. in the Exchequer, Knowles v. Powell.

13. If *Lord of a Manor* to which *Advowson is appendant*, is outlaw'd, and the King takes the Profits, he shall present, and the Party shall not be restored to this Presentment after Induction, if he reverses the Outlawry. Otherwise it is where the Advowson is *in gross*. Mo. 269. pl. 421. Mich 30 & 31 Eliz. in Case of Beverly v. Cornwall.

14. If *Advowson* comes to the Queen by Forfeiture for Outlawry, and the Church is now void, and the Queen presents, and then the Outlawry is revers'd for Error, yet the Queen shall enjoy the Presentment, because the *Presentment comes to the Queen as Profit of the Advowson*. Mo. 270. Beverly v. Cornwall.

But it is otherwise upon a Charter of *Pardon*; for there he shall not be restored to the Presentment. Br. Forfeiture de Terres, pl. 73. cites 9 H. 6. 57. Per Paston.——Ibid. pl. 104 cites S. C. For Pardon *is not Restitution.*

15. *But* if a *Church* be *void* at the Time of the Outlawry, and the Presentment by this is forfeited as Chattel principally and distinct by itself, there, upon *Reversal* for Error, the Party shall have Restitution of the *Presentment*. Mo. 270. in Case of Beverly v. Cornwall.

16. Lord of a *Manor* is outlaw'd, and the King *grants Copyholds*, the Party shall not defeat them by his Restitution in Error, because they are but *Things accessory* to the Principal. Mo. 270. in Case of Beverly v. Cornwall.

And. 277. S. C.—— S. C. cited Arg 2 Vern. 313. in Case of Peyton v. Ayliff.—— A *Lease for Years* being the Principal, is to be restor'd upon the Reversal, tho' the *Profits received* are forfeited and lost. Admitted by the Counsel for the Outlaw. 2 Vern. 313. Peyton v Ayliff. —By

17. A Term of one outlawed for Recusancy was sold, and afterwards the Outlawry was revers'd. Anderson and Walmsley held that the Term should be restored; for the *King's Interest is but conditional*, i. e. it is good if the Outlawry be good, and therefore a Term being sold, it is tied with a Condition, that into whosoever Hands it comes, if the Outlawry be revers'd, the Term is reduced to the Owner. And it is not like a Sale made by the Sheriff; for the Sheriff sells it by Authority of Law to levy the Money, and there, if the Judgment be revers'd, the Party shall be *restored* only to the Money, and not to the Term; for he lost it not by the Judgment; and they gave Judgment for the Plaintiff, Periam J. not being resolved. Cro. E. 278. pl. 3. Pasch. 34 Eliz. B. R. Eyre v. Woodfine.

—By Ld. Sommers, the Term ought to be reſtored. 2 Vern. 312. [which ſeems to admit the Profits received to be loſt.]

The Grant of *Goods* of a Perſon attainted is *till* the Outlawry be reverſed. Arg. Vern. R. 10. in Caſe of Prodgers v. Phrazier.

18. J. N. and J. S. ſued B. to an Outlawry before Judgment. It was found by Inquiſition that B. had 500 l. *Stock in the Eaſt-India Company*. *The King* ſeiſed the Stock, and *granted it to J. N. and J. S. in Satisfaction of their Debts*, and that they might ſue for it in their own Names. The Court of Exchequer decreed the Stock to be transferred to them, and *the Company entred the Names in their Books*, and put out the Name of B. Afterwards *J. S. aſſign'd his Intereſt to W. and his Name is entred* in the Company's Books for his Share. *B. reverſes the Outlawry. J. N. proceeded in his Action, and got Judgment, but no Execution.* The *King granted to B. a Reſtitution de omnibus, de quibus nobis non eſt reſponſum.* Then P. *another Bond-Creditor, got Judgment againſt B. and outlaw'd him after Judgment.* The *King granted this* 500 *l. to P.* as he had before granted to J. N. and J. S. Upon a Bill in the Exchequer by P. the Court decreed, That the Stock was well transferr'd by the Grant to J. N. and J. S. and that it was executed by transferring the Stock, and ſo the King anſwer'd of it. As to the Caſe of *Outlawry before or after Judgment*, or of the Aſſignee of the King's Aſſignee, and the King's immediate Aſſignee, they made *no Difference*. And tho' J. N. after Reverſal of the firſt Outlawry, ſued and got Judgment againſt B. yet they held no Difference between the Caſe of him and W. but that both ſhould retain the Proportions aſſign'd at firſt to J. N. and J. S. 2 Lev. 49. Paſch. 24 Car. 2. in the Exchequer-Chamber, Pinſold v. the Eaſt-India Company, Northey & al.

2 Vern. 315. Hill. 1693. Ld. Keeper Somers cited this Caſe, and ſaid that it was ended by Compromiſe, but that the Ld. C. B. Hale was of Opinion that there ought to have been Reſtitution in this Caſe.

19. In Scire Facias to have Reſtitution after Reverſal of the Outlawry, it was inſiſted that the Leaſe made by the King to the Plaintiff of the Outlaw's Lands, is made to him for Satisfaction of his Debt out of the Reſidue of the Profits, *after and beyond the Fine and Rent reſerved*, and ſo the Reſidue beyond is received by him to his own Uſe; and therefore after *Reverſal* of the Outlawry, all the Reſidue ought to be repaid by him. Quod fuit Conceſſum per Cur. And ſaid that tho' Part of the *Money received was levy'd by Proceſs of the Exchequer*, this was in Aid of the Plaintiff, and for his Benefit the Money was levy'd of the Rents, Iſſues, and Profits, and after, in Purſuance of the Demiſe made, deliver'd to him, which is in Law a Receipt, and Levying out of the Rents by him. Quære if Judgment given. 2 Jo. 101. Mich. 29 Car. 2. B. R. Rockley, alias Buckley v. Wilkinſon.

2 Show. 68. pl. 52. Trin. 31 Car. 2. B R. S. C. by the Name of Buckley v. Wilkinſon, ſays it was urged that the King's Intereſt was but conditional; and if the Outlawry be reverſed, the Goods ſhall be reſtored, and then the Party is ſet where he was, as if the Outlawry had never been; but the contrary was urged to be the Practice of the Exchequer, to which the Court agreed.——2 Keble 871. pl. 25. **Wilkinſon v. Rockley**, S. C. ſays it was objected, that this ſhould be pleaded in the Exchequer upon the Seiſure and Extent, which the Court agreed. And that of *Profits anſwer'd into the Exchequer* there can be no Reſtitution againſt the King, according to 21 H. 7. 8. but that of Profits *levied, and not anſwer'd* into the Exchequer, there may be Reſtitution there, but not here in B. R. And per Cur. a Superſedeas was awarded [as to the Reſtitution.]——S. C. cited 2 Vern. 314. in Caſe of Peyton v. Ayliff. ——5 Mod. 49 Trin. 7 W. 3. in the Caſe of **the King v. Thornby**, it was ſaid by Treby Ch. J. in his Argument, That upon Reverſal of Attainders, we know there is no Reſtitution of the Money paid to the King; and the Reaſon is, becauſe the Barons cannot in ſuch Caſe controul the Treaſury. He remember'd, ſeveral Years ſince, there was a Sollicitor who brought the Rolls of a forfeited Eſtate in Diſpute into Court, and they order'd the Money to be put into the Hands of the Remembrancer; for they ſaid, if it was once paid into the Treaſury, there was no getting it out again. And ibid. 61. per Holt Ch. J. It is true, if a Man be outlaw'd in B. R. and the Party's Goods are ſeiſed into the King's Hands, and then the Outlawry is reverſed, there can be no Reſtitution. The Reaſon of this is, for that the Court of B. R. cannot ſend a Writ to the Treaſurer; and the Court of Exchequer have no Record before them to iſſue out a Warrant for a Reſtitution. So if an Attainder be reverſed, the mean Profits taken into the Exchequer cannot be reſtored, for the ſame Reaſon; and alſo for that the King cannot be made a Diſſeiſor, and the Statute gives a Remedy only as to Parliament.——S. P. Skin. 614, 615. per Holt Ch. J. in the Banker's Caſe.

20. A Man had a *Debt* due to him *by Judgment*, and was outlaw'd. The Grantee from the Crown *acknowledged Satisfaction upon the Record* of the

the Judgment. Upon Reverſal the Acknowledgment was ſet aſide, and Reſtitution made. Arg. cited as the Caſe of **Garret and the Earl of Holland.** 2 Vern. 313. in the Caſe of Peyton v. Ayliff.

21. *Equity of Redemption of a Term for Years* was reſtored upon Reverſal of Outlawry for *Treaſon*, (tho' doubted by Counſel Arg. if it was forfeitable or not, being only of a Term for Years.) 2 Vern. 312. pl. 302. Hill. 1693. Peyton v. Ayliffe.

22. The *Judgment on the Reverſal* is to be reſtored to what was *not anſwer'd to the King*, which in all Caſes has been underſtood of the *meſne Profits* anſwer'd to the King, and not as to the principal Thing itſelf, tho' ſeiſed into the King's Hands; and he took it to be the ſame in Caſe of a *Leaſe for Years* as of a Freehold; per Ld. K. Sommers. 2 Vern. 315. Peyton v. Ayloff.

23. A Bill was to be relieved againſt a Judgment in Ejectment, obtain'd by virtue of a *Purchaſe under a Venditioni Exponas of a Term for Years, on an Outlawry of the Plaintiff*, who inſiſted that his Title to the Lands was a Fee, and not a Term for Years; upon which an Injunction was granted. But the Defendant *pleaded the Purchaſe under the Outlawry*, and it was allow'd, and the Injunction diſſolved. G. Equ. R. 184. 12 Geo. 2. in Canc. Robinſon v. Haynes.

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* See (L. a)

(U. b) Reſtitution. *How granted, or* * *obtain'd.*

1. A Man was outlaw'd, and reverſed the Outlawry, and had *Writ of Reſtitution* of his Goods, directed to the Bailiff of Weſtminſter; and ſo it ſeems that Writ of Reſtitution *may go to whomſoever has the Goods.* Br. Reſtitution, pl. 21. cites 6 H. 7. 9.

2. Upon a Motion for a Reſtitution, after Reverſal of an Outlawry, it was ſaid by Hale Ch. J. That he *muſt plead the Reverſal* to the Seiſure in the Exchequer. 1 Vent. 191. Hill. 23 & 24 Car. 2. B. R. Anon.

(W. b) *Grantee* of Outlaw. *What Intereſt he has* after Reverſal. *And who bound* by ſuch Grant.

1. THE *Termor* being *outlaw'd* for Felony, *granted his Term* and Intereſt *to the Plaintiff*, who is put out by J. S. and after the *Outlawry is reverſed*; and the *Plaintiff brought Treſpaſs for the Profits* taken *between the Outlawry reverſed and the Aſſignment.* And the Queſtion was, If the Action did lie; for that during that Time the Queen had the Intereſt, and the Aſſignee had no Right. And it was adjudged for the Plaintiff; for by Reverſal it is as if no Outlawry had been, and there is no Record of it. Cro. E. 270. pl. 13. Hill. 34 Eliz. in Scacc. Ognell's Caſe.

2. An Outlaw *ſuffers a Common Recovery.* This will bar the Eſtate-Tail, becauſe of the intended Recompence only, and the Tenant might have counterpleaded the Vouching ſuch Perſon, and ſo it is his Fault. Arg. Keb. 30. in Caſe of Plunkett v. Holmes.

(X. b) *How to* get at, or *discover the Effects of the Outlaw.*

See (R) (S)

1. A. Sued B. to an Outlawry in Debt on Bond before Judgment, and brought a Bill againſt C. who was *Truſtee for B. of an Annuity* of 20 l. a Year, deviſed out of a perſonal Eſtate, to ſubject it to the Plaintiff's Debt. Lord C. Parker, at firſt, inclin'd that the Bill did not lie; but afterwards was of another Opinion, all the Defendant's Intereſt, both equitable as well as legal, being forfeited to the Crown; and tho' the *Plaintiff was intitled to a Grant* thereof from the Crown, which upon Application to the Court of Exchequer he would *of courſe* have, yet ſince this Truſt continued in the Crown till taken out, the Plaintiff was directed to get ſuch Grant, and make the *Attorney-General a Party*, and and then to come again. Wms.'s Rep. 445. Trin. 1718. Balch v. Waſtall.

2. So where *B. owed A.* 100 *l.* and *C. owed B.* 100 *l.* on Note. *A. outlaw'd B.* and brought a *Bill in Chancery againſt B. and C. to have this* 100 *l. paid him.* The Maſter of the Rolls declared, that A. could have no Title but by *Grant under the Exchequer Seal*, all B.'s perſonal Eſtate being veſted in the Crown by the Outlawry; and put off the Cauſe, in order that A. might get ſuch Grant, and make the Attorney-General Party. Wms.'s Rep. 446. Trin. 1718. in the Caſe of Balch v. Waſtall, cites it as Paſch. 1721. Hayward v. Fry.

(Y. b) *Executors or Adminiſtrators of Outlaw. Their Power* and Intereſt. *And Pleadings* by them.

1. IN Debt againſt Executors, they pleaded Outlawry in their Teſtator. Upon Demurrer Walmſley and Owen J. held it no Plea; for *one outlaw'd may well make a Will and Executors, and they may have Aſſets* to ſatisfy, over and beſides the Goods forfeited, as in Caſe of Debts due upon Contract; or it might be that he *deviſed Lands to be ſold by his Executors*, which are ſold, the Money is Aſſets in their Hands. But Beaumond e contra; for the Bar is good to a common Intent, and ſuch kind of Aſſets ſhall not be intended, unleſs ſhewn. Anderſon abſente, Adjornatur. Afterwards for Defect in the Pleading, without Regard to the Matter in Law, it was adjudg'd for the Plaintiff. Cro. E. 575. pl. 21. Trin. 39 Eliz. C. B. Wolley v. Bradwell & Ux' Executors of Manners.

Win. 58. in Caſe of Bulloigne v. Gervaſe, has a Nota at the End, viz. Note well that it was ſaid concerning this Caſe of Manners, that a Writ of Error was brought of that afterwards, and that the Caſe remains till this Day undetermined.

2. *Debt* upon Bond *againſt B. Adminiſtrator of A. B. pleaded in Bar, that A. his Inteſtate was outlaw'd after Judgment, and died, and the Outlawry ſtill in Force.* Upon Demurrer it was objected, that this is a Plea only by way of Argument, that he ſhall not be charged for this Debt, becauſe he has no Aſſets; and in this Caſe this Outlawry *ought to be given in Evidence upon Riens enter Mains pleaded*, and ſhould not be pleaded in Bar; for by Poſſibility the Outlawry may be reverſed, and then the Adminiſtrator

Hutt. 53. Bullen v. Gervis, S. C. ſays that upon View of the Record in Woolley's Caſe, the

Court gave Judgment that it was no Plea.— Brownl. 43. S. C. but S. P. does not appear.

miniſtrator ſhall be charged if he has any Goods. The Court ſeem'd to think the Plea not good. Win. 58. Hill. 20 Jac. C. B. Bulloigne v. Gervaſe.

3. Tho' *Choſes en Action* are recoverable by *Information in the Exchequer*, yet if the *Executor brings Scire Facias on a Judgment*, he ſhall recover, and be *accountable to the King* for it; and the Debtors of the *Inteſtate* (tho' he was outlaw'd) may pay their Debts to the Adminiſtrator, and his Releaſe is a good Diſcharge. Hutt. 54. Mich. 20 Jac. in Caſe of Bullen v. Jervis.

For more of Utlawry in General, ſee **Account, Acceſſory, Addition, Error, Execution, Plea and Demurrer,** and other Proper Titles.

Wages.

(A) *Servants Wages recoverable* in what Caſes, and How, *before* the Statute of 5 *Eliz.* *And Orders of Juſtices* relating thereto, *ſince* that Statute. Good or not.

1. DEBT againſt a Prior by a *Servant retain'd* with his Predeceſſor, in Office of Bailiff of Husbandry, for 40 s. per Ann. which was more than the Statute allow'd, and did Service to the Predeceſſor to the Uſe of the Houſe; and held that it lay well, tho' the Wages *exceed the Statute*, inaſmuch as he was retain'd, and the Service came to the Uſe of the Houſe. Br. Dette, pl. 214. cites 3 E 4. 21.

2. If a Servant be retained for 40 s. per Ann. and ſerves, he ſhall have *Debt*, but he ought to *count that he was in the Service during the Time.* Br. Count, pl. 47. cites 37 H. 6. 8.

3. The Statute of 5 Eliz. cap. 4. extends to ſuch as are retained in *Husbandry*; and therefore other Retainers are left as they were at Common Law, and a Retainer ſhall be *intended according to the Statute*, unleſs the contrary be ſhew'd by the other Party; ſo that where the Retainer was for a Year, it ſhall be intended *that the Wages were appointed by the Juſtices*; Per Winch J. And it was alſo ſaid by the Court, that if the Juſtices of Peace in this Kind do neglect to ſet down the Wages, yet a *Servant may bring an Action upon his own Contract*, and that he *need not ſhew the Place where he did his Service*; for if he did no Service, yet if he did not depart, it is very good. Win. 75. Paſch. 22 Jac. C. B. Weaver v. Beſt.

4. Juſtices

4. Juſtices of Peace made an Order for D. to pay his *Coachman* the Wages agreed upon between them. It was moved againſt this Order, that the Statute 5 Eliz. cap. 4. extends not to Coachmen, or other Servants than in Husbandry. And the Court were of the ſame Opinion, and quaſh'd the Order. 2 Jo. 47. Paſch. 28 Car. 2. B. R. De Vall's Caſe.

S. P. Arg. becauſe they cannot compel a Man to ſerve in that Capacity. 5 Mod. 140. in Caſe of the King v. Gately. ——Only Labourers are not within the Statute; Per Holloway. Comb. 3. Mich. 1 Jac. 2. B. R. Snape v. Dowſe.——Juſtices of Peace have no Juriſdiction to judge of Wages, unleſs in Caſe of Husbandmen. 10 Mod. 68. Mich. 10 Ann. B. R. The Queen v. Wooton.——S. P. 6 Mod. 91. Hill. 2 Ann. B. R. The Queen v. Corbet.

5. Exception to an Order of Seſſions upon the Statute for Servant's Wages, viz. That it does *not appear that the Servant was hired according to the Statute.* Quaſh'd. Comb. 3. Mich. 1 Jac. 2. B. R. Snape v. Dowſe.

6. An Order of 2 Juſtices for Payment of Wages recited it to be due to a *Day-labourer not retained by the Year*, according to the 5 Eliz. 4. The Court held clearly the Order to be void, becauſe the Juſtices of Peace have no Authority as to Servants Wages, unleſs hired by the Year according to the Statute, and in the Service of Husbandry; and this not appearing in the Order, it was quaſh'd; for the Statute takes no Notice of other Service; and their Power, as to Wages, is only what they have by the Statute. Carth. 156. Mich. 2 W. & M. in B. R. The King &c. v. Champion.

6. A Juſtice of Peace made an Order for the Payment of a *Seaman's Wages*; and upon an Action brought againſt him, the Plaintiff recovered 30l. Damages. Arg. 5 Mod. 140. in the Caſe of the King v. Gately, cites it as one Reycroft's Caſe.

8. It was moved to quaſh an *Order of Seſſions for Servants Wages and Coſts of Suit*, for Non-payment whereof they committed him to Priſon, which it was ſaid they could not do, and that they ought to have indicted him for diſobeying their Order; and that the Juſtices of Peace have no Power to compel Payment of Servant's Wages; And it was ordered to be quaſh'd, Niſi. 5 Mod. 419. Mich. 10 W. 3. The King v. Pope.

6 Mod. 204. Arg. in Caſe of the Queen v. London, cites Paſch. 3 W. & M. The King and Queen v. Jammer; and that it was there held that the Juſtices could inforce their Order by Commitment.

9. An Order to pay for *Day's-works and Labour done*, was held well, for the *Court will intend it within their Juriſdiction* upon general Words, *unleſs the contrary appears* upon the Face of the Order. 1 Salk. 441. in the Caſe of the Queen v. Gouche, it was cited by Gould J. as the Caſe of the King v. Dummer.

The Court, in Favour of Servants, will always, unleſs the contrary appears upon the Face of the Order, preſume Servants to be Servants in Husbandry, and will admit of no collateral Proof to the contrary. 10 Mod. 68. Mich. 10 Ann. B R. The Queen v. Wooton.

10. An *Order* of Juſtices, *reciting that 42 s. 4 d. was due* from G. to J. S. *for Work and Labour in Husbandry, required him to pay* the ſame. It was objected, That it does *not appear to be Statute-wages*, and their Juriſdiction is of no other. But per Powell and Gould, tho' the *Statute gives them a Power only to ſet the Rate* for Wages, *and not to order the Payment*, and the Courts of Law indulge Remedies for Wages, as appears by its ſuffering the Admiralty to have Cognizance of Mariner's Wages; and therefore they would *intend it ſuch Wages as were within the Statute.* And the Order was affirm'd, Holt abſente. 1 Salk. 441. pl. 3. Mich. 1 Ann. B. R. The Queen v. Gouche.

11. The Juſtices of Peace made an Order upon the Defendant, that he ſhould *pay B. ſo much Money for Labour and Work done, without ſaying* ſo much as *that he was his Servant*; and it was quaſh'd; for Per Cur. This might

3 Salk. 261. S. C.—— Poor's Settlements 229. pl. 273. cites S. C.

might be Carpenter's Work &c. 6 Mod. 91. Hill. 2 Ann. B. R. The Queen v. Corbet.

12. *Order* was for Payment of Wages, *reciting that* 2 *Perſons were retained by* L. Overſeer of the Works in Hampton-Court Gardens, *at ſo much per Diem, and had work'd* there *ſo many Days*; therefore the Order was, that L. ſhould pay them; Et per Cur. The Statute extends only to Servants in Husbandry, not to Gentlemen's Servants, nor to Journeymen with their Maſters; *Had the Order been general*, viz. *to pay ſo much to* 2 *of his Labourers &c. or* to 2 of his *Servants, the Court ſhould have ſuppoſed them* Servants *in Husbandry, but here is no Room for ſuch* an *Intendment*, ſince the contrary appears. Salk. 442. pl. 5. Trin. 3 Ann. B. R. The Queen v. London.

13. An *Order was* made by the Juſtices of Peace, *for the Defendant to pay* 40 *s. for Wages generally*; and becauſe it was not ſaid for what Wages, it was moved to quaſh it; for they can only ſettle Wages in Husbandry; But Per Cur. we will intend it for ſuch Wages, ſince the contrary does not appear. Salk. 484, 485. pl. 40. The King v. Gregory.

14. An *Order* of Seſſions was made upon the Maſter, *to pay* 7 *l. Wages to J. S. his Servant in Husbandry.* It was objected that J. S. was a Covenant-ſervant, and that the Statute does not extend to ſuch, tho' in Husbandry. But Powell J. held that the Statute of 5 Eliz. having a favourable Conſtruction, has been extended to *Covenant-ſervants*, if *in Husbandry.* 11 Mod. 266, 267. Hill. 8 Ann. B. R. The Queen v. Cecill.

15. Order for Payment of Servants Wages quaſh'd, becauſe the *Evidence* for the Order &c. *was only the Servant*, and he is not good Evidence, being intereſted. MS Caſes, Hill. 8 Ann. B. R. The Queen v. Ceville.

16. A *Warrant* was granted by a Juſtice of the Peace upon the Statute of the 5 Eliz. againſt a Maſter, for not paying a Labourer's Wages, *without Proof on Oath that any thing was due.* And for this an Information was granted againſt him. And the Court held further, that the Warrant is not to be granted in the firſt Inſtance, but *after a Summons and Conviction.* Trin. 11 Geo. 2. B. R. The King v Covert.

For more of Wages in general, See **Mariner's Wages, Maſter and Servant** (N) and other Proper Titles.

Waife.

(A) Waife. [*What ſhall be ſaid Waife.*]

Fol. 809.

1. IF a Thief leaves my Horſe or his own **Horſe** in an Inn, for a certain Sum by the Week **for his Meat, it is not any Waife.** P. 1 Ja. B. **adjudg'd.**

2. But

2. But if he leaves it there without any Agreement for his Meat it is a Waiſe. P. 1 Ja. B. adjudg'd.

3. This Forfeiture is not like a Stray, where tho' the Lord may ſeize yet the Party, who is the Owner, may retake them within the Year and Day; but here the true *Owner cannot ſeize his own Goods, tho' upon freſh Suit within the Year and Day.* H. Hiſt. Pl.C. 541.cites 8 E. 3. 11. a.Avowry, 151. 3 E. 3. Cor. 162.

4. If a Man be *purſued as a Felon*, and he flies, and *waives his own Goods*, theſe are forfeited; Per Cur. as if they had been ſtolen Goods. Br. Eſtray, pl. 9. cites 29 E. 3. 29. and M. 37 H. 8. accordingly.

5. It ſeems that a Waiſe is *that which is ſtole*, and *Waifs and Catalla Felonum, are the proper Goods of the Felon*; therefore a Man may have the one by the Flight, and not the other as it ſeems. Br. Eſtray, pl. 2. cites 44 E. 3. 19.

Bona Waivilata ſeu Derelicta, *are* Goods that are ſtolen and waved by the Thief in his Flight. Bona Fugitivorum are the proper Goods of him who flies for Felony. See 4 Rep. 109. b. in Foxley's Caſe.

6. If *Goods are baild to J. N. and he ſuffers them to be ſtolen from him*, and the *Felon waives them in the Bailee's Manor, and he takes them as Waif*, this *is no Plea*; Per Cott. J. Br. Eſtray, pl. 12. cites 10 H. 6. 22.

Contra if he was robb'd of them, or if the Bailor had retook them, and after they had been ſtolen and waived; for in the one Caſe it is Folly and Negligence in the Bailee, and in the other not. Ibid.

7. *Treſpaſs of Goods* carried away, the *Defendant ſaid that he had Waiſe in his Manor of D. and that one ſtole the Goods de quodam ignoto, and brought them into his Manor, and there waived them, and he ſeized them as Goods waived*, and the *other traverſed that they were not ſtole*; Per Laicon, if they were not ſtole, yet if they were waived, they are forfeited; For if a Man takes Goods only by Treſpaſs, if they are purſued to be taken, and he waives the Goods and flies, now he refuſes them, and the Poſſeſſion is not in any; and then the King, or he who has Waiſe of the Grant of the King, ſhall have it. Per Needham, Waiſe cannot be unleſs the Goods were ſtole; and denied the Caſe of the Treſpaſs. And if a Man flies for Felony, and leaves his Houſe and Goods, yet there his Goods are not waived by it; and by pleading of Waiſe is implied that the Goods were ſtolen, and by ſtealing and waiving the Goods are forfeited. Br. Eſtray, pl. 6. cites 12 E. 4. 5.

8. If a Man *waives his own Goods without Offence, and ſays* that *he will not have them any longer*, this is no Forfeiture, and he may retake them at his Pleaſure. Br. Forfeiture de Terres, pl. 112. cites Doct. & Stud. lib. 20. ca. 51. fo. 157.

6. If a Felon *ſteals Goods and carries them into a Manor, and leaves them there in his own or another's Houſe, or in Cuſtody of another, or puts them into the Ground or other ſecret Place* and then flies, they are not Waiſes; for a Waiſe is when a Felon is purſued or thinks he is ſo, and fearing to be apprehended, and having the Goods then in his Poſſeſſion, flies and waives them. But *if he has not the Goods with him when he flies and is purſued, or is in Fear of being apprehended, they are neither waived nor forfeited*, but the Owner may take them when he will without any freſh Suit. Reſolved 5 Rep. 109. a. Paſch. 43 Eliz. B. R. Foxley's Caſe.

Mo. 572. pl. 785 Mich. 41 & 42 Eliz. S. C. and S. P. accordingly, Foxley v. Anſley. — Cro. E. 693. pl. 3. S. C. Gawdy and Popham held, that Purſuit of the Felon need not be alleged. But Popham ſaid it ſhould be alleged that the Felon fled for Fear of being apprehended, and therefore waived them. — — If Felon leaves the Goods eloign'd with Intent to fetch them another Time they are not waived. Mo. 572. pl. 785. Per Popham in S. C.

Cro. E. 694. pl. 3. Mich. 41 & 42 Eliz. B. R. Foxley v. Anſley, S. C. and S. P. by Popham Ch. J.

10. The *Reaſon why* Waifs are *given to the King or Lord of the Manor*, and that the Owner ſhall loſe his Property in them, is, becauſe of his Default in not making freſh Purſuit to apprehend the Felon, and therefore the Law hath impoſed this Penalty on him, that unleſs the Felon upon freſh Suit be attainted at his Suit in Appeal of the ſame Felony that he ſhall loſe all the Goods which the Felon waives at the Time of his Flight; but if the Felon hides them there is no Default in the Party, it being ſufficient for him to make freſh Suit after Notice. 5 Rep. 109. a. b. Paſch. 43 Eliz. B. R. Foxley's Caſe.

11. *Goods of Aliens* ſtolen and waived by the Felon, ſhall not be ſaid Waifs by 13 E. 4. Per Doderidge J. 3 Bulſt. 19. Hill. 12 Jac. in Caſe of Waller v. Hanger.

(B) Waife. *Who ſhall have them.*

1. NOTE per Belk. that Waifs *do not belong to the Lords of the Hundred, by Reaſon of the Hundred, but* belong *to the Leet*, and the *King ſhall have it by Reaſon of the Leet.* Br. Eſtray, pl. 2. cites 44 E. 3. 19.

Br. Eſtray, pl. 7. cites S. C. —— Br. Freſh Suit, pl. 4. cites S. C. —— But by apprehending &c. the Felon on *Freſh Suit* the Property is preſerved to the Plaintiff againſt him that claims Waif and Stray. 2 Le. 192. pl. 242. Trin. 28 Eliz. C. B. Rooke v. Denny.

2. It was ſaid for Law by the Reporter, That if *Goods* are *ſtole*, if they *come into a Franchiſe*, the *Lord* of the Franchiſe *ſhall have them*, if freſh Suit be not made, and *if it be no Franchiſe* the *King ſhall have them*, if the Party does not make *freſh Suit*; which Franchiſe ſeems to be ſuch a one as has Waife, or Bona & Catalla Felonum Fugitivorum. Br. Forfeiture de Terres, pl. 110. cites 21 E. 4. 16.

Br. Eſtray, pl. 7. cites S. C. —— Br. Freſh Suit, pl. 4. cites S. C.

3. *And* it was granted per tot. Cur. That if a Man *ſteals Goods and waives them*, he who was robbed may *ſeize them* 20 *Years after*, if the King nor the Lord of the Franchiſe have not ſeized them, but if they are ſeized, then he who was robbed ought to ſue Appeal, and ſhall have them if he makes Freſh Suit; Quod nota. Br. Forfeiture de Terres, pl. 110. cites 21 E. 4. 16.

4. Note, where *Goods are ſtolen and waived, and ſeized as Waife* by him who has Waife, by this the Property is changed, and the firſt Owner ſhall not rehave them without ſuing Appeal. But ſee a late *Statute* 21 *H.* 8. *cap.* 11. That if he gives in Evidence at the Arraignment upon Indictment, and the Felon be attainted, he ſhall have Reſtitution as if he had ſued Appeal. Br. Eſtray, pl. 8. cites Dr. & Stud. lib. 2. cap. 3. and 51.

5. A Lord who has Bona Waviata, ſhall not have the Goods of Aliens ſtolen and waived by Felons; and if waived *after the Alien's Death*, the Lord ſhall not have them, but the Executor of the Alien; Per Doderidge J. 3 Bulſt. 19. Hill. 12 Jac. in Caſe of Waller v. Hanger.

(C) Plead-

(C) Pleadings.

1. THE *Lord of a Hundred* juſtified for a Waiſe there, becauſe a *Thief had ſtolen Goods, and Hue and Cry was made, and he* ran away and *waived the Goods, and he took them claiming as Waiſe.* Br. Eſtray, pl. 2. cites 44 E. 3. 19.

2. *Treſpaſs of taking a Horſe.* The *Defendant ſaid that it was ſtole, and waived, and he as Lord of D. where* &c. *took it as Waiſe.* The *Plaintiff ſaid that it was not ſtole*; and a good Iſſue. So if he had ſaid that it was not waiv'd. Nota. Br. Iſſues Joines, pl. 68. cites 12 E. 4. 5. Br. Traverſe per &c. pl. 241. cites S. C. That the Plaintiff replied *Abſque hoc that it was ſtole.* And Per Needham, the Waiving ought to be travers'd, and not the Stealing. But per Jenney, he may traverſe the one or the other, and after it was taken that the Iſſue was well join'd.

3. *In Caſe* for miſuſing the Plaintiff's Horſe, by which the Horſe became blind of one Eye &c. and *counted that* the Horſe was ſtolen by 3 Felons, and that *he made freſh Suit, and the Felons were apprehended and attainted at his Suit* before Windham J. and that the Horſe came to the Hands of the Defendant, who miſuſed it as above. The Defendant *pleaded, that* before that and the Attainder of the ſaid Felons, *they had waived the ſaid Horſe within his Manor*, in which he had Waiſe and Eſtray &c. The Court held this no Plea, *without traverſing the Freſh Suit* whereof the Plaintiff had declared, the Property of the Plaintiff being thereby preſerved; and therefore upon that Miſuſer an Action well lies; and Judgment for the Plaintiff. 2 Le. 192. pl. 242. Trin. 28 Eliz. C. B. Rooke v. Denny.

4. In Trover &c. the Defendant juſtified as Servant to the Sheriff of Middleſex, for that the Plaintiff had ſtolen the Goods, and carried them to D. in the County of Middleſex; at which Place the Defendant ſeiſed them ut Bona waviata; and without Argument it was adjudged for the Plaintiff; for he *ought to allege a Felony committed* &c. *and that the Goods were waived by the Felon.* Cro. Eliz. 611. pl. 18. Paſch. 40 Eliz. C. B. Davie's Caſe.

5. A. ſtole B.'s Goods; *B. makes Freſh Suit.* A. waives the Goods and flies, and *before B. comes the Goods are ſeiſed as waiv'd*, and then *B. comes and challenges them.* Crooke and Harvey J. held the Goods not forfeited, B. having done his Endeavour, and purſued from Vill to Vill; and that they ſhall not be ſaid waived, but where it cannot be known to whom the Property is. Hutton and Yelverton ſaid that Goods waived ſhall be ſaid ſuch as are ſtolen, and which the Felon, being purſued for Fear of Apprehenſion, waives and flies; ſo that by Seiſure before the Owner comes, the Property is preſently alter'd out of the Owner in the Lord, notwithſtanding the Freſh Suit, unleſs that Suit was always *within View of the Felon.* But all agreed that if the *Owner comes and challenges the Goods before Seiſure*, and after the Flight of the Felon the Owner ſhall have his Goods without Queſtion. Het. 64. 65. Mich. 3 Car. C. B. Dickſon's Caſe.

For more of Waiſe in general, See **Freſh Suit, Reſtitution,** (C) and other Proper Titles.

Wales.

See 20. Geo. 2. ch. 42. 9. 43. which declares & enacts, That in all cases, where the Kingdom of England, or that part of Great Britain called England, hath been, or shall be mentioned in any act of parliament, the same hath been & X

X shall from henceforth be deemed to comprehend the dominion of Wales & town of Berwick upon Tweed. See also Ld. Hardwicke's words in the Berwick case 2. Burr. 853. See further the Discourse upon the running of the Statute into Wales by the late Lord Chancellor in my MS. of Law Cases.

(A) What *Process* goes into Wales.

1. WHen the Manor of Bergaveny was demanded, they *wrote to the Sheriff of the County of Hereford to ſummon the Tenant* in the Manor in Wales. Br. Cinque Ports, pl. 8. cites 19 H. 6. 12.

2. A * *Fi. fa.* or a † *Ca. ſa.* or other *Judicial Proceſs*, did not go into Wales; Per tot. Cur. Godb. 214. pl. 305. Mich. 11 Jac. C. B. Anon.

*The Plaintiff had *Judgment in Debt in London*, and a *Fieri facias* to the Sheriff, who *returned Nulla bona, but Teſtatum fuit that he had Lands in Denbighſhire*, and *Fi. fa. to the Sheriff of Denbigh, who returned that Breve Domini Regis non currit in Walliam.* Kelyng Ch. J. on the firſt Motion held that the Writ lies, the others ſaid nothing, but ordered the Sheriff to make ſuch Return as he would ſtand to, who ſtood to this Return. And Twiſden doubting whether the Writ lay, adjornatur. Lev. 291. Trin. 22 Car. 2. B. R. Draper v. Blandy.—— 2 Saund. 195. S. C. that Kelynge Ch. J. inclined ſtrongly that the Writ lies; and that afterwards it was mov'd again before Rainsford and Morton J. who upon hearing the Caſe argued, made a Rule for a new Writ, and to amerce the Sheriff; but it being mov'd afterwards, when Twiſden J. was preſent, and he inclining ſtrongly that ſuch Proceſs did not run into Wales, the Caſe was adjourn'd over to the next Term; and the Reporter ſays that nothing afterwards was done in it ——Raym. 206. S. C. ſays it was afterwards adjudg'd an ill Return, by Twiſden, Rainsford and Morton J.

† If *Debt* be brought *againſt one in London*, and *he afterwards removes and inhabits in Wales*, a *Ca. Sa.* may be awarded againſt him there: And the Regiſter mentions a Record removed from Callice by Certiorari; Per Doderidge J. Cro. J. 484. pl. 1. Trin 16 Jac. B. R. Sir John Carew's Caſe.

So where *two Welchmen were Bail in B. R.* and Judgment being had againſt the Principal, a *Ca. Sa.* iſſued into Wales againſt the Bail; and the Court ſaid that if the Parties found themſelves aggriev'd, they might have a Writ of Error. 2 Bulſt. 54. 55. Mich. 10 Jac. Hall v. Rotheram.——S. C. cited by Ellis J. 2 Mod. 11. in Caſe of Whitrong v. Blaney.

3. But it was agreed, that a *Capias Utlagatum* did run into Wales. Godb. 214. pl. 305. Mich. 11 Jac. C. B. Anon.

4. An *Extent* had gone into Wales; Per Brownlow Prothonotary. Godb. 214. pl. 305. Mich. 11 Jac. C. B. Anon.

S. C. cited by Ellis J. 2 Mod. 10. in Caſe of Whitrong v. Blaney.

5. Where an Action of *Debt on a Bond* was brought *in Hertfordſhire*, and upon Nil debet pleaded the *Plaintiff had* a Verdict, and *Judgment and* a Writ of *Execution* was directed *to the Sheriff of Radnor* in Wales, who *return'd that Breve Domini Regis did not* come there, it was clearly agreed by the Court that the Writ was well awarded; and the Sheriff was fined 10 l. for his ill Return. 2 Bulſt. 156. 157. Mich. 11 Jac. Bede v. Piper.

Poph. 144. S. C. ſays it was upon a Motion *to remove an Indictment of Battery in Wales* into B. R. and that it was objected that ſuch a Writ had not been granted ſince the Reign of Edw. 1. But the Court reſolv'd that the Writ ſhould be granted, becauſe it is *in the King's Caſe*; and by Haughton J. he may ſue in what Court he will; and tho' ſuch Writ in ſuch Caſe ought not to be granted in Caſe of a common Perſon, yet that is no Reaſon but it may be granted in the King's Caſe. ——2 Roll. Rep. 28 29. S. C. mentions it as an Indictment of Barretry; and that a Certiorari being granted, it ſtood per Cur.——Doderidge J. ſaid the Regiſter mentions a Record removed from Callice by Certiorari. Cro. J. 484. in Sir John Carew's Caſe.

6. *Certiorari* was prayed *to remove Indictments* taken in Wales *for Riots*, and granted, there being diverſe Precedents to that Purpoſe, as the Clerk of the Crown inform'd the Court. Cro. J. 484. pl. 1. Trin. 16 Jac. B. R. Sir J. Carew's Caſe.

7. The common *Proceſs of B. R.* does not run into Wales, but the Courſe is to bring it by Original, and ſo to the Outlawry; Per omnes J. 2 Roll Rep. 141. Hill. 17 Jac. in Caſe of Floid v. Betheld.

8. *Judgment in Debt* was had *in the Great Seſſions* againſt the *Defendant*, dwelling in one of thoſe Counties, and afterwards he *died inteſtate. One who dwelt in London, and had nothing in Wales, took out Letters of Adminiſtration.* It was moved, at a Meeting of all the Judges and Barons, whether any Execution might be in Wales, the Adminiſtrator not inhabiting nor having any thing there; and if not, then whether the Record might be removed by Certiorari, and ſent by Mittimus into B. R. or C. B. to the Intent to have a Sci. fa. to have Lands out of Wales, or Goods in the Adminiſtrator's Hands liable to it there. And all the Juſtices and Barons conceived that he *could not have* a *Sci. fa. in any Court but where the Judgment was given*; and if it ſhould, then all Judgments in inferior Courts might be removed and executed in the Courts at Weſtminſter, which would be very inconvenient to the Subjects to make Lands or Perſons liable in other manner than at the Time of the Judgment; and there is no Remedy but to execute ſuch Judgments in their peculiar Juriſdictions. Cro. C. 34. pl. 7. Anon.

The Plaintiff having obtained a *Judgment in B. R.* ſued out a *Sci. fa. againſt the Heir and Tertenants*, directed *to a Sheriff in Wales*; and the Queſtion was, whether this Scire facias would lie into Wales; and by 3 Judges againſt the C. B. Whitwrong v. Blaney.

Ch. Juſtice Vaughan, it was held that it would lie. 2 Mod. 10. Hill. 26 & 27 Car. 2.

9. Concerning Proceſs out of the Courts at Weſtminſter into Wales of late Times, and how anciently, ſee Vaugh. 395 to 420.

(B) *Trials* there.

See (C) and Tit. Trial (N. b. 6)

1. ASSISE was brought in the County of Glouceſter, of the Land of Gower in Wales; and the Plaintiff recover'd, and well; for when *a Man* is *deforced of Land in a Seigniory in Wales*, he *ſhall have his Action in the Court of the Lord* there; for Writ of the King does not run into Wales. *But* if the *Lord himſelf* be *deforced of his Seigniory* in Wales, there he *ſhall ſue by Writ in England in the County next adjoining*; for none can give him Remedy in Wales. Br. Juriſdiction, pl. 101. cites 18 E. 2. and Fitzh. Aſſiſe, 382.

Br. Aſſiſe, pl. 435. cites S. C. Brooke ſays, and ſo ſee that the bringing of this Action in England is not by Equity of the Statute of 9 E. 3. For this is before that Statute.

2. An *Indictment of Murder* was removed out of Wales, and tried in an Engliſh County. See 8 Mod. 135. Trin. 9 Geo. 1724. The King v. Althoe.

3. Upon a Motion for a Certiorari to remove an Indictment for Murder out of Wales, the Court ſaid, that where there is a juſt *Reaſon* to induce the Court *to believe Partiality will be ſhew'd* of either Side, the Indictment ſhall be removed into an Engliſh County. But the Truth of the Matter will be ſuſpected where it is upon the Motion of either *the Priſoner or Proſecutor*, and in ſuch Caſe *there muſt be a full and clear Affidavit*, to induce the Court to grant a Certiorari. But where it is at the *Inſtance of the Attorney-General*, it ſhall be granted without an Affidavit. And ſo a Rule to ſhew Cauſe was diſcharged for want of a ſufficient Affidavit; but the Proſecutor to have Leave to move it again upon a better. 8 Mod. 146. Trin. 9 Geo. 1724. The King v. Burnaby.

(C) *Error* or *Judgment* there.

But per Aſcue, Error in the County Palatine ſhall be redreſs'd here. Br. Cinke Ports, pl. 8.

1. IF Error be in Wales, it ſhall be redreſs'd *before the Juſtices Errants*; and *if no Juſtices Errants* are there, *it ſhall be redreſs'd here*; Per Newton. Br. Cinke Ports, pl. 8. cites 19 H. 6. 12.

Contra of Error in Wales; for this ſhall be *redreſs'd in Parliament*; per Aſcue. Br. Cinke Ports, pl. 8. cites 19 H. 6. 12. ——But ſee now the 34 & 35 H. 8. cap. 26.

Error was aſſign'd upon a Judgment in Wales in Ejectment, That this Statute *appoints that for Lands in Wales the Action ſhall be by Original*; whereas in this Caſe it was by Plaint.

2. 34 & 35 *H.* 8. *Cap.* 26. *Par.* 32. Enacts, That *all Actions real and mix'd, Attaints, Conſpiracies, Aſſiſes, and Quare Impedit, Appeals of Murder and Felony, and all Actions grounded upon any Statutes, ſhall be ſued by Original Writs, to be obtain'd and ſeal'd with the ſaid Original Seal, returnable before the Juſtices at their Seſſions, within the Limits of their Authorities, in Manner and Form as is aforemention'd.*

Par. 33. *Item, That all manner of perſonal Actions, as Debt, Detinue, Treſpaſs, Account, and ſuch like, amounting to the Sum of* 40 *s. or above, ſhall be ſued by Writs Original, to be obtain'd and ſeal'd as is aforeſaid, or by Bills at the Pleaſure of the Party ſuing the ſame before the ſaid Juſtices, within the Limits of their Authorities, as is uſed in North-Wales.*

To which it was anſwer'd, That this is to be intended in Real Actions in which Lands are demanded; but this Action is in the Perſonalty. And the Court held, That Judgment was to be affirm'd. Sed adjornatur. Cro. E. 340. pl. 6. Mich. 36 & 37 Eliz. B. R. Griffith v. Williams.

One brought *Annuity by Bill* in the Grand Seſſions in Wales, and declared, That the Defendant by Deed granted to him an Annuity, or annual Rent of 20*l.* for his Life, by virtue whereof he was ſeiſed in Dominico ſuo ut de libero Tenemento for his Life, and for 11 Years Arrears he brought his Action. *Error was aſſign'd, that* this Bill of Annuity is not maintainable; but he *ought* by the Words of this *Statute to have brought an Original Writ*; and this is an Action mix'd. *But* reſolved by all the Court, That an Annuity brought by Bill there, is well brought; for *being an Annuity which charges the Perſon only that grants*, and not granted for him and his Heirs, it is meerly perſonal; nor is this Grant any real Thing, or out of any Realty, and therefore cannot be ſaid to be Real or Mix'd; and a Releaſe of Actions perſonal is a Bar in it. The Judgment was affirm'd. Cro. C. 170. pl. 17. Mich. 5 Car. B. R. Bodvell v. Bodvell.——Jo. 214. pl. 3. S. C. accordingly.

Error was brought in B. R. to reverſe a Judgment in *Ejectment*, for Lands in Wales, given before the Juſtices there.

Par. 113. *All Errors and Judgments before the Juſtices at the Great Seſſions, in Pleas real or mix'd, ſhall be redreſs'd by Writ of Error out of the Chancery returnable before the King's Bench. And all Errors in Pleas perſonal ſhall be reform'd by Bills, to be ſued before the Preſident and Council of Wales; and if the Judgment be affirm'd in the ſaid Writs of Error, or Bills, then to make Execution and other Proceſs thereupon, as is uſed in the King's Bench.*

And upon Conſideration of the *Statute of* * 28 *H.* 8 *of Wales*, and becauſe an Ejectment is *a* † *mixt Action*, the Court at firſt doubted; but at laſt they adjudged that the Writ of Error would lie in B. R. Mo. 248. pl. 391. Mich. 29 Eliz. Griffith's Caſe.——Cro. E 104. pl. 13. **Griffith v. Appice**, S. C. adjudged that B. R. had Juriſdiction, and the Judgment was reverſed.

* This is miſprinted for the 34 and 35 H. 8. cap. 26. par. 113.

† The printed Statutes have the very Word (mixt.)

3. In Error of a Judgment in Wales, in a Quod ei Deforciat, the Error aſſign'd was becauſe the *Venire Facias had not* 15 *Days between the Teſte and Return* thereof, but the Return was the very next Day after the Teſte. Sed non allocatur; for in Wales their *Proceſs is from Day to Day*, in one and the ſame Seſſion. Cro. C. 178. pl. 2. Hill. 5 Car. B. R. Griffith v. Jenkins.

4. A *Quod eis Deforciant* was brought in the Grand Seſſions in the County of P. and the *Plaintiffs made Proteſtation ſequi breve iſtud in forma &c. brevis de quod ei deforciant at Common Law, according to the Statute of Rutland*, and *demanded a Meſſuage and Lands in R. quæ clamant tenere ſibi & hæredibus, of the Body of his Wife, ut in Jure ipſius.* The Defendants demanded Judgment of the Writ, becauſe it is a Writ founded upon the Statute of W. 2. which provides That he that brings ſuch Writ muſt mention therein what Eſtate he claims in the Tenements demanded, which was not done; and adjudged there, that the Writ ſhould abate. But upon Error brought, it was reſolved the Writ was well brought; for it is given by the Statute of Rutland, 12 E. 1. and altho' the *Stat. of Weſt.* 2. gives a Special Writ of Quod ei Deforciat in Special Caſes, where Tenant for Life, in Dower, or in Tail, loſe their Lands by Recovery by Default; and in ſuch Caſe the Writs make mention of their Eſtates, yet this *doth not take away the Statute of Rutland*, which gives the Quod ei Deforciat; wherefore it was reſolved for the Plaintiff in the Writ, and the Judgment was reverſed. Cro. C. 444. pl. 15. Hill. 11 Car. B. R. Griffith & Ux' v. Lewis & Ux'. Jo. 380. pl. 12. S. C. and Judgment in the Grand Seſſions revers'd accordingly.

5. Error was brought of a Judgment in *Quod ei deforciat*, in the Grand Seſſions of Wales, and aſſign'd that *Judgment final was given on a Default after Appearance*, when it ought to be a Petit Cape only in all Real Actions on a Default after Appearance, and a Grand Cape on a Default before Appearance; and the Court held this manifeſt Error. Lev. 105. Trin. 15 Car. 2. B. R. Slaughter v. Tucker.

6. 1 *W. & M. Seſſ.* 1. *cap.* 27. *par.* 4. *which takes away the Court before the Preſident and Council, in the Marches of Wales &c. enacts, That all Errors in Pleas perſonal, within the Principality of Wales, ſhall be redreſs'd by Writ of Error, in the ſame manner as Errors in Pleas real and mix'd are appointed to be redreſs'd by the* 34 & 35 *H.* 8.

(D) *Juriſdiction* allow'd or not.

1. IN Aſſiſe *Recovery in Bank of Land in Wales* is void; per Forteſcue. Contra it ſeems, by him, of Recovery in Bank of Land in County Palatine. Br. Cinke Ports, pl. 12. cites 36 H. 6. 33.

2. G. E. made *Oath*, That all the Parties are *Inhabitants*, and dwelling within the Marches of Wales; and that the Matter contain'd in the Bill is *for no Title of Land*; therefore the Cauſe is diſmiſs'd to the Determination of the ſaid Commiſſioners. Cary's Rep. 119, 120. 21 & 22 Eliz. Morgan v. Bithell & Evon. S. P. Ibid. 120. Phelps v. Powel.— The Matter of the Plaintiff's Bill is but for a *Leaſe for Years, and no Title of Freehold*, therefore diſmiſs'd. Cary's Rep. 131. 22 Eliz. Moore v. Marſhall.——Ibid. 145 S. P. Arden v. Veale.

But the Juriſdiction of Wales was not allow'd for a *Promiſe*, tho' made within the Juriſdiction, by Parties dwelling there. Cary's Rep. 142. 22 Eliz. Hatton v. Price.

3. Defendant makes *Oath that the Lands* complain'd of *are under* 40 *s. by the Year*, therefore diſmiſs'd. Cary's Rep. 121. 21 & 22 Eliz. Morgan v. Ap Richard & Lewis.

4. Juriſdiction of Wales over-ruled, tho' all the Parties are dwelling within the Juriſdiction of the Marches of Wales, which is no Cauſe of Demurrer for *Title of Lands*. Cary's Rep. 127, 128. 22 Eliz. Keyes v. Hill & Ux.'

5. Bill

5. Bill touching a *Practice* and Misbehaviour uſed by the Defendant againſt him, *in bringing him up by Subpœna* at the Suit of one Anthony Hink, whereas the Plaintiff never knew any ſuch Man, *and for divers other Miſdemeanors uſed by the Defendant in this Court towards the Plaintiff*; the Defendant demurred, for that *both Parties dwell within* the Juriſdiction of the Marches of Wales, where he ſuppoſes the Plaintiff is to ſeek his Remedy. But over-ruled, for that Miſdemeanors committed in this Court are moſt meet to be here examined. Cary's Rep. 128. cites 22 Eliz. Griffith v. Penrine.

12 Mod 138. Mich. 9 W. 3. S. C. the Court were of Opinion to grant a Prohibition. —— Ibid. 172. Hill. 9 W. 3. S. C. accordingly; and the Court ſaid they would not prohibit their Proceedings in this Court of Equity, but only their Proceeding on any Proceſs againſt any living out of the Juriſdiction. —— S. C. cited 8 Mod. 375. Arg. in Caſe of Vaughan v. Evans.

6. The Plaintiff prays a Prohibition to the Grand Seſſions of Wales, for that the Defendant had brought a *Bill* againſt him there *to diſcover a Deed concerning his Title*, and *ſuppoſed to be in the Poſſeſſion of the now Plaintiff*; and *ſuggeſts that he lives out of the Juriſdiction* of the Court, *and ought not to be ſued there*; a Prohibition was granted for this being in the Nature of a Chancery Suit, the Proceſs is perſonal by ſummoning of the Perſon, which they cannot do, he living in another County and out of the Juriſdiction, by that Means you would run a Man to a Contempt, and thereby grant a Sequeſtration of his Lands, that is no Way under your Authority, or ſubject to the Obſervance of your Power. Comb. 468. Hill. 10 W. 3. B. R. Tranter v. Duggen.

7. E. had a *Mortgage* of Lands within the Juriſdiction of the Grand Seſſions in Wales. *V. pretended that he had purchaſed the Lands and got Poſſeſſion by undue Means. E. filed a Bill in the Grand Seſſions* againſt T. who lived within the Juriſdiction, and *V.* who *lived in London, where he was ſerved with a Subpœna*, but *he not appearing, E. got a Sequeſtration*, and then V. moved for a Prohibition, which the Court granted, and order'd the Plaintiff to declare on it, and that the Defendant might take Advantage by Plea or Traverſe; but it ſeem'd hard in perſonal Actions, to puniſh a Man not within the Juriſdiction of the Court; and that it is ſaid in Hutton, that it cannot be done. 8 Mod. 374. Trin. 11 Geo. 1. 1726. Vaughan v. Evans.

For more of Wales in General, ſee **Prohibition** (I. a) **Trial** (N. b. 6) and other Proper Titles.

* Warrantia Chartæ.

* This Writ is *ſupplementary in Place of Voucher*, where that cannot be had, and is in Nature of Voucher. Hob. 21. in Caſe of Roll v. Osborne.

[A] *Of what Thing* it lies.

1. IT lies of † an Advowſon. 43 E. 3. 25. 9 H. 6. 56. b. where it is granted with Warranty.

—— † In *Quare Impedit by the Heir in Tail*, a Man may plead Warranty of the Anceſtor with Aſſets deſcended, and

and bar him, and if he has *nothing by Deſcent*, and *Land deſcends to him after*, there *he ſhall have Scire facias to have in Value*; Per Finch and Mombray, and not denied; Quod nota. Br. Scire Facias, pl. 29. cites 43 E. 3. 26.

2. A Warrantia Chartæ does not lie of a *Piece of Land* no more than a Præcipe quod reddat; nor of a *Selion of Land*. Godb. 152. pl. 197. Paſch. 5 Jac. in C. B. Ballet v. Ballet.

[B] *Upon what Warranty* it lies.

1. UPON a Releaſe with Warranty, he may have a Warrantia Chartæ. 10 H. 6. 18. Becauſe he cannot vouch. S. P. Per Wood and Brian, F. N. B. 134 (I) in Marg. cites 12 H. 7. 2.——It lies upon a Releaſe with Warranty contra omnes gentes. Agreed by all the Juſtices, Godb. 151. pl. 197. Paſch. 5 Jac. in C. B. Ballet v. Ballet.——See Voucher (P) pl. 1, 2, 3, 4.

2. If a Man has Cauſe to vouch another out of the Line in a Writ of Entry within the Degrees, but he cannot vouch, becauſe he cannot vouch out of the Line, he ſhall have a Warrantia Chartæ. 10 H. 6. 18. b.

3. If the Lord confirms to the Tenant in Fee with Warranty, a Warrantia Chartæ lies upon this Warranty. 30 E. 3. 13. S. P. F.N.B. 134. (I) in Marg. cites there.

12 H. 7. 2. Per Wood and Brian.——See Tit. Voucher, (P) pl. 8. and the Notes

4. A Warrantia Chartæ lies upon a Warranty by Homage Auncestrell. 30 E. 1. 3. b. * 24 E. 3. 34. b. * Br. Warrantia Carte, pl. 13.

cites S. C. per Skip.——Homage Auncestrell, implies a Warranty, F. N. B. 134. (F)——Homage bindeth to Warranty. 2 Inſt. 11.

The Law was generally holden in thoſe Days, that Homage being Parcel of the Tenure reſerved to the Feoffor and his Heirs, imported a Warranty to the Feoffee and his Heirs, and ſo much is implied by theſe Words in the *Statute De Bigamis*, cap. 6. (*ſive Homagio*) that is, without any Warranty, by Reaſon of Homage, but that was ever intended, ſo *long as the Tenancy continued by Deſcent in the Blood of the firſt Purchaſer*; for if the Tenement were transferred out of his Blood by Feoffment, or any other Tranſlation, in that Caſe the Tenant ſhould vouch his Feoffor or his Heirs, if he had any Warranty, but not in Reſpect of the Homage; And that this was the ancient Law appears by Glanville, who ſays, Si aliquis alicui donaverit aliquod tenementum pro Servitio & Homagio ſuo, quod poſtea alius verſus eum dirationaverit, tenebitur quidem dominus tenementum id ei Warrantizare, vel competens excambium ei reddere; ſecus eſt tamen de eo, qui de alio tenet feodum ſuum ſicut hæreditatem ſuam, & unde fecerit homagium, quia licet is terram illam amittat, non tenebitur dominus ad eſchambium; and this is ſignified in the doing of Homage, Homagium ſi dominus recipere voluerit, tunc in ſignum warrantiæ acquietationis & defenſionis manus tenentis infra manus ſuas tenere debet, dum tenens profert verba homagii. And at this Day it holds in Caſe of † Homage Auncestrel. 2 Inſt. 275, 276.

† But ſee now the Statute 12 Car. 2 cap. 24.

5. And the Writ ſhall be Unde Chartam ſuam habet. 30 E. 1. 3. b. S. P. Tho' he has no

Charter thereof, and conſequently cannot ſhew any; and therefore in this Caſe the Words Unde Chartam habet &c. are not material. F. N. B. 134. (F)

6. If Land be *given in Tail with Warranty to him his Heirs and Aſſigns*, and the *Donee aliens in Fee, and dies without Iſſue*, this Waranty ſhall be a Bar in Formedon in Reverter of the Land. Br. Tail and Dones, pl. 7. cites 46 E. 3. 4. Per Wilby.

7. The Writ of Warrantia Chartæ lies properly where a Man doth enfeoff another by Deed, and *binds him and his Heirs* to Warranty &c. Now if the *Defendant* be *impleaded in an Aſſiſe*, or in a Writ of *Entry in Nature of an Aſſiſe*, in which Actions he cannot vouch, then he ſhall

have that Writ againſt the Feoffor or his Heir, who made ſuch Warranty. F. N. B. 134. (D).

A Reverſion and Rent without the Words Dedi &c. without Deed, is good to bind him in the Reverſion to Warranty

8. If a Man has a *Leaſe* of Lands *for Life* rendring Rent, or makes a *Gift in Tail rendring Rent without Deed*, and afterwards the Leſſee or Donee is impleaded in ſuch Action where he cannot vouch, then he ſhall have this Writ of Warrantia Chartæ againſt the Leſſor or Donor, or his Heir who has the Reverſion: For that *Reverſion and Rent reſerved makes a Warranty* in itſelf by the Statute of Bigamis, cap. ult. altho' he hath not any Deed thereof. F. N. B. 134. (G).

be it the Leſſor or his Grantee. F. N. B. 134. (G) in the New Notes there (c) cites 10 H. 7. 10. 34 E. 3. Garranty, 30. 20 E. 3. Counterplea of Warranty, 7. But ſays, the Vouchee there may diſclaim if he be not the Leſſor &c. cites 10 H. 7. 10. ſo if he be (not) Leſſor, Grantee or Heir, cites 17 E. 3. 39. 18 E. 3. 42. and cites Co. Litt. 384 b.

Ibid. in the New Notes (e) ſays Videtur quod ſic, Per Thirn, 17 E. 3. 44. but Hill and Shard contra.

9. If a Man *exchanges Lands* with another *by Deed*, if he be impleaded he ſhall have a Writ of Warrantia Chartæ by that Deed of Exchange, altho' there are not Words of Warranty in the Deed. F. N. B. 135. (B).

The Court held clearly that Warrantia Chartæ does not lie in this Caſe, unleſs there are the Words (Dedi & conceſſi) in the Deed.

10. If a Man makes a *Feoffment* in Fee with *Warranty againſt him and his Heirs*, the Feoffee upon ſuch Warranty ſhall never have Warrantia Chartæ. For when the Warranty is only againſt him and his Heirs, if he be impleaded by a Stranger, he never ſhall vouch by this Warranty, and the Nature of ſuch Warranty is only to rebut againſt him and his Heirs, and not to have Recompence in Value; by Dyer, Brown and Walſh. Dal. 48. pl. 8. 5 Eliz. Anon.

D. 221. pl. 17. Paſch. 5 Eliz. Anon. but ſeems to be S. C. —— F. N. B. 134 (H) in the New Notes there (a) cites S. C.

Declaration was upon the Warranty of *Dedi & Conceſſi* tantum. In the Deed there was a

11. It was held by the whole Court, That upon a *Warranty againſt Feoffor and his Heirs*, or *J. S. and his Heirs*, or the *Grandfather or Great Grandfather of the Feoffor and his Heirs*, no Warrantia Chartæ lies, unleſs that *Dedi* be within the Deed, which implies a general Warranty. Cro. E. 861. pl. 36. Mich. 43 Eliz. C. B. Sir Hugh Portman v. Sir Gervaſe Clifton.

ſpecial Warranty againſt Feoffor and his Heirs, and againſt the Heirs and Aſſigns of the Father of the Feoffor. Reſolved that the ſpecial Warranty ſhall not expound and *controul* the Generalty. Cro. E. 864. pl. 43. Mich. 43 & 44 Eliz. in the Exchequer Chamber, Rant v. Cock.

[C] *In what Caſes* it lies.

1. IF the Vouchee at the Summons **ad Warrantiam** ſicut Pluries be returned Nihil, **whereof he may be ſummoned**, where the Vouchee is dead, but the Tenant cannot take this Averment, but it ought to come by the Return of the Sheriff, **yet tho' the Tenant** cannot vouch the Heir, **he ſhall not have Warrantia Chartæ againſt him. Quære.** 17 E. 3. 41. b.

2. If a Man *releaſes to me with Warranty, and I grant to him that I will not vouch him, nor take Advantage of the Warranty againſt him or his Heirs, unleſs by Rebutter, unleſs I am impleaded by his Covin*; and after I am impleaded

pleaded by Formedon by his Covin, Quære if I ſhall have Warrantia Chartæ againſt him; For Formedon is an Action in which a Man may vouch. Br. Warrantia Cartæ, pl. 20. cites 43 E. 3. 20.

3. Where a Man *purchaſes with Warranty*, and the *Feoffee knows him to be the Villein of J. N.* and this ſame *J. N. impleads the Feoffee*, and he vouches his Feoffor, who is a Villein, the Demandant may *counterplead that he is his Villein*, and ouſt him of the Voucher, and there he loſes his Voucher, but he ſhall have Writ of Warrantia Chartæ; Per Finchedon, quod nota. Br. Warrantia Cartæ, pl. 6. cites 48 E. 3. 17.

4. A Man cannot vouch in *Quare Impedit*, but ſhall have Writ of Warrantia Chartæ; Quod nota. Br. Warrantia Cartæ, pl. 17. cites 9 H. 6. 56. Per tot. Cur. Br. Voucher, pl. 7. cites S. C.

5. A Man may have Warrantia Chartæ *in Præcipe quod reddat*; As *where the Tenant has Releaſe or Confirmation with Warranty, he cannot vouch, for* Fear that the Demandant has counterpleaded the Poſſeſſion; *and therefore he may have Writ of Warrantia Chartæ*, Per Wood; and Brian Ch. J. was of the ſame Opinion, & nullus negavit. Br. Warrantia Cartæ, pl. 15. cites 12 H. 7. 2. F. N. B. 134. (I) in Marg. cites S. C.

6. If a Man *leaſes for Years*, and *covenants to warrant the Land* &c. and the *Leſſee is ouſted by Tort*, he ſhall not have Covenant. Contra if it was upon elder Title. Br. Garranties, pl. 1. cites 26 H. 8. 3.

7. In a *Præcipe* the *Tenant vouch'd*, and *at the Sequatur* ſub ſuo Periculo, the *Tenant and Vouchee made Default*; whereupon the *Demandant hath Judgment againſt the Tenant*, and afterwards the Demandant brings a Scire facias againſt the Tenant to have Execution, in this Caſe the Tenant may have a Warrantia Chartæ. Co. Litt. 393. a.

8. Upon *Owelty of Services* this Writ lies, but that is after Seiſin of the Services. F. N. B. 134. (G) in Marg. cites Co. Litt. 384. b. * 21 H. 6. 8. * Br. Warrantia Cartæ, pl. 18. cites S. C.

[D] *Who ſhall have it.*

Fol. 810.

1. NOne ſhall have Warrantia Chartæ but the Tenant in Demeſne. 17 E. 3. 44. F. N. B. 135. (B) in the new Notes there (e) cites S. C. Per Hill and Shard. ——S. P. Br. Warrantia Cartæ, pl. 19. cites 24 E. 3. 25.——S. P. And *not the Voucher or Tenant by Receipt.* Br. Warrantia Cartæ, pl. 30. cites 17 E. 3.

2. For it is a good Counterplea of the Action that he was not Tenant of the Land the Day of the Writ purchaſed. 45 E. 3. 2. 18 E. 3. 42. b. Iſſue thereupon. 3 E. 3. Fitzh. Garrantie of Charters 4. 15 H. 3. Garranty of Charters 25. Adjudged per Curiam. S. P. Br. Warrantia Cartæ, pl. 19. cites 24 E. 3. 25.——S. P. by Hobart Ch. J. in the Caſe of Roll v. Osborn, Hob. 21. pl. 37. and cites 24 E. 3. 25. 7 E. 4. 12. and 17 E. 3. 44. and 16 H. 3. Fitzh. Tit. Warranty des Charters 29. But he ſays it ſeems to be a Plea but prima facie; for it is allowed alſo 7 H. 4. 18. and yet it is concluded that the Vouchee may have the Writ when he cannot vouch, even as a 2d or 3d Meſne Lord may have a Writ of Meſne as well as the Tenant in Demeſne; and ſo 3 E. 3. Fitzh. Warrantia Chartæ 4. The Defendant pleaded that the Plaintiff was *not Tenant the Day of the Writ*, and Iſſue upon it. But Fitzh. abridging the Caſe ſays, that if he had pleaded himſelf Tenant *by Voucher* the Day of the Writ purchaſed, it would have ſerv'd; and 31 E. 3. Fitz. Warrantia Chartæ 22. in Fine, Burton ſays, that the *Defendant* in Warrantia Chartæ *ſhall have a Writ of Warranty of Charters over, hanging the Writ againſt him*; and Reaſon and Juſtice requires it, ſince this Writ is ſupplementary in Place of Voucher, where that cannot be had; therefore is this Writ as well to be allowed *after Alienation*, as Voucher is allowed; for Alienation cannot be imputed unto Folly; for as a Man may vouch, coming in as Vouchee, ſo this Writ, as it is in Nature of a Voucher, is equally to be allowed; and therefore 41 E. 3. 7. if the *Tenant by the Curteſy* grants his Eſtate with Warranty unto J. S. and comes in as Vouchee, he ſhall have Aid of him in Reverſion, as if he were Tenant

nant in Poſſeſſion; and 43 E. 3. 23 If a *Copartner* make a Feoffment with Warranty, and comes in as a Vouchee, he ſhall be able to deraign the Warranty paramount as if he were in Poſſeſſion.

* Br. Warrantia Cartæ, pl. 9. cites S. C.—— F. N. B. 135. (B) in the new Notes there (e) S. P. cites 18 E. 3. 19. Per Shard, and 7 H. 4. 18.

3. A Vouchee, who cannot vouch over, **ſhall have Warrantia Chartæ, becauſe he** is now Tenant in Law. * 7 H. 4. 18. b. 18 E. 3. 19. **admitted. Contra** 17 E. 3. 44.

4. **When the ſaid** Counterplea **is taken, the** Plaintiff may maintain his Action by this, that he was Tenant by his Warranty the Day of the Writ purchaſed. 3 E. 3. **Fitzh. Garranty of Charters** 4.

5. But **a Man who is** not Tenant of the Land ſhall not have this Writ before he comes in by Voucher, **tho' he has a Warranty.** 17 E. 3. 44.

6. **If the** Tenant **of the Land** with Warranty be diſſeiſed **by a Stranger, he ſhall not have this Writ during this Diſſeiſin, becauſe he is not Tenant of the Land during the Diſſeiſin, and the Writ ſuppoſes him Tenant.** 11 H. 3. **Rot.** 3. **between** *Simon de Abbendun and Reginald de Meſſebury*, **agreed and adjudged.**

7. So **if a** Stranger takes unjuſtly Redditum Terræ, **(that is, as it ſeems, takes the Profit of the Land, by which is intended a Diſſeiſin) of the Tenant, he ſhall not have this Writ**; **for he** may have his Aſſiſe, **if he will.** 11 H. 3. **Rot.** 3. **Adjudged.**

8. If there be 3 *Jointenants*, and the *one releaſes to the reſt*, they may deraigne the former Warranty by Voucher, or Warrantia Chartæ; for they be in a 3d Part by the Releaſe. Weſt's Symb. S. 197. cites 40 E. 3. 41.

9. If a Man be impleaded who is not Tenant of the Land, but *Perner of the Profits*, he ſhall not have a Writ of Warrantia Chartæ, becauſe he can loſe nothing. F. N. B. 135. (C)

If a Man *infeoffs A. to have* and to hold *to him his Heirs and Aſſigns, and A. infeoffs B and his Heirs*, and *B. dies*, in this Caſe the Heir of B. as Aſſignee to A. ſhall have a Warrantia Chartæ. So as Heirs of Aſſignees, and Aſſignees of Aſſigns, and Aſſigns of Heirs, are within this Word (Aſſigns,) which ſeem'd to be a Queſtion in Bracton's Time. Co. Litt. 384. b.

10. An *Aſſignee* ſhall have a Writ of Warrantia Chartæ. F. N. B. 135. (D)

But where a Warranty is to A. and his Heirs, *Aſſignee* of A. ſhall not have Warrantia Charta on this Warranty; for no Warranty is made to him, and therefore the Law does not allow him to bring the Action. Agreed per Cur. on a Demurrer. And. 299. pl. 308. Paſch. 33 Eliz. Yaxley v. Kemp.

None ſhall have Advantage of Warranty Real, if he be not *Tertenant*, as by Voucher or Warrantia Chartæ. Br. Garranties, pl. 1. cites 26 H. 8. 3.—— *Contra* of Warranty *Perſonal*; for if he be ouſted &c. he may have Covenant. Ibid.

11. *None* ſhall have a Writ of Warrantia Chartæ, *but the Tertenant.* F. N. B. 135. (D) in Marg. cites 7 H. 4. 18. 17 E. 3. and Br. War. Chartæ, 30.

None ſhall have it but in *Privity of Eſtate*. Co. Litt. 385. a.

12. If any *Lands be given to 2 Brethren in Fee-ſimple, with a Warranty to the Eldeſt and his Heirs*, the *Eldeſt dies without Iſſue*, the *Survivor, albeit he be Heir* to him, yet *ſhall* he not have a Warrantia Chartæ. Co. Litt. 385. a.

Ceſty que Uſe may take Advantage of a Warranty annexed to

13. Warburton thought that the Statute 27 H. 8. of Uſes, gave the Benefit of the Warranty to *Ceſty que Uſe*, and that he ſhall vouch as Aſſignee, and have Warrantia Chartæ; and that Tenant for Life, created by an Uſe, ſhall have Benefit for his Time of the Warranty, and may vouch, or have Warrantia Chartæ; but that he muſt make his Count accordingly.

accordingly. Mo. 859. pl. 1180. Trin. 9 Jac. Roll v. Osborn & Ux'. an Eſtate. 2 Salk. 685. Paſch. 4 Annæ, B. R. Smith v. Tindal. ——— 11 Mod. 102. S. C.

14. Lord by *Eſcheat* ſhall not have the Benefit of a Warranty, becauſe he *is in by Title*; but if he comes in by way of *Eſtate*, he ſhall, of a Warranty that runs with the Eſtate. And ſo if one comes in in the *Per, or in the Poſt*, he ſhall have the Benefit of the Warranty; per Williams J. Bulſt. 164. in Caſe of Heywood v. Smith. S. P. And. 299. in Caſe of Yaxley v. Kemp.— And ſo of him that has *Goods*

[E] What ſhall be *good Cauſe to have the Writ.*

1. **If a Man** makes Feoffment of Land with Warranty, and after a Rent in Fee is recover'd againſt the Feoffee, **he may have a Warrantia Chartæ** to have in Value **for the Rent.** 30 E. 3. 30. 31. **Dubitatur.**

2. *Tenure* is no Cauſe to bind to Warranty, unleſs it be *by Owelty of Services, or Homage Anceſtrell.* Br. Warrantia Carte, pl. 13. cites 24 E. 3. 35. Per Skip.

3. If a Man *leaſes* Land *for Years with Warranty*, and the *Leſſee is ouſted by one who Right has*, he ſhall have Action of Covenant upon the Warranty. *Contra* if he be ouſted *by him who no Right has*; for then he may have Treſpaſs, or Ejectione Firmæ. *Otherwiſe* it ſeems of a Warranty *of Franktenement*, and he is impleaded by him who no Right has, yet he may vouch by this Word Warranty. Br. Garranties, pl. 80. cites 22 H. 6. 52.

[F] *At what Time* it lies.

1. **A Warrantia Chartæ lies** * before any Impleading, **but the** Writ ſhall ſuppoſe an Impleading. 29 E. 3. 4. b. 30 E. 3. 29. **Adjudged.** * A Man may have Warrantia Chartæ, *Quia timet*

ſe implacitari, and recover Pro loco & tempore; *but no Execution* ſhall be awarded. Br. Warrantia Cartæ, pl. 11. cites 21 H. 6. 41. & 22 H. 6. 22.——Weſt's Symb. S. 197. cites Same Caſes; and 24 E. 3. 35. & 12 H. 4. 12. & F. N. B. 134 (K)——*But if he be ouſted after*, he ſhall have his Warranty upon the firſt Recovery. *But* Brooke ſays, it ſeems in this Caſe that he ſhall make *Requeſt to the Warrantee, pending the Aſſiſe, to adminiſter a Bar*; for otherwiſe he ſhall not have Execution, as it is ſaid elſewhere. Br. Warrantia Cartæ, pl. 11. cites 21 H. 6 41. & 22 H 6. 22.——Weſt's Symb. S. 197. cites Same Caſes, & 12 H. 4 12. But cites 48 E. 3. 22. Regiſt. Orig. Fol. 158. a. That the Writ of Warrantia Chartæ *muſt be ſued, hanging the principal Plea*, and *before Judgment*, as of Aſſiſe, or Entry in the Nature of Aſſiſe; for then if the Warrantor dies, yet the Writ ſhall not abate; but his Heir ſhall be reſummon'd to anſwer upon the ſame.——And Hob. 22. in Caſe of **Roll v. Osborne**, cites the Regiſter 158. That ſi Judicium inde redditum ſit, non valet hoc breve. But Hobart Ch. J. ſays, That this muſt be well underſtood; for clearly it may be brought *before any principal Plea, and after the Plea take any other*, and then by Judgment, or by Diſcontinuance, and the like. And he is of Opinion, that *before Execution* it may be brought, *if the Party pray'd his Plea in Time*; for 'till Executiom, he is in of the Eſtate warranted. But if the Execution be had, then the Warranty fails with the Eſtate.

S. P. And if the *Defendant* appears, and *ſays that he is not impleaded*, he by this Plea confeſſes the Warranty, and the Plaintiff ſhall have Judgment to recover his Warranty. F N. B. 134. (K)

2. Where one was *impleaded in an Action in which he might have vouch'd*, it was agreed by all the Juſtices, That he may have a Warranta Chartæ, if he did not vouch. Mo. 859. pl. 1180. Trin. 9 Jac. Roll v. Osborne & Ux'.

[G] *How* it ſhall be *brought.*

1. IF B. be ſeiſed of a Manor, and A. releaſes to him with Warranty, B. may have a Warrantia Chartæ for Parcel of the Manor only. M. 3 Jac. B. *Mordant's Caſe.* Per Curiam.

2. And it ſeems, that if he be after impleaded of the other Part of the Manor, he may have other Warrantia Chartæ of this alſo. Dubitatur 3 Jac. B.

3. Tenant by his Warranty, if he brings Warrantia Chartæ, ought to diſcloſe the ſpecial Matter by his Count. 17 E. 3. 44.

4. He ought at leaſt to diſcloſe the ſpecial Matter by his Plea. 18 E. 3. 19.

5. In a Warrantia Chartæ, if the Plaintiff counts that the Defendant is bound to warrant certain Land, and a Bailiwick of the Foreſtry of diverſe Places, it is good, without declaring in certain of which he is impleaded; for if he be bound to Warranty, he ought to warrant the Intirety; but he ſhall render in Value only [for] what he loſt. 29 E. 3. 4. adjudged.

6. *Warrantia Chartæ* was brought *by W. and T.* where *Aſſiſe was brought againſt them, in which the Plaintiff recover'd* &c. and the *Defendant ſaid that W. is dead pending the Writ*; Judgment of the Writ; and the *other ſaid that the Eſtate was to T. and to the Heirs of T.* and becauſe it ought to be purchas'd pending the Aſſiſe, pray'd that the Defendant anſwer; For if the Writ abates, and T. brings another, this is not pending the Aſſiſe; and after the Writ abated by Award, and the Plaintiff was not amerced for Cauſe of Death. And per Wich, in this Caſe the new Writ purchas'd after the Aſſiſe is good by Reaſon of the Death; and ſo no Default in the Plaintiff, but the laſt Writ good; quod non negatur. Br. Warrantia Cartæ, pl. 7. cites 48 E. 3. 22.

7. In Warrantia Chartæ, *if the Writ comprehends Tenure, the Declaration ſhall be Unde Chartam ſuam habet* generally. Br. Warrantia Cartæ, pl. 18. cites 21 H. 6. 8.

F. N. B. 134. (H) in Marg. cites S. C. and 14 E. 3. 35. accordingly.

8. Upon *Feoffment in Fee* with Warrant7, *or Releaſe with Warranty*, he ought in the Declaration to *ſhew the Deed.* Br. Warrantia Cartæ, pl. 21. cites 21 H. 6. 8.

(G. 2) Brought *where.*

A Man may bring his Writ of Warrantia Chartæ *in what County he pleaſes, if the Deed bears not Date in a certain Place* or County; for then he ought to bring the Writ where the Deed bears Date. But if a Man bring a Writ of Warrantia Chartæ, by reaſon of Homage Auncеſtrel &c.

1. WArrantia Chartæ *in the County of S.* and *upon Nihil return'd, Proceſs iſſued upon Teſtatum* eſt, *returnable* &c. *in the County of D.* and there it was agreed that Warrantia Chartæ may be brought in another County than where the Land is. Br. Warrantia Cartæ, pl. 21. cites 31 E. 3. and Fitzh. Reſummons 28.

&c. then it ought to be brought in the County where the Land lies. F. N. B. 135. (F)——And in the new Notes there (c) cites 4 E 3. pl. 12.

2. A Man may ſue a Writ of Warrantia Chartæ *at the Common Law for* a Warranty made of *Lands in Ancient Demeſne.* F. N. B. 135. (K) And Ibid. in the new Notes, ſays ſee 16 E. 3. Cauſe a Remover 15. Reg. 12. 30 E. 3. 13. And per Skipw. the Tenant ſhall have Warranty *againſt the Lord in the Lord's own Court.*

[H] Warranty of Charters. *Counterplea.*

1. **It is a good Counterplea** that the Plaintiff is not Tenant of the Land for which the Warranty is demanded, **becauſe the Writ ſuppoſes that he is Tenant.** 11 H. 3. Rot. 3. *Simon de Abbendun againſt Reginald de Meſſebury*, **admitted and adjudged.** 15 H. 3. **Garrantie of Charters 25. adjudged per Curiam.** 18 E. 3. 42. b. **Iſſue thereupon.**

2. So **it is good Counterplea that the Plaintiff** was not Tenant of the Land the Day of the Writ purchas'd. 45 E. 3. 2. 3 E. 3. **Garrantie of Charters** 4. See (D) pl. 2.

3. **It is a good Counterplea,** that the Plaintiff might have vouch'd him in the Action in which the Recovery was, and he did not **vouch him,** nor give Notice of it, ſhewing that he might have barr'd the Plaintiff in the firſt Action. **Skene Regiam Majeſtatem, lib. 1. cap. 22. vers. 1. b.** S. P. F. N. B. 134. (I) But Ibid. in the new Notes (b) ſays it is no *Plea* here to ſay *that the Plaintiff is impleaded in ſuch an Action, wherein he may vouch* &c. yet *in a Scire facias it is a good Plea* to ſay *that he was impleaded in ſuch an Action wherein he might vouch, but did not* &c. *and ſo by Reaſon of his Default he could not have Execution*; cites 18 E. 3. 42. Garranty de Charters 8. and cites 9 E. 2. Garranty de Charters 20. accordingly, that it is a good Plea.——S. C. cited by Hobart Ch. J. Hob. 22. in Caſe of **Roll v. Osborn,** as reſolv'd, tho' it was in a Formedon.

4. In Aſſiſe, if *a Feme ſole warrants Land to W. N.* and *he who has Cauſe of Action marries the ſame Feme,* he ſhall be barr'd by the Warranty of his Feme during the Coverture. Brook makes a Quære if the Tenant vouches the Demandant and his Feme by a ſtrange Name; and ſays it ſeems that he ſhall rebut. Br. Voucher, pl. 97. cites 13 Aſſ. 10. *But* if the *Tenant who gets the Warranty marries the Feme who made the Warranty*, and is implied, it ſeems there that the Warranty is loſt for ever. But quære if he may not vouch himſelf and his Feme by a ſtrange Name. Br. Voucher, pl. 97. cites 13 Aſſ. 10.

[I] Warranty of Charters. *What will abate it. Acts of Demandant.*

1. **If** 2 join **in Warranty of Charters, and after the** one is nonſuited, **the** other ſhall have the Warranty of the Intirety **for the Miſchief of the Warranty.** 42 E. 3. 17. b.

2. **If upon a Warrantia Chartæ a** Fine be levied, and after Recoveror loſes the Land, **yet he** ſhall not have Scire facias to recover in Value, **becauſe** the Nature of the Writ of Warranty of Charters is deſtroyed by the Fine levied upon it. 12 H. 4. 12.

(K) *Writ*

(K) *Writ and Count.* Abatement.

1. WArrantia Chartæ; the Writ is *Quod de eo tenet, & unde chartam ſuam habet* &c. and yet the Plaintiff may *count*, and bind the Defendant *by Homage Aunceſtrell*; Per Wilby Juſtice, quod non negatur. Br. General Brief, pl. 8. cites 24 E. 3. 35.

2. It ſeems that *he who will purſue by the common Writ of Warrantia Chartæ, ought to pray the Party to* warrant pending the firſt Writ of Aſſiſe, or the like; and alſo bring his Writ pending the ſaid firſt Writ, and before Judgment in it. Br. Warrantia Cartæ, pl. 13. cites 24 E. 3. 35.

But he, who *recovers pro loco & tempore*, ſhall have in Value after his Loſs.

But Brooke ſays it is ſaid elſewhere, that in this Caſe alſo the Party, *when he is impleaded after, ought to pray the Warrantor to warrant* &c. Ibid.

3. *Warrantia Chartæ againſt two, and he ſhews Deed of the one*, he ſhall not have the Warranty; per Candiſh. But there per Knivet and Thorp J. this goes in Abatement of the Writ, and he may have a new one, and ſo only dilatory. *But in Præcipe quod reddat*, if the Tenant vouches two, and *ſhews Lien by Dedi of the one and of the other in one Deed*, where Dedi is no Warranty but againſt the Feoffor, and not againſt his Heir; yet becauſe the Demandant is no more delay'd by the Voucher of two than by the Voucher of the one, and it is peremptory to the Tenant upon Voucher, and if he fails of his Lien it is peremptory to him, and he cannot re-vouch, therefore the Voucher is good againſt the one, and he ſhall warrant the Whole. Br. Warrantia Cartæ, pl. 14. cites 39 E. 3. 26.

4. *In Warrantia Chartæ againſt two*, and he *ſhews ſeveral Deeds* of them, the Writ ſhall abate; for he cannot join them. Br. Warrantia Cartæ, pl. 14. cites 39 E. 3. 26.

5. It ſeems that in Warrantia Chartæ againſt 2, and the *one is an Infant at the Time of the making of the Deed, it ſhall bind the other.* But Quære if by this Writ, or by another Writ againſt him only. Br. Warrantia Cartæ, pl. 14. cites 39 E. 3. 26.

6. *If* the *Defendant dies pending the Writ* of Warrantia Chartæ, the Writ ſhall not abate; but his *Heir ſhall be re-ſummon'd* to anſwer the Plaintiff. Quod nota. Br. Warrantia Cartæ, pl. 27. cites the Regiſter.

7. Tho' the *Writ ſuppoſes that he holds of the Defendant*, yet that is *not material* whether he holds of him or not. F. N. B. 134. (E)

Ibid. in the new Notes, (f) cites 14 H. 6. 26. Contra per June & Paſton.

8. If a Man impleaded brings *a Warrantia Chartæ* againſt whom he hath a Warranty, *and vouches him alſo* in the Action; and afterwards pending the Action, a *Stranger who hath ancienter Title enters upon him*, yet that ſhall not abate his Warrantia Chartæ ſued out before. Quod vide * Hill. 21 H. 6. F. N. B. 135. (G)

* See Br. Warrantia Carte, pl. 11. cites 21 H. 6. 41. **Mills v. Clifford**, S. C.——And F. N. B. 135. (G) in the new Notes there (f) cites S. C.

Hob. 28, 29. in Caſe of **Roll v. Osborne**, cites 9 H. 5. 12. where one brought a *Scire Facias upon a Fine, as Heir to 2 Parceners*, and the Tenant *pleaded in Bar a Fine levied by the 2 Parceners with Warranty*, and relied upon the Warranty, and the Plea was holden double, and he forced to rely upon the Warranty of the one only.

9. A Man may ſue forth *divers Writs* of Warranty of Charters *againſt divers* Men; and if he has divers Warranties againſt them, he ſhall recover ſeverally againſt them. F. N. B. 135. (I)

10. If

10. If a Man has *Warrantia Chartæ pending*, altho' that the *Plaintiff in the [first] Action* againſt him, who brought the Warrantia Chartæ, be *nonſuited* in his Action, this ſhall not abate the Writ of Warrantia Chartæ; for he may ſue a Writ of Warrantia Chartæ, altho' no Action is ſued againſt him for the Land &c. F. N. B. 135. (L)

11. A Warrantia Chartæ was brought by A. againſt B. *of 2 Meſſuages and the Moiety of an Acre of Land*, unde Chartam habet &c. and *declar'd that himſelf and the Defendant, and one F. were ſeiſed in the new Buildings, and of one Piece of Land adjoining* &c. *in the Tenure* &c. *containing* from Eaſt to Weſt 20 Foot by Aſſiſe, and from the North to the South 30 Foot; and *that* the ſaid *B. and F. releaſed* unto him; *and that B. for him and his Heirs, did warrant Tenementa prædict' to A. and his Heirs.* The Defendant pray'd *Oyer of the Deed*, and thereby *it appear'd that B. and F. and one R.* did releaſe to him all their Right in &c. *and that B. for him and his Heirs, did warrant Tenementa prædict' to A. and his Heirs, and that F. by another Clauſe for him and his Heirs, did warrant* Tenementa prædict' *to A. and his Heirs.* Upon Demurrer it was unanimouſly agreed by all the Juſtices, 1ſt, That upon ſuch a Releaſe with *Warranty, contra omnes gentes*, a Writ of Warrantia Chartæ lies. 2dly, Altho' every one paſſeth his Part only, viz. a 3d Part, yet *every one* of them *warrants the* Whole; and becauſe they may ſo do, and the Words are general without Reſtraint by themſelves, the Law will not reſtrain them. The Words are, that they do warrant *Tenementa prædicta*, which *is all the Premiſſes.* 3dly, For the Reaſon aforeſaid, it *need not be ſhew'd how they hold in Jointure.* 4thly, That the *Writ* is good *againſt one only*, becauſe the Warranties are ſeveral. But if they had been *joint Warranties*, then it ought to have been *againſt all*; ſo againſt the Survivor, and the Heir of one of them; and if they had both died, againſt both their Heirs. 5thly, That the Writ was well *brought for the Things as they are* in Truth, *without naming them according to the Deed.* 6thly, That if there be *New Buildings*, of which the Warranty is demanded, *which were not at the Time of the Warranty made*, and after the Deed is ſhewn, the Defendant ought not to demur, but *to ſhew the Special Matter, and enter into the Warranty for ſo much as was at the Time of the making of the Deed*, and not for the Reſidue. See Fitz. Warrantia Chartæ, 31. Godb. 151, 152. pl. 197. Paſch. 5 Jac. in C. B. Ballet v. Ballet.

Noy 146. S. C. adjudg'd accordingly.

12. A *Writ* and *Count* in a Warrantia Chartæ *muſt have* 4 *Points* compleat in them. 1ſt. He muſt be Tenant of the Land the Day of the Writ purchas'd. 2dly. It muſt be by a Conveyance whereby the Land, whereto the Warranty is annex'd, muſt paſs; or at leaſt, if Right be *releas'd, or Confirmation made with Warranty, he muſt be *Tenant of the Land*, to whom it is made in Warranty. 3dly. This Writ muſt be brought hanging the principal Plea. 4thly. It muſt contain the Specialty of the Warranty and Lien. Hob. 21. Roll v. Osborn.

Mo. 860. pl. 1180 Trin. 9 Jac. S. C. accordingly, and ſays that the 3d Point is to be intended of its being to be brought before Execution had, or otherwiſe before the Writ purchaſed, as Quia timet implacitari.

* For if it be to *one Tenant in Common*, or *Jointenant*, it is not good. Noy 146. Ballard v. Ballard.

13. If a Man brings a *Warrantia Chartæ upon a Warranty of Land, and obtains Judgment*, he *ſhall uſe that Judgment after for Rent demanded* or recover'd, *if the Warranty did extend unto the Rent.* 31 E. 3. Fitz. Garr. Chart. 22. And yet upon a Voucher in like Caſe, it ſhould have been more ſpecial; the Reaſon is apparent, for the Rent is demanded when he vouch'd; but it may be it was not foreknown that Rent would be demanded when the Writ of Warranty of Charters was brought; but if it were, he *ought to declare ſpecially*, and the rather *if he cannot vouch in the principal Plea of the Rent*; for there muſt be a Means to diſcuſs whether the Rent in the Demand be warranted as a Rent ſuſpended when the

Warranty was made, ſo as the Land was warranted as diſcharged of Rent. Hob. 22. pl. 37. in Caſe of Roll v. Osborne.

(L) Plea. *What* ſhall be ſaid a *good Plea* in a Warrantia Chartæ.

1. ONE brought this Writ, *Unde chartam ſuam habet:* The Defendant *pleaded Non habet* Chartam ſuam, and the Plaintiff confeſs'd the ſame, and *replied* it was *Charta anteceſſoris ſui.* Adjudged for the Defendant. F. N. B. 134. (F) in Marg. cites 12 H. 3. Gar. de Charters 27.

Contra it ſeems *if the firſt Defendant diſſeiſes J. N. of his Land*, and after *this Land is put in Execution*, and after the *Diſſeiſee re-enters. Or if a Man dies ſeiſed* of Land, and *has Iſſue a Daughter, and dies*, and the *Daughter warrants other Land and leſes in Warrantia Chartæ*, and the *Plaintiff has Execution of Land deſcended, and after a Son is born, and he enters*; *Or* if the *Heir enters by Conſent of the Raviſher had by his Mother, Or by Remainder to the right Heirs of J. N. and warrants other Land, and loſes, and this Land is put in Execution*, and after *another nearer Heir is born*, he ſhall not defeat the Execution. And ſo ſee that a Man may recover Land in Warrantia Chartæ. Ibid. cites Fitzh. Voucher, 297.

2. If a Man recovers in Writ of *Warrantia Chartæ*, and the *Sheriff puts him in Execution of the Land of a Stranger*, and the *Stranger brings Aſſiſe and recovers his Land again*, and after *he who recover'd in the firſt Warrantia Chartæ brings Sci. fa. againſt the firſt Defendant*, he ſhall not plead this Execution which was againſt the Stranger; for as it ſeems *it is no Execution, but a Tort of the Sheriff without Warrant.* Br. Warrantia Cartæ, pl. 25. cites 30 E. 1.

S. P. F N. B. 134. (D) in Marg. cites Itin. North. 2 E. 3. Garr. de Charters, 13. 2 E. 2.

3. If *Tenant in Tail aliens with Warranty, and dies*, and *Aſſets deſcend in Fee*, and the Feoffee brings Writ of Warrantia Chartæ againſt the Iſſue in Tail, this lies well, notwithſtanding that the Iſſue had *Writ of Formedon pending of the ſame Land*; Quod nota bene. Br. Warrantia Cartæ, pl. 30. cites Itinere Northampton, Anno 2 E. 2.

Ibid. 6.——S. P. by Hobart Ch. J. Hob. 22. in Caſe of Roll v. Osborn, but ſays he may rebut, and cites 2 E. 3. 6.

4. In Warrantia Chartæ it is no Plea to *ſay that the Plaintiff loſt nothing in the Aſſiſe.* Br. Warrantia Cartæ, pl. 29. cites 3 E. 3. and Vet. N. B. Warrantia Cartæ.

5. Writ of Warrantia Chartæ by A. againſt J. T. of 2 Houſes and 100 Acres of Land, and *counted that the Defendant infeoffed him with Warranty, and that B. brought Aſſiſe againſt this Plaintiff in which he loſt, and pending the Aſſiſe, and after, he came to him and pray'd him to warrant him* &c. and *ſhew'd thereof Deed.* Skip. demanded Judgment of the Writ; for it is Quod de eo tenet, et unde cartam ſuam habet, and ſo *double* lien, viz. by the Tenure, and by the Warranty, et non allocatur. Wilby, ſaid he had ſeen that upon ſuch Writ Unde cartam ſuam habet, the Plaintiff had bound the Defendant *by Homage Anceſtrel*, quod nota; and Skip. demanded Oyer of the Deed, and had it; and ſaid that it appear'd by the Aſſiſe and by the Date of this Writ, that it is *purchaſed after the Aſſiſe determined*; Judgment of the Writ. Per Thorp, a Man ſhall have Warrantia Chartæ, and recover pro loco & tempore, but ſhall not make in Value till he has loſt, and this ſhall be as it is ſaid elſwhere *Quia timet implacitari*, but this Writ was not of ſuch Form. And it is ſaid there, that if he does not bring his Writ pending the Aſſiſe, he ſhall not recover

recover in Value. Skip. ſaid, that at the time of the making of the Deed we had nothing in the Tenements, and they did not paſs by this Deed, Priſt. &c. et adjornatur. Br. Warrantia Cartæ, pl. 13. cites 24 E. 3. 35.

6. In Warrantia Chartæ it is a good Plea *that the Demandant had enter'd, pending the Plea*, upon the Plaintiff, he then Tenant of the Land, *or that the Plaintiff* in this Action *had* * *nothing* in the Land *the Day of the firſt Writ purchaſed, nor ever after*; for the Law will not that a Man ſhall make in Value upon an ill Writ; Per Arderne; to which Newton and Danby agreed. Br. Warrantia Cartæ, pl. 12. cites 21 H. 6. 49.

West's Symb. S. 197. cites S. C. — * S. P. per Candiſh, quod non negatur Br. Warrantia Cartæ, pl. 5. cites 45 E. 3. 2. —— West's Symb. S. 197. S. P. cites 45 E. 3. 5. and 3 E. 3. ——— S. P. Br. Warrantia Cartæ, pl. 28. cites 3 E. 3. and Vet. N. B. Warrantia Cartæ.

7. In Warrantia Chartæ upon Warranty [of] his Anceſter, the Defendant *pleaded Riens per diſcent.* By the Court, *Judgment* ſhall be enter'd *for the Plaintiff without Trial*, if he will; for *the Warranty is confeſs'd* Pro loco & tempore; for the Trial may be long and chargeable. Noy. 149. Thompſon v. Jackſon.

(M) *Judgment.* How *and what* ſhall be *recover'd.*

1. A Man ſhall have Warrantia Chartæ and recover Pro loco & tempore, but ſhall not make in Value till he has loſt; Per Thorpe; And this ſhall be as it is ſaid elſwhere, *Quia timet implacitari.* Br. Warrantia Cartæ, pl. 13. cites 24 E. 3. 35.

2. Warrantia Chartæ, the Defendant pleaded *that he had nothing by Deſcent in Fee the Day of the Writ* of Warrantia Chartæ *brought againſt him*, ſcil. *from the ſame Anceſtor who made* the Warranty; yet the Plaintiff recover'd Pro loco & tempore. Br. Warrantia Cartæ, pl. 30. cites 33 E. 3. and Vet. N. B. Tit. Warrantia Cartæ.

But Brooke ſays, ſee 21 E. 3. 9. that if *Land deſcends to him after, Scire facias* ſhall iſſue againſt him to have Execution, and ſhall have Execution; quod nota. Ibid.

3. A Queſtion was demanded in Bank, of what Effect Judgment in Warrantia Chartæ *Pro loco & tempore* is, and it was moved that Warranty *is only a Covenant*, and by this Covenant a Man *ſhall not bind the Land to be deliver'd in Value to whoſeſoever Hands it comes after by Purchaſe* or otherwiſe; for this is miſchievous, Quod verum eſt, that it ſhall not be bound by the Warranty or Covenant real; but otherwiſe it ſeems by *the Special Judgment* above. Br. Warrantia Cartæ, pl. 8. cites 2 H. 4. 14.

4. If a Man brings Writ of Warrantia Chartæ and recovers *Pro loco & tempore*, he ſhall have Execution after *of all the Lands and Tenements which the Defendant had at the Time of the Judgment given.* Br. Warrantia Cartæ, pl. 10. cites 12 H. 4. 12.

5. A Man may recover *Land* in Warrantia Chartæ. Br. Warrantia Cartæ, pl. 25. cites Fitzh. Voucher, 297.

But ibid. pl. 1. cites 9 H. 6. 21. that a Man *ſhall not recover Land, but* all in *Damages.* —— But ibid. pl. 31. cites F. N. B. That the Judgment and Recovery in Writ of Warrantia Chartæ, is *to have Land in Value and Damages*, and *not all in Damages.*—But ibid. pl. 4. cites 42 E. 3. 7. And ſays that the beſt Opinion was, That where the Plaintiff is *delay'd and does not loſe the Land*, he *ſhall recover but only his Warranty and no Damages.* —— *But* where he *loſes the Land* he ſhall recover Damages. Ibid. cites F. N. B.

6. If I *recover my Warranty Pro loco & tempore in Warrantia Chartæ*, and after am impleaded *in Action in which I cannot Vouch*, as in Aſſiſe or Scire facias,

facias, *I ought to make Requeſt to him againſt whom I recover'd, to adminiſter to me a Plea*, and ſo give Notice to him of the Action which is pending, or otherwiſe I ſhall not have Execution; Per Markham, quod Cates. by, conceſſit. Br. Warrantia Cartæ, pl. 16. cites 8 E. 4. 11.

But if he loſes the Land after, then he ſhall have Execution of Land in Value and Damages.

7. *Where the Plaintiff* in this Action *recovers Pro loco & tempore, and has loſt no Land*, quære if he ſhall have Damages. It ſeems that he ſhall not, for he is not yet damnified. Br. Warrantia Cartæ, pl. 31. cites F. N. B. Ibid. —*And where no Land is to be recover'd in Value*, there he ſhall loſe his Warranty as upon Recovery upon Voucher. Ibid.

For more of Warrantia Chartæ in general, ſee **Covenant, Voucher,** and other proper Titles.

Fol. 812.

* A Warren conſiſts of 2 Things, viz a Place of Game and of Liberty. Ow. 66. in Caſe of Moyle v. Mayle.

* Warren.

[A] [Ancient Grants thereof.]

[1.] 12 E. 1. ROT. Cartarum 2. Memb. 7. part 49. The King granted a Warren to another in his Lands. 13 E. 1. Memb. 26. ſuch Grant 20 E. 1. Memb. 3.

[2.] 12 E. 1. The aforeſaid Memb. 7. part 57. Grant de libera Warrenna in his Lands.

[3.] 31 E. 1. Memb. 2. Grant of Warren per breve de Privato Sigillo (interlined).

[4.] 4 E. 1. Rotulo Cartarum Membrana 1. part 3. and 6. Grant of Warren ita quod aliis non liceat fugare ibidem ſine licentia illius &c.

[5] In the Book called Tranſcriptum Cartarum Comitis Cornubiæ Charter 214. H. 3. granted a free Warren to Richard Earl of Cornwall, in all the Demeſnes of the ſaid County, excepto infra metas Foreſtæ, ita quod nullus intret (as the Words are) ſuper foriſfacturam noſtram decem librarum. (Note the Antiquity of this Pain.)

[B]

[B] Warren. *What Perſons may create* [a Warren.]

1. NOne **can make a Warren** without the Licence of the King; **for he cannot appropriate thoſe Things which are** Feræ Naturæ, **and** in Nullius Bonis **to himſelf, and to reſtrain them of their natural Liberty without the King's Licence.** **Co.** 11. *Monopolies* 87. **b.** S. P. 2 Inſt. 199.

2. *None can have Conies in his own Land, unleſs by Grant* from the King, *or* by *Preſcription*; if otherwiſe, he is puniſhable by Quo Warranto. Cro. E. 548. pl. 21. Hill. 39 Eliz. C. B. agreed in the Caſe of Boulſton v. Hardy.

[C] Warren. *Deſtruction of the Game.*

1. THE Lord of a Manor adjoining to a Warren of the King, may **preſcribe to chaſe** and take the Conies, if they come into his Demeſnes of the Manor. 4 **H.** 4 4. **b.**

2. 22 & 23 *Car.* 2. *cap.* 25. *Par.* 4. recites, That *diverſe Warrens and Grounds not incloſed, are us'd for breeding Conies, and that diſſolute Perſons deſtroy the Conies, for that the ſame is not prohibited by former Statutes, which extend only to Warrens or Grounds inclos'd*; and enacts, *That if any Perſon ſhall wrongfully enter into any Warren, or Ground lawfully us'd for breeding or keeping of Conies (altho' the ſame be not inclos'd) and ſhall chace, take, or kill any Conies, againſt the Will of the Owner or Occupier, not having lawful Title ſo to do; and ſhall be thereof convicted in Manner following, the Parties ſo offending ſhall yield to the Party grieved treble Damages and Coſts, and ſuffer Impriſonment* 3 *Months, and after till they ſhall find Sureties for their good Abearing.*

W. was convicted before Juſtices for killing Conies in a Warren inclos'd. It was mov'd to quaſh this Conviction, becauſe the 3 Jac. 1. cap. 13. which relates to Warrens inclos'd, does not give this ſummary Way of

Par. 5. *Prohibits all Perſons, except the Owner, to kill Conies on the Borders of any Warren, or other Grounds lawfully us'd for keeping Conies, under the Penalty of making Recompence to the Owner, and to pay not exceeding* 10 *s. to the Uſe of the Poor where &c. and in Default to be committed to the Houſe of Correction, not exceeding a Month.*

Proceeding by Conviction; and this Statute of 22 Car. 2. which authorizes that Way of Proceeding, relates not to Warrens inclos'd. But per Cur. the Conviction is well warranted by the 22 & 23 Car. 2. for whereas the former was a partial, this is an univerſal Law. (*Into any Warren*) this ſatisfies the Preamble; and there is a vaſt Difference between the Words (*not inclos'd*) and (*tho' not inclos'd*) the former being reſtrictive, but not the latter. And unleſs this Act extends to Warrens inclos'd, they would be in a worſe Caſe than thoſe not inclos'd; for then an Offence in the latter would be puniſhable by the ſhort Way of Conviction before Juſtices, but not the former. 10 Mod. 279. Hill. 1 Geo. B. R. The King v. Weſton.

[D] Warren. [*Diſ-warren'd.*]

1. 27 E. 1. **RDt. Cartarum Memb. 4. Warrenna** de Stanes de-warrennata & de-afforeſtata.

2. If a Man *has a Warren in his own Land by Grant of the King*, and *makes Feoffment of the Land, and retakes an Eſtate in Fee*, the Warren is extinct. Br. Quo Warranto, pl. 6. cites 6 E. 2. 7.

3. A *Charter* for a Warren *recited, that none ſhould chace* there, *without Leave of* the *Grantee, under* the *Penalty of* 20 *l. to the King*, and 2 d. to the Grantee. It was inſiſted, that he had uſurp'd upon the King by uſing his Warren, which he had not when the Charter was granted; and alſo that *Parcel of the Demeſnes* of this Manor *extend within the King's Foreſt, which is excepted in the Grant, and ſo* he has *forfeited* his Franchiſe. Beſides *he* has *ſuffer'd ſeveral to chaſe* in the Warren *without his Leave, and has not ſued them* at Law, *ſo that the King has no Profit of the Forfeiture* of the ſaid 10 l. which belongs to him, upon all ſuch as are convicted, and therefore it was pray'd that the Franchiſe be ſeiſed &c. Quod conceſſum fuit. Kelw. 141. b. pl. 13. Caſes in Itin. in Time of E. 3. The Prior of Aſhley's Caſe.

But if he makes Feoffment, and does not reſerve the Warren, this is good, and he ſhall have the Warren; and ſo by ſuch Means, after his Grant obtain'd of the King of the Warren, if he makes Feoffment, and reſerves the Warren, he has Warren in another's Land. Quod nota. Ibid.

4. If a Man has *Warren in his own Land, and aliens the Land*, the Warren is determin'd; For he has parted with his Right of the Land, diſcharged of all things, and he himſelf cannot have it; for he has not reſerved it, and the Feoffee cannot have it; for he did not grant it to him, but the Land only. Br. Warren, pl. 3. cites 35 H. 6. 55. Per Moile & non negatur.

5. C. claim'd free Warren in his Park, tho' it was *within the Bounds of the Foreſt*, and made his Claim by Letters Patents of King Charles. Whereupon the *Officers* of the *Foreſt were directed to inquire*, 1*ſt*, *whether it be impaled.* 2dly, *whether there be any Salteries into it*, ſo as the King's Deer may get in thither. 3dly, *whether there be any Conies* there; *and* if there be, *whether the Park is ſo incloſed that they cannot get out*, for then they will both eat upon the Foreſt and ſpoil the Riding. All of theſe are Cauſes of Seiſure, till they do replevy their Liberties. The Officers found, that the Park was well impaled, and that there were no Salteries, and that there were Conies there, but they could not get out; and ſo the Claim was allow'd. Et inſuper dictum eſt ei per Curiam, quod Parcum prædictum a modo includat, Ita quod Cuniculi non exeant in Foreſtam periculo incumbente. Jo. 296. 8 Car. In Itinere Windſor, Carye's Caſe.

(E) *By Preſcription or Grant.* Their *Extent* and *Difference.* And *Incidents* to either.

1. A Man *cannot have Warren unleſs by Grant of the King, or by Preſcription.* Br. Warren, pl. 1. cites 3 H. 6. 12.

2. *And* per Marten, he *ſhall not have it by Preſcription, unleſs within his own Land or his own Manor*, and not in Manors held of others; Brook ſays, *Quære* inde; for it ſeems not to be Law. Br. Warren, pl. 1. cites 3 H. 6. 12.

See Tit. Preſcription (G) pl. 3. S. C.—— A Man may have Warren *in his own Land by Grant of the King*, but *not in another's Land.* Br. Warren, pl. 2. cites 34 H. 6. 28.——*But* he may have Warren in another's Land, or in his own Land *by Preſcription*, well enough. Note the Difference. Ibid.——S. P. Br. Warren, pl. 3. cites 35 H. 6. 55.——Br. Jointenancy, pl. 5. cites 36 H. 6. 55.——A Man may have a Warren in another Man's Land; Per tot. Cur. D. 30. pl. 209 Hill. 28 H. 8. Anon.——S. P. Per Doderidge J. and not denied. 3 Bulſt. 82. Mich. 13 Jac. in Caſe of Rice v. Wiſeman.——S. P. by Doderidge. Roll Rep. 259. pl. 28. in S. C.

3. If

3. If one has a Warren *by Charter* in all his Manor, he may erect a *Lodge*, or make *Coney-burrows* in any Place of the Manor at his Pleaſure; but if he claims it *by Preſcription*, he ought to make the Coney-burrows in ſuch Places wherein they have been us'd, and not in others. Cro. J. 155. pl. 5. Paſch. 5 Jac. B. R. Leiceſter Foreſt's Caſe.

4. When a Man claims Warren *infra omnes terras Dominicales*, he cannot extend this into the Land of Freeholders; for when any one claims Warren *by Charter*, he cannot enlarge this beyond the Charter, but ought to take it as it is expreſs'd in the Charter. Otherwiſe it is where he claims the Warren *by Preſcription*; Per tot. Cur. 2 Bulſt. 254. Mich. 12 Jac. Fowler v. Seagrave. See Tit. Preſcription (G) pl. 4.

5. No Warren can be claim'd by Preſcription *within a Foreſt* without the Help of an Allowance in Eyre, and for want thereof the Party preſented was fined 10 s. and the Warren to be deſtroy'd. Jo. 280. 8 Car. in Itin. Wyndſor Sir Rich. Harriſon's Caſe.

(F) Paſſes. *What Words will paſs a Warren.*

2. IF the *Kings grants Warren to a Man and his Heirs without mentioning his Aſſigns*, and the *Tenant aliens the Land*, the Aſſignee ſhall have the Warren; per Thirn. Brooke ſays, it ſeems that he intends where he aliens the Land, and grants the Warren expreſsly; for it ſeems that *Warren does not paſs without expreſs Words*. Br. Warren, pl. 5. cites 14 H. 4. 6.

2. Where a *Man has a Warren* in his Land, and *demiſes the Land* for Years *without expreſſing the Warren*, the Leſſor ſhall not have it during the Term, for he has not reſerved it, and the Leſſee ſhall not have it; for it is not granted to him, by the beſt Opinion; but per Priſot, *if* the Warren be appendant to the Manor or Land, *it ſhall* well *paſs* by the Demiſe of it, *but if* it be *in Groſs it ſhall be in Suſpence* during the Term. Br. Grants, pl. 144. cites 32 H. 6. 24.

3. If a Man *ſeiſed of the Manor in which he has Warren, makes Feoffment of the Manor cum pertinentiis*, the Warren does not paſs; quod nota. Br. Warren, pl. 7. cites It. Not. If one has a Manor, and the King grants him Warren within the ſame Manor, if he afterwards enfeoffs the King of the Manor cum Pertinentiis, yet the Feoffor ſhall have the Warren. Per tot. Cur. D. 30. b. pl 209. Hill. 28 H. 8. Anon.

A Warren *in Groſs* in a Patentee *does not paſs by a Bargain and Sale of the Manor*; for a Warren is not Parcel or any Member of a Manor, but it may be appertaining, but that is by Preſcription. Cro E. 547. pl. 21. Hill. 39 Eliz. C. B agreed in the Caſe of Boulſton v. Hardy. —— A Warren does not paſs by a Feoffment of Land. Arg Poph. 159. cites 7 Rep. Butt's Caſe. ——— There is a *Difference between a Warren uſed to a Manor Time out of Mind*, and a Warren *appendant*; for the firſt paſſes not by Grant of the Manor cum Pertinentiis, it not being Parcel; but in the other it paſſes, but not without the Words, cum Pertinentiis. D. 30. b. pl. 209. Marg. cites 8 H. 7. 4.

(G) Warren. *Privileges and Powers* thereof.

1. THE Common Uſe of England is to *kill Dogs and Cats* in all Warrens, *as well as any Vermin*, which ſhews that the Law has been always taken to be that they may kill them; Per Popham J. And adjudg'd accordingly for the killing of a Maſtif Dog there running

running after Conies, alleging that the Dog was divers Times killing Conies there. Cro J. 44 pl. 13. Mich. 2 Jac. B. R. Wadhurſt v. Damm.

2. He that had *Libera Warrenna* may bring *Treſpaſs againſt any one but the Owner of the Soil* for hunting in his Free Warren, becauſe Libera Warrenna was a Liberty to Hunt in one's own or another's Ground excluſive of all others; and this was granted by the King, who is Maſter of all Game. Admitted. 2 Salk. 637. pl. 4. Trin. 4 & 5 W. & M. in B. R. in the Caſe of Smith v. Kemp.

(H) *Pleadings* in Treſpaſs in Warrens.

1. TReſpaſs of entring into his Warren and taking his Pheaſants and Conies, the *Defendant ſaid as to the Pheaſant, that he let his Faulcon fly at the Pheaſant in his own Land and out of the Warren, and the Pheaſant flew into the Warren, and there the Faulcon kill'd it, and he follow'd his Faulcon, and took it.* Judgment. Per Knivet, in this Caſe your entering and carrying away of the Pheaſant is tortious. Br. Treſpaſs, pl. 111. cites 38 E. 3. 10.

2. Treſpaſs for entring into his Warren and *Chaſing, taking,* and carrying away *the Hares, Conies, and Partridges,* and *did not ſay where he took them,* and the Writ awarded good; for it ſhall be *intended* where the Chaſing was; Quod nota. Br. Brief, pl. 59. cites 43 E. 3. 13.

3. Treſpaſs for chaſing in his Warren, the *Defendant ſaid that he was in in the Land by Deſcent from his Father, by which he chaſed,* as lawfully he might; it is a good Anſwer per tot. Cur. to put the Plaintiff to ſhew how he has his Warren; for *if it be by Grant of the King it is only in Dominicis terris ſuis,* and *if he has it by Preſcription he ought to ſhew it*; quod Curiæ conceſſit; by which he ſaid that he chaſed in his Warren in his own Lands, Priſt, and the others e contra; quod nota; and it ſeems that this is no good pleading at this Day. Br. Warren, pl. 4. cites 44 E. 3. 12.

Br. Treſpaſs, pl. 10. cites S. C.

4. *Treſpaſs Quare Warrenam ſuam Vi & Armis intravit & fugavit ibidem, and killing Conies* &c. The *Defendant ſaid that the Place where &c. is his own Franktenement and Soil, Judgment of the Writ*; becauſe he cannot enter into his own Soil *Vi & Armis.* And by the beſt Opinion, becauſe the Writ is in Warrenam intravit, and not in Terram intravit, the Writ is good; for it may be the Warren of the Plaintiff and the Soil of the Defendant; Quære; and per Martin, clearly *this does not go to all the Writ*; by which he anſwer'd to the reſt, and *as to chaſing, ſaid that the Land where* &c. *is held of C. P. and not of the Plaintiff*; *Judgment* Si Actio *without ſhewing how he has Warren there* and the *Plaintiff ſhew'd Title by Preſcription to have Warren appendant to his Manor of D. in the ſame County,* &c. Br. Warren, pl. 1. cites 3 H. 6. 12.

5. The *Writ is Vi & Armis tho' it be another's Franktenement.* Br. Warren, pl. 2. cites 34 H. 6. 28.

6. Treſpaſs Vi & Armis for entring into *his Free Warren and taking his Hares.* The *Defendant ſaid that the Place is the Franktenement of W. who licenced him to enter and chaſe,* per quod &c. And no Plea; for it may be his Franktenement, and the Warren of the other by which he added to his Plea, *abſque hoc that he had Warren there,* and non allocatur, for this amounts to Not Guilty, by which he ouſted the Traverſe, and added, Judgment if without Title ſhewn he may claim Warren; Et non allocatur; for it is only Writ of Treſpaſs, in which he cannot recover his

Warren

Warren but Damages for the Treſpaſs, and is in Poſſeſſion; and therefore a Man *ſhall not be compelled to ſhew Title*; and after, by Rule of Court, nothing was enter'd but Not Guilty, and he ſhall give his Matter in Evidence. Br. Treſpaſs, pl. 34. cites 34 H. 6. 28. 43.

7. Treſpaſs *for chaſing in his Warren, and taking and carrying away the Hares and Conies*; the *Defendant ſaid the Plaintiff had nothing in the Land in which he has Warren, unleſs jointly with J. N. who is in full Life not named in the Writ*; *Judgment of the Writ*; and no Plea, but the Defendant was compelled to anſwer by Award, becauſe *it may be that he has only a Joint Eſtate in the Land* in which &c. *and yet has the Warren alone*, as if he has *Warren by Preſcription, and after purchaſes the Land to him and another*, yet the Warren remains, and is not extinct as Rent or Common ſhall be; note the Difference. Br. Warren, pl. 3. cites 35 H. 6. 55. Br. Jointenancy, pl. 5. cites S. C. 36 H. 6. 55. S. C.

8. Treſpaſs Quare Warrenam ſuam in D. fregit & Cuniculos cepit, fugavit &c. The *Defendant ſaid that the Plaintiff was ſeiſed of three Acres, where &c. in Fee, and leaſed to N. at Will, who licenced the Defendant to kill the Conies*; Judgment if without Title ſhewn &c. Et non allocatur; Per Catesby, this ſhall be a good Plea in Treſpaſs of a Cloſe broken and Conies taken; and per Danby Ch. J. this is true; for the Warren does not paſs by the Leaſe, and a Man may have Warren in his own Land, by which the Defendant *ſaid that the Place is three Acres, which was the Franktenement of J. N. and that he by his Command enter'd and kill'd the Conies, abſque hoc, that the Plaintiff has Warren there.* And no Plea; for it amounts to Not Guilty. Br. Warren, pl. 6. cites 5 E. 4. 53.

For more of Warren in general, See **Foreſt, Preſcription, Waſte,** (D) pl. 12. &c. and other Proper Titles.

Waſte.

[A] Waſte. *Prohibition* at the Common Law [*to the Clergy.*]

Fol. 813.

See case of Jefferson v. Bishop of Durham & others 1. Bos. & Pull. 105. & Bishop of Winchester's case 1. Ro. Abr. 300. pl. 3. & cites 2 Leo. 200 S. C. cited Wittingham 2. Brem. 55. & in Skelton v. Skelton 2. Ford Abr. 837.

1. IF a Biſhop cuts and ſells the Trees of his Biſhoprick, **for this Waſt a Prohibition ſhall be granted to him, commanding him to ceaſe doing ſuch Waſte. M. 12 Jac. B. R. per Curiam. Hill. 13 Jac. B. R. 35 E. 1. Reſolved in Parliament, the *Biſhop of Durham*'s Caſe. Co. 11. 49.** S. C. cited per Coke Ch. J. 11 Rep. 49. a. in Liford's Caſe. —— And in Roll. Rep. 86. pl. 34. in Caſe of Stockman v. Whither, and ſays it ſeems to be good Law; for it is the Dowry of the Church, and the King is Patron of the Biſhoprick.

2. So **if a** Parſon or Vicar **waſts the Trees of his Parſonage or Vicaridge, a Prohibition ſhall be granted; for it is the** Dowry of the Church. Roll Rep. 335. pl 44. S. C. by the

Name of Knowle v. Harvey, accordingly. —3 Bulſt. 158. S. C. held accordingly, and was againſt a Vicar for lopping and cutting down Timber-Trees growing in the Church-Yard.

Church. H. 13 Jac. B. R. between *Stoakes and Harvey*, reſolved, and Prohibition granted; and there *Sacker's Caſe*, reſolved, and Prohibition granted. Co. 11. *Liford's Caſe*, 49. The Patron may have the Prohibition.

3. So if a Prebendary waſts the Trees of his Prebend, the Patron may have a Prohibition. Between *Ackland and Atwell*, Prohibition granted by the Ld. Coventry, Ld. Keeper, for the Prebend of Catton in Devon.

Roll Rep. 86. pl. 34. S.C. by the Name of Stockman v. Whither, and there Coke Ch. J. ſaid, That if this Biſhop of Sarum cuts and ſells the Trees, and does not employ them for Reparation, and any one would move it, he would grant a Prohibition; and the other Juſtices ſeem'd to agree to it.

4. It was holden in this Caſe, That if a Biſhop, Parſon, or other *Eccleſiaſtical Perſon*, *cuts down Trees* upon the Lands, *unleſs* it be *for Reparations* of their Eccleſiaſtical Houſes, and do, or ſuffer to be done, any Dilapidations, that they may be puniſh'd for the ſame in the Eccleſiaſtical Court, and a Prohibition will not lie in the Caſe; and that the ſame *is a good Cauſe of Deprivation* of them of their Eccleſiaſtical Livings and Dignities. But yet for ſuch Waſts done, they *may be alſo puniſh'd by the Common Law*, if the Party will ſue there. Godb. 259. pl. 357. Mich. 12 Jac. in B. R. Salisbury Biſhop's Caſe.

Sid. 152 pl. 20. Earl of Rutland v. Gie, S. C. ſays the Court doubted of the principal Caſe, becauſe otherwiſe Mines in Glebe can never be open'd.

5. On a Motion for Prohibition, the Suggeſtion appear'd to be that the Parſon had *dug and found Lead-Mines in his Glebe, and had fell'd Timber*; and it was inſiſted that this was Waſt, and prohibitable by 35 *E.* 1. *De non proſternend' arbores &c.* But per Cur. It lies not for Mines; for then Mines in Glebe-Land can never be open'd. Lev. 107. Trin. 15 Car. 2. B. R. Rutland's (Earl of) Caſe.

[B] Againſt whom it lies. Eccleſiaſtical Perſons. [*Or others.*]

* It ſeems that (vel) or ſome ſuch Word, is here omitted; and that the Meaning is, that the Abbot (or) his (Monks or Servants) do Waſte &c.

1. REX Vicecomiti ſalutem; Cum ad nos providere pertineat ut Eleemoſina quæ de patronatu noſtrorum predeceſſorum, & noſtro fuit in ſtatu debito abſque vaſto venditione vel deſtructione inde facienda conſervetur; Tibi præcipimus quod non permittas, quod Abbas de G. &c. * ſui vaſtum venditionem vel deſtructionem faciant de boſcis, dominibus [ſive] hominibus, pertinentibus ad prioratum, ſive Cellam de L. quod eſt de patronatu noſtro & taliter te habere in hac parte ne pro defectu tuo vel miniſtrorum tuorum ad te nos graviter capere debeamus. Teſte Rege 3 E. 1. Rot. Clauſarum Memb. 10. And there after a Writ directed to the Sheriff, quod Scire faciat Abbati de G. & Priori Cellæ ſuæ de L. quod ſint coram nobis in Octabis ut ſuper defectibus &c. reſpondeant.

Hob. 36. pl. 41. Drury v. Kent, S. C.

2. Pending a Quare Impedit, if the Incumbent cuts Trees upon the Glebe, and upon the Lands of Copyholders of a Manor, Parcel of the Rectory, a Prohibition lies. Hobart's Reports, 51. between *Prenty and Kent.*

3. I

3. A Prohibition of Waſt lay againſt Tenant by the Curteſy, Tenant in Dower, and Guardian in Chivalry, at the Common Law. Co. Litt. 53. b. [i]

Co. Litt 316. a. S. P.—— Br. Waſte, pl. 139. cites Dr. & Stud. lib. 2 as to Tenant by the Curteſy and in Dower, and that Damages ſhould be recover'd againſt them at Common Law.

Tenant in Dower and Guardian were puniſhable at Common Law by Prohibition, *and Attachment* thereupon, if they did Waſte F. N. B. 55. (C)

At the Common Law, if *he that had the Inheritance did fear* (for Example) *that Tenant* in Dower &c. *could do Waſt*, he might, before any Waſt done, have a Prohibition directed to the Sheriff that he ſhall not permit her to do Waſte. And this was the Remedy that the Law appointed, before the Waſt done by the Tenant in Dower, Tenant by the Curteſie, or the Guardian, to prevent the ſame, and this was an excellent Law. And this Remedy may be uſed at this Day. After Waſt done, there lay an *Action of Waſt at the Common Law in this Form*; Rex Vicecom' ſalutem, ſi talis fecerit te ſecurum de clamore ſuo proſequendo, tunc pone per vad', & ſalvos plegios talem mulierem &c. quod ſit coram Juſticiariis noſtris &c. oſtenſura quare fecit vaſtum, venditionem, & exilium de terris, hominibus, redditibus, boſcis, vel gardinis, quæ tenet in dotem de hereditate talis in tali villa, contra prohibitionem noſtram, & habeas ibi nomina plegiorum, & hoc breve, teſte &c. The Writ ſays *contra Prohibitionem noſtram*, yet the Plaintiff might well maintain his Writ, *albeit no Writ of Prohibition of Waſt had been ſued out before*; for that the Common Law was a Prohibition of itſelf; and ſo ſays Bracton, ſpeaking of the Waſt done by a Guardian; Dominus vaſtum emendabit ſic, quod damna reſtituet ſive vaſtum fecerit ante prohibitionem ſive poſt. 2 Inſt. 299, 300.

4. But no Prohibition of Waſte lay at Common Law againſt Tenant for Life or Years, becauſe they come in by their own Act, and the Leſſor might have provided that no Waſt ſhould be done. Co. Litt. 53. b. [54. a. 355. b.]

Br. Waſt, pl. 139. cites Dr. & Stud. lib. 2. S. P. and that ſo it was of Tenant *pur auter Vie.*—*But it lies on the Statute of Marlebridge* 23. *Gloucaſter* 5. *gives an Action of Waſt againſt the Leſſee for Life or Years.* 11 Rep. 81. b.—And *Statute of Glouc.* Co. Litt. 54. b.

5. If a *Parſon is Tenant in Common* with another of a Wood, or other Land, *and the other Tenant does Waſt* in the Land or Wood &c. the Parſon ſhall have a Prohibition. F. N. B. 49. (I)

S. C. cited by Coke Ch. J. 11 Rep. 49. a. in Liford's Caſe; and ſays that if the other endeavours to do Waſt, the Parſon for the Preſervation of the Timber-Trees ſhall have a Prohibition againſt him not to do Waſt, becauſe (as the Chief Juſtice ſaid) *if the Parſon* of a Church *will waſt* the Inheritance of his Church to his own private Uſe, in cutting the Trees, *the Patron may have Prohibition* againſt him; for the Parſon is ſeiſed as in Right of his Church, and his Glebe is the Dower of his Church, and therefore ſince Prohibition lies againſt him, it is but reaſonable that he ſhall have the like Remedy againſt him who holds with him in common. 11 Rep. 49 a. Mich. 12 Jac. in Liford's Caſe.—— Roll Rep. 100. pl. 44. in Caſe of **Stamp v. Clinton**, alias Liford, S. C. & S. P. by Coke Ch. J. accordingly.

6. A Prohibition is awardable *againſt any who waſts the Houſes of the Parſon Incumbent, or cuts the Trees, or does any Waſt.* Agreed by all the Juſtices. Mo. 917. pl. 1303. Hill. 13 Jac. B. R. Saccar's Caſe.

S. C. cited Roll Rep. 335. in Caſe of **Knowle v. Harvey**,

That after a Judgment in Quare Impedit by **the King v. Sacker**, and Writ to the Biſhop, Sacker continued Poſſeſſion, and waſted the Vicarage-Houſe, and a Prohibition was granted; and it was ſaid that any one might have this Writ againſt him, for it is the Writ of the King. The Prohibition was Not to do Waſt.

7. The *Prohibition of Waſte* was *abrogated, and the Action of Waſte framed* upon the Act of Weſtm. 2. [cap. 14.] as in the Regiſter appears. 2 Inſt. 146.

[C] Waſte

Fol. 814. [C] Waſte by the Statutes. *Of what Things ſimply* Waſte may be.

* Br. Waſt, pl. 74. cites S. C. [But there, and alſo in the Year-Book, the Aſh is mention'd to be of the Value of 4 d. only, and whether that may not be the Reaſon why it was held not to be Waſt, may perhaps be a Queſtion; for the ſame ſeems not very plainly expreſs'd]

1. IF a Man cuts Aſhes it is Waſte. Contra * 38 E. 3. 7. b.

Mo. 812. pl. 1099. S. C. accordingly; only inſtead of Beeches, it is there mention'd as of Birches.

2. Waſt may be committed in cutting of Beeches in Buckinghamſhire, becauſe there by the Cuſtom of the Country it is the * beſt Timber. P. 8 Jac. B. per Coke, ſaid to be adjudged in the Earl of *Cumberland's Caſe*. Co. Litt. 53.

* And are converted to Building. Co. Litt. 53. (r)

3. So Waſt may be committed in cutting of Birches in Berkſhire, becauſe they are the principal Trees there for the moſt part. Tr. 11 Ja. B. Per Coke, if the Tenant deſtroys, or ſuffers to be deſtroy'd, a Quick-ſet Hedge of Whitethorne, this is Waſte. Co. Litt. 53.

Cro. J. 101. pl. 31. S. P. by 2 Juſtices. Mich. 3 Jac. B. R. in Caſe of Brook v. Rogers.

4. The Cutting of Trees which are Aridæ, Mortuæ, Cavæ, non exiſtentes Maheremium, neither bearing Fruit nor Leaves in Summer, is not Waſt. Co. Litt. 53.

5. If the Tenant of the Land builds a new Houſe where there was not any before, and after ſuffers it to be waſted, Action of Waſte lies. Co. Litt. 53.

6. If a Leſſee permits Statiuncula, Anglice, the Standings ante oſtium Meſuagii ſui ſtare & eſſe diſcooperta & irreparata per quod Maheremium Statiuncularum illarum devenit corruptum & ratione inde ruinam minatur, it is Waſt. P. 8 Car. B. R. between *Weymouth* and his Wife Plaintiffs, and *Guilbert* and his Wife Defendants, in Writ of Error adjudged, and the Judgment given in Bank affirm'd accordingly.

[D] *What Act* ſhall be ſaid Waſte.

D. 37. Maleverer v. Spink.—*So of ancient Paſture.* Ch. Rep. 14 Atkins v. Temple.—It is not enough to ſay it was Paſture Diu ante, but to make it Waſt it ought to be Paſture *Time out of Mind.* Arg. 2 Show. 8. in Caſe of Gunning v. Gunning.

1. IF the Tenant converts Arable into Wood, or e Converſo, it is Waſte; for it not only changes the Courſe of Husbandry, but alſo the Proof of Evidence. Co. Litt. 53. b. Hobart's Reports, Caſe 295. *in page 234.*

2. If

2. If a Leſſee ſuffers arable Land to lie freſh, and not manur'd, ſo that the Land grows full of Thorns and other Trees, this is not Waſte, but ill Husbandry. 2 H. 6. 10. b. Curia. Br. Waſt, pl. 5. S. P. cites S. C.——F. N. B. 59. (M) S. P.

3. If Tenant in Dower of a Manor to which Villeins are regardant, manumits the Villeins, this is not any Waſte, becauſe it is not any Manumiſſion but againſt herſelf; for he in Reverſion may ſeiſe them after her Death. * 2 H. 6. 11. Curia. F. N. B. 60. (O) in the new Notes there (d) cites 2 H. 6. 11. a. 14 H. 4. 11. S. P.——* Br. Waſte, pl. 5. cites S. C. of a Tenant for Life in general.

4. But if ſhe had beat the Villeins, or conſtrain'd them to do other Services which they did not before, by which they go out of the Seigniory, it is Waſte. * 2 H. 6. 11. Time of E. 1. B. R. Iſſue Whether the Villeins departed per Duritiam of the Leſſee or not. * Br. Waſte, pl. 5. cites S. C.——F. N. B. 55. (C) S. P.—Ibid. 60. (O) is that Deſtruction of Villeins by Tillage, is adjudg'd Waſt. [And ſo are both the Engliſh Editions, viz. (by Tillage) but the French Edition is (by Tallage) which ſeems more agreeable to the Year-book of 2 H. 6. 11. which is by conſtraining them to do more Services than they were wont to do; and Tallagium, according to Sir H. Spelman, is to be underſtood for an unjuſt Exaction of Services not due.] And Ibid. in the new Notes there (d) ſays, that if Villeins by Reaſon thereof go out of or leave the Seigniory, it is *Exile*, and puniſhable in Waſte; and cites 2 H. 6. 11. a. and 14 H. 4. 11.——And accordingly 2 Inſt 304. ſays, That Exile and Deſtruction of Villeins by Tallage and Oppreſſion, is Waſt.——Co. Litt. 53. b. ſays, that Exile or Deſtruction of Villains or Tenants at Will, or making them poor, where they were rich when the Tenant came in, whereby they depart from their ſeveral Tenures, is Waſt.

5. If a Leſſee converts a Corn-mill into a * Fulling-mill, it is Waſte. Tr. 5 Jac. B. by 2 Juſtices. In ſuch Places, where, by the Cuſtom of the Country the Plowing of Meadow is good Husbandry, and for meliorating of the Meadow, there the Plowing of it is not Waſte. * Cro. J. 182. pl. 22. Trin. 5 Jac. B. R. in Caſe of the City of London v. Greyme——Converting a *Brew-houſe of* 120 *l. per Annum into other Houſes let for* 200 *l. a Year*, is Waſte, becauſe of the Alteration of the Nature of the Thing, and the Evidence. 1 Lev. 309. Hill. 22 & 23 Car. 2. B. R. Cole v. Green.——2 Saund. 252. S. C.

6. If an ancient Meadow, which has been Meadow Time out of Mind &c. as Brook-Meadow be converted into Arable, it is Waſte. H. 8 Jac. B. *Treſham and Lamme*, Per Curiam. 2 Brownl. 46. Treſham v. Lamb, S. C. accordingly.——F. N. B. 59. (N) S. P.——Chancery would not give Way to the *Plowing up* of *ancient Paſture*, tho' it was inſiſted upon that the Nature of the Ground was for Tillage, and had been formerly plow'd. Chan. Rep. 116. 13 Car. 1. Fermier v. Maund.

7. But if Meadow be ſometimes arable, and ſometimes Meadow, and ſometimes Paſture, there the Plowing of it is not Waſte. H. 8 Jac. B. Per Curiam. Fol. 815. 2 Brownl. 46. Treſham v. Lamb, S. C accordingly.

8. The Converſion of Meadow into Arable is Waſte; for it not only changes the Courſe of Husbandry but the Proof of his Evidence. Co. Litt. 53. b. Hobart's Reports, Caſe 295. [296.] F. N. B. 59. (N) S. P.—D. 37. Maleverer v. Spinke.——Br. Waſt, pl. 143. cites 10 H. 7. 2.——Converting a *Meadow into a Hop-garden*, is not Waſte; for it is imploy'd to a *greater Profit*, and it may be Meadow again; Per Windham and Rhodes J. but Periam J. ſaid, tho' it be a greater Profit, yet it is alſo with greater Labour and Charges. 2 Le. 174. pl. 210. Trin. 29 Eliz. C. B. Anon——*But* converting of a *Meadow into an Orchard*, is Waſte, tho' it be to the greater Profit of the Occupier; Per Periam J. 2 Le. 174. pl. 210. Trin. 29 Eliz. C. B. Anon.

So for cutting the Germens.

9. A ſuffering of Germens to be deſtroy'd with Beaſts, **is Waſte.** 9 H. 6. 67.

Br. Waſt, pl. 10. cites 9 H. 6. 65. But ſays that the Defendant brought Writ of Error immediately.—See (E) pl. 27.

10. **If a** Leſſee or his Servants ſuffer a Wood to be open, **by which** Beaſts enter and eat the Germens, **tho' they grow again, yet it is Waſte; for after ſuch Eating they never will be great Trees, but Shrubs.** 11 H. 6 1. b.

Suffering the Pale to decay; ſo that the Park is not incloſ'd, is Waſt.

11. **If the Tenant** of a Park ſuffers the Pale to decay, by which the Deer are diſpers'd, **it is Waſte. Co. Litt. 53. Hobart's Reports, Caſe 295.**

Br. Waſt, pl. 130. cites 12 H. 8. 1.

Ow. 66. S. C. accordingly, held not to be Waſt.—Noy 70. S. C. adjudg'd not to be Waſt.

12. **If a Leſſee** plows the Land ſtor'd with Conies, **this is not Waſte,** unleſs it **be a** Warren by Charter or Preſcription. **P. 40 El. B. between** *Moyle and Moyle*, **adjudg'd Per Curiam.**

13. So **it is of a** Warren by Charter or Preſcription. **See Noy's Reports between** *Moyle and Moyle* 70. **Tr. 40 El. B. between** *Moyle and Moyle.* **Contra** 17 E. 3. 7. b. **of a** Fiſhery.

S. P. And ſo it was holden, Paſch. 15 Eliz. in C. B. Et ſic de ſimilibus.

14. **If the Tenant of a** Dove-Houſe, Warren, Park, Vivary, Eſtangues, **or ſuch like,** takes ſo many that ſo much Store is not left as he found at the Time of the Demiſe, **it is Waſte. Co. Litt. 53. Hobart's Reports Caſe, 295. [296].**

And ſo if the Tenant deſtroys the Doves, or Game &c. it is Waſte. And he that has the Inheritance ſhall recover the Dove-Houſe, Park &c. And therefore the Makers of the Statute of Glouceſter, meaning to include all kind of Waſts, uſed this General Word (Thing.) 2 Inſt. 304

If Leſſee of a Pigeon-Houſe *ſtops the Holes that the Pigeons cannot build,* Waſt lies, as it has been adjudg'd. Ow. 67. in Caſe of Moile v. Moile.——See (E) pl. 30.

Deſtroying *of Conies, or ſtopping Coney-boroughs, by Leſſee of a Warren* is not Waſt. Noy. 70.

15. **If a Leſſee of Land** deſtroys the Cony-Boroughs **in the Land,** it not being a Free Warren **by Charter or Preſcription, it ſeems it is not Waſte. Tr. 9 Car. B. Rot. 1746. in Action of Waſte,** it being aſſign'd for Waſt, and found by Verdict that he had done Waſte therein, **yet the Plaintiff releaſed it and took Judgment for the Reſidue of the Waſts found by the Jury.**

Moyle v. Moyle.——4 Le. 240. S. P.——It was uſual to have Waſt againſt thoſe that *made Holes in the Land,* but not againſt thoſe that *ſtop them up,* becauſe thereby the Land is made better; Per Walmſley J. Ow. 67. Trin. 41 Eliz. in Caſe of Moile v. Moile.

It is not Waſte, nor will Waſte lie for Conies, becauſe a Man has not Inheritance in them, and a Man can have no Property in them, but only Poſſeſſion; Per Curiam. Ow. 67. Moile v. Moile.

Waſt may be done in Houſes, by pulling or *proſtrating* them down, or by *ſuffering* the ſame *to be uncover'd,* whereby the Sparrs or Rafters, Plaunches, or other Timber of the Houſe are rotten.

16. Default of Coverture of a Houſe **is Waſte, tho' the Timber be ſtanding.** 18 E. 3. 15.

Co. Litt. 53. (a)——F. N. B. 59. (N) S. P.

But where the old Houſe fell by its being ruinous, and he made a new one, this needed not to be ſo long and ſo wide as the old Houſe was; Per Newton; quod non negatur. And ſo ſee the Diverſity, and nota bene. Br. Waſt, pl. 95. cites S. C.

17. **If a Leſſee** raſes the Houſe, and builds a new Houſe, **if it be** not ſo long and wide as the other, **it is Waſte.** 22 H. 6. 18 b.

18. So

18. So **if he rebuilds it** more large **than it was before, it is Waſte**; for it will be more Charge for Leſſor to repair it. **Co. Litt. 53.**

19. **If a Leſſee** flings down a Wall between a Parlour and a Chamber, by which he makes the Parlour more large, **it is Waſte, becauſe it cannot be intended for the Benefit of the Leſſor, nor is it in the Power of the Leſſee to tranſpoſe the Houſe. Kell. 13 H. 7. 37. b.** So of a Partition between Chamber and Chamber. Br. Waſte, pl. 143. cites 10 H. 7. 2.

20. **If a Leſſee** pulls down a Hall or Parlour and makes a Stable of it, **it is Waſte. Kell. 13 H. 3. 37. b. 39.**

21. **If a Leſſee** pulls down a Garret over-head, and makes it all one and the ſame Thing, **it is Waſte. Kell. 13 H. 7. 37. b. by Keble.**

22. **If a Leſſee of Land** makes a new Houſe **upon the Land** where there was not any before, **this is not Waſte; for it is for the Benefit of the Leſſor. Kell. 13 H. 7. 38. b. by Wood. P. 38 El. B. R. in *Cecill and Cave*'s Caſe, by two againſt one. Contra Co. Litt. 53. It ſeems, that it is not Waſte for a Leſſee** at the End of a Term to ſow the Land with Woad, **tho' it will not well bear Corn for 7 Years after. Contra H. 8 Jac. B. by Coke and Forſter.** 11 Mod. 7. contra, and if he *lets it fall* it is a *New Waſt.* Anon.

23. **If the Tenant** digs for Gravel, Lime, Brick-Earth hid in the Ground, or ſuch like, **it is Waſte,** not being open at the Time of the Leaſe. **Co. Litt. 53. b.**

24. **If a Leſſee** digs Slat-Stone **out of the Land it is Waſte.** *9 H. 6. 66. b. **Co. Litt. 53. b.** Fol. 816.

* Br. Waſt, pl. 10. cites S. C.—Digging for Stones, *unleſs in an Ancient Quarry*, is Waſte, *tho' the Leſſee fills it up again.* Ow. 67. in Caſe of Moile v. Moile.

25. So **if he digs** Coals **it is Waſte. 9 H. 6. 66. b. Co. Litt. 53. b. not being open at the Time of the Leaſe. Co. Litt. 54. b. Hobart's Reports. Caſe 295.** Br. Waſt, pl. 10. cites S. C. —— F. N. B. 59. (N) —— if the Leſſee Leaſe of Land in which there was a Coal-Mine, but not open at the Time of the Leaſe; opens it, it is Waſte; and if he aſſigns his Intereſt, it is ſtill Waſte in Aſſignee; but where the Leaſe is of Lands, and all Mines in it, there the Leſſee may dig in it. 5 Rep. 12. a. b. Trin. 41 Eliz. C. B. Sanders's Caſe ——Cro. E. 683. pl. 15. Sanders v. Norwood S. C. that it is Waſte in the Aſſignee of the Leſſee to dig Coals, tho' the Mine was open'd by the Leſſee.—Brownl. 241. Saunders v. Marwood S. C. accordingly.

26. But **if Leſſee of Land with Mines of Coals, Iron, and Stone,** digs **the** Coals, Iron, and Stones, ſo much as is neceſſary for him to Uſe without ſelling, **it is not Waſte. 17 E. 3. 7. b. Hobart's Reports, Caſe 295. Admitted [that] where** Mines **of Coals are** granted by expreſs Words, **the Leſſee may open and dig them, tho' not open'd at the Leaſe made.**

27. **If a Leſſee** digs for Gravel or Clay for Reparation of the Houſe, not being open at the Time of the Leaſe, **it is not Waſte no more than the** Cutting of Trees for Reparation. **Co. Litt. 53. b.**

28. **If a Leſſee** digs the Earth and carries it out of the Land, **Action of Waſte lies. M. 9 Car. between *Nowell and Donning*, adjudged by admitting it in Writ of Error, and only queſtion'd becauſe the Writ was** effodit Terram and 100 Load Terræ inde provenientis aſportavit; **It was not proper to call it Land when it was dug, but this adjudg'd good alſo.**

29. **If a Leſſee** digs Clay **[or Loome] it is Waſte. D. 1 Ma. 90. b. Co. Litt. 53. b.** Adjudg'd Waſte; for the Soil is impair'd by the Digging of it. Br. Waſt, pl. 93. cites 22 H. 6. 18.

30. **If the Tenant** digs for Mines of Mettal hidden **in the Soil, it is Waſte. Co. Litt. 53. b.**

31. But

31. But if the Mine be open at the Time of the Leaſe, the Leſſee may dig and make his Profit of it. Co. Litt. 54. b.

32. If there be one Mine open in the Land, and another Mine not open, and the Owner leaſes it to another, with the Mines in it, he may dig in the open Mines, but not in the cloſe Mines; But otherwiſe it would be if there was not any open Mine there, but all cloſe; for otherwiſe the Grant would take no Effect. Co. Litt. 54. b.

See Leaſe 2. Mod. 193.

33. If a Leſſee ſuffers a Sewer or Wall to be not repair'd, by which the Sea ſurrounds the Meadow, and conſumes it by Inundation, and Loturam Terræ, it is Waſte. * 20 H. 6. 1. b. 17 E. 3. 45. Co. Litt. 53. b.

* Br. Waſt, pl. 12. cites S. C. but adds a Quære.—Mo 62 pl. 173. Trin. 6 Eliz. Anon. S. P. admitted.——Mo. 73. pl. 200. Trin. 6 Eliz. Anon. S. P. by Dyer and Walſh. —— 10 Rep. 139. b. in Keighley's Caſe, S. P. by the Reporter.

34. So if by ſuch Default the ſweet Water does ſuch Damage by Inundation. 20 H. 6. 1. b. Co. Litt. 53. b. Hobart's Reports, Caſe 295.

35. So a fortiori, if arable Land be ſurrounded by ſuch Default; for the ſurrounding waſhes away the Marle and other Manurance from the Land. 20 H. 6. 1. b.

Permitting a Houſe to be ruinous, is Waſte. Br. Waſte, pl. 143. cites 10 H. 7. 2.—Contra if it was *ruinous at the Time of the Demiſe*, and [in ſuch Caſe] the Termor is not bound to repair it, notwithſtanding it falls in his Time. Ibid.

36. If a Leſſee permits a Chamber fore in decaſu pro defectu Plauſtrationis, Anglice Plaiſtering, per quod groſſum Maheremium devenit putridum & Camera illa turpiſſima & fœdiſſima devenit, Action of Waſte lies for it. P. 8 Car. B. R. between *Weymouth* and his Wife Plaintiffs, againſt *Gilbert* and Elizabeth his Wife, in Writ of Error, upon Judgment in B. adjudg'd, and firſt Judgment affirm'd.

* Cro. C. 381. pl. 9. Stonehouſe v. Corbett, S. C. but S. P. does not appear. And Ibid. 400. pl. 9. S. C. but † Fol. 817. not S. P.—Jo. 354. pl. 1. S. C. but S. P. does not appear.

37. So if a Leſſee permits the Walls to be in Decay for Default of Daubing per quod Maheremium devenit putridum, Action of Waſte lies. Mich. 9 Car. B. R. between *Newell and Donning* adjudged in Writ of Error upon Judgment in Bank, and the firſt Judgment affirm'd accordingly. Intratur. Mich. 8 Car. Rot. 271. Tr. 9 Car. B. 1746. between Sir *John* * *Corbet* and Sir *James Stonehouſe*, admitted and adjudged that Action of Waſte lies for permitting Muros Meſuagiorum fore in Decaſu † & irreparatos in Defectum oblimationis, Anglice Dawbing & Plauſturationis eorundem, upon No Waſt done pleaded; and this alſo admitted in Writ of Error upon it in B. R. Hill. 9 Car. Rot. 133.

38. *Breaking of a Pale* is not Waſte. Br. Waſte, pl. 94. cites 22 H. 6. 24. Per Cur.

If a Wall be uncovered when the Tenant comes in, it is no Waſt, if it be ſuffer'd to decay. Co. Litt. 53. a.

39. So of *a Wall uncover'd*, this is no Waſte, but *of a Wall cover'd with Thatch, and of a Pale of Timber cover'd*, this is Waſte, *which ought to be ſhewn in the Writ.* Br. Waſte, pl. 94. cites 22 H. 6. 24 Per Cur.

40. *Breaking a Hedge is not* Waſte. Br. Waſte, pl. 94. cites 22 H. 6. 24 Per Cur.

41. Deſtruction of *Saffron-heads in a Garden*, is not Waſte. Br. Waſte, pl. 143. cites 10 H. 7. 2.

42. Tho' there be *no Timber growing upon the Ground*, yet the Tenant at his Peril muſt keep the Houſes from waſting. Co. Litt. 53. a. (d)

43. *Barn-*

43. *Burning the Houſe by Negligence or Miſchance* is Waſte. Co. Litt. 53. b. (t)

44. A leaſed a Houſe and Land for Years by Indenture, in which was a *Clauſe, That if Leſſee* happens to *do any Waſte*, the *Leſſor may re-enter*. The *Leſſee ſuffer'd the Houſe to fall for want of covering* and repairing. Tho' the Words were (to do any Waſte) yet Dyer and Walſh, inclined that Leſſor might re-enter, becauſe ſuch Waſte is puniſhable by the Statute of Glouceſter, and the Words (any Waſte) is general and indifferent to either of the 2 Kinds of *Waſt*, viz. *voluntary or negligent* &c. Quære. D. 281. b. pl. 21. Hill. 11 Eliz. Anon.

2 Inſt. 145. ſays the Leſſor ſhall re-enter, and ſays, that the Words (to do or make Waſt) in legal Underſtanding in the Statute of Marlebridge, includes as well permiſſive Waſte, which is Waſte by Reaſon of Omiſſion, or not doing, as for want of Reparation, as Waſte by Reaſon of Commiſſion, as to cut down Timber-Trees, or proſtrate Houſes, or the like; and the ſame Word hath the Statute of Glouceſter, cap. 5. Que aver fait Waſt, and yet is underſtood as well of paſſive as active Waſt; for he, that ſuffers a Houſe to decay, which he ought to repair, doth the Waſte; So as this Word, facere, hath not only this Signification in a penal Statute, but in a Condition alſo.

45. The felling *Horn-Beams*, *Hazels*, *Willows*, *Sallows*, tho' *of forty Years Growth*, is no Waſte, becauſe theſe Trees would never be Timber; Per Meade J. Godb. 4. pl. 6. Hill. 23 Eliz. C. B. Anon.

46. *Diviſion* of a great Meadow into many Parcels by making of Ditches is not Waſte; for the *Meadows* may be the better for it, and it is for the Profit and Eaſe of the Occupiers of it. Sic dictum fuit. 2 Le. 174. pl. 210. Trin. 29 Eliz. C. B. Anon.

47. The *Breaking a Weare* is Waſte, and ſo of the *Banks of a Fiſh-pond*, ſo that the Water and Fiſh run out. Arg. and agreed per Cur. Ow. 67. Trin. 41 Eliz. in Caſe of Moyle v. Moyle.

48. If Leſſee of a *Hop-Yard plows it up* and ſows Grain there, it is Waſte, as it has been adjudg'd. Owen. 67. in Caſe of Moile v. Moile.

49. B. Leſſee for Years upon Condition to do no Waſte, there was a *Fiſh-Pond* on the Lands demiſed, *ſtored with Carps* &c. C. a *Stranger deſtroy'd all the Fiſh B. being on the Land*, and thereupon A. enter'd. The Queſtion was, whether this was Waſte within the Statute of Glouceſter? It was ſaid, that it was, becauſe Fiſh are Parcel of the Inheritance; But the Court gave no Opinion. 4 Le. 240. pl. 392. Anon.

50. *Leſſee for Years*, the *Trees being excepted*, has Liberty to take the *Shrowds and Loppings* for Fireboot; *if he cuts any Tree* it ſhall be *Waſte as well for the Loppings as for the Body* of the Tree; by Hubbard, and the whole Court, without Queſtion. Noy. 29. Rich. v. Makepeace.

51. The Law will not allow that to be Waſte, which is *no Ways prejudicial to the Inheritance*; Per Richardſon Ch. J. Het. 35. Mich. 3 Car. C. B. in Caſe of Barret v. Barret.

52. *Plowing*, *burning*, *and breaking Down-Lands* is Waſt. MS. Tab. Tit. Waſt, pl. 1. May 5th, 1710. or March 5th, 1712. Worſley v. Steuart.

[E] What Act ſhall be Waſte. *Of what Thing* ſimply Waſte may be, *without Collateral Reſpect.*

* Br. Waſt, pl. 44. cites S. C. —— ‡ Br. Waſt, pl. 130. cites 12 H. 8. 1.

1. OF White Thorns **Waſte may be by cutting down.** * 46 E. 3. 17. 9 H. 6. 67. **In** ‡ Quick Thorn, **(it ſeems it is White Thorn.)** ——Eradicating or *unſeaſonable cutting* of *White Thorns* is Waſte. D. 35. b. Marg. pl. 35 cites it as ſo held by Coke Ch. J. and the Court Tr. 4 Ja. in C. B. —— Cro. J. 126. pl. 15. Trin. 4 Jac. B. R. Anon. S. P. and ſeems to be S. C.

Stubbing or ſuffering to be deſtroy'd a *Quickſet Hedge* of White Thorn is Waſte. Co. Litt. 53. a. (m).

* Br. Waſt, pl. 7. cites S. C.

2. But **it is not Waſt to cut down** Black Thorns ſimply, **unleſs he cuts** a Wood of them **in Generality.** 46 E. 3. 17. * 9 H. 6. 10. b. **(but it does not ſhew what Thorns they are).**

F. N. B. 59. (m) —— If uſually cut and ſold every ten Years, it is no Waſte, but if he dig them up by the Roots, or *ſuffer the Germens to be bitten with Catle* after they are felled, ſo as they will not grow again, the ſame is a Deſtruction of the Inheritance, and Waſte lies for it. And *mowing the Stocks with a Wood Scythe* is a malicious Waſte; and continual mowing, and biting, is Deſtruction. Godb. 210. pl. 298. Sir John Gage v. Smith.

3. **If a Termor cuts down** Underwood of Hazel, Willows, Maple or Oak, which is ſeaſonable, **it is not Waſte.** M. 11 Jac. B. between *Sir John Gage and Smith*, **per Curiam.**

4. **If** Aſhes are ſeaſonable Wood to cut from ten Years to ten Years, **it is not Waſte to cut them down** for Houſeboot &c. 7 H. 6. 38.

Br. Waſt, pl. 82. cites S. C. but inſtead of 9 Years it is ſaid (60) Years in all the Editions, but the Year-Books are (9) as here in Roll. But it ſeems this may be owing to a Miſtake of the Manuſcript Copy, which might be as in the Year-Book in Roman Figures, viz. (IX) and the Printer miſtook the (I) for an (L) and ſo thought it (LX) which is the ſame as (60).

5. But if **the Aſhes are** groſs of the Age of 9 Years, and able for great Timber, **it is Waſte to cut them down.** 7 H. 6. 38.

* This is miſprinted for (11) H. 6. 1. b. —— Br. Waſt, pl. 134. cites S. C. (viz.) 11 H 6. 1. but ſays that this Caſe was totally *denied* in the Time of H. 8. for they are of the Nature of Timber and may be Timber, but by this Way they never can grow to be Timber.—And by Bromley Ch. J. and Hale J. the cutting Oaks of 10 or 8 *Years Growth* is Waſte; for they might be Timber hereafter, and Termor may take Oaks, Aſhes &c. which are *ſeaſonable Wood, which have been uſed to be fell'd every* 20, *or* 16, 14, *or* 12 *Years*. Br. Waſt, pl. 136. cites 4 E. 6.

6. **If** Oaks **are** ſeaſonable **and** have been uſed to be cut always at the Age of twenty Years, **it is not Waſte to cut them down at ſuch Age or under; for in ſome Countries where there is great Plenty, Oaks of ſuch Age are but ſeaſonable Wood.** * 10 H. 6. 1. b.

This muſt be by a *Cuſtom*, and ſuch Cuſtom may be *alleged in the Wood itſelf without ſaying, In tali Villa talis habetur Conſuetudo* F. N. B. 59. (m) in the New Notes there (d) cites 4 H. 6. 1. Raſt. Entr. 69. and ſee 40 E. 3. 52. 11 H. 6. 5.

Br. Waſt, pl. 134. S. P. cites 11 H. 6. 1. —— [And it ſeems that this is miſprinted in Roll, and inſtead of (7. b.) ſhould be (1. b.)]

7. But after **the Age of** 20 Years Oaks cannot be ſaid to be Wood ſeaſonable; **and therefore it ſhall be Waſt to cut them down.** 11 H. 6. 7. b.

——Some hold that Termor may take Oaks, Aſhes &c. *at* 25 or 27, *or* 30 *Years, if they be ſeaſonable Wood*, which is *called Silva Cedua*. Br. Waſte, pl. 136. cites 4 E. 6. ——Br. Waſt, pl. 134. ſays it was agreed at the Parliament at Sarum, that Conſultation lies of Silva Cedua, tho' it does not renew annually; whence it ſeems that Silva Cedua is not Waſte, as appears in the Regiſter.——F. N. B. 59. (M) in the new Notes

Notes there (d) ſays, that Oaks cannot be ſaid ſeaſonable Wood, which are paſt the Age of 20 Years; but by a Cuſtom in any Place where there is Plenty of Wood (Timber) Oaks under 20 Years may be ſeaſonable Wood; and that ſuch Cuſtom may be alleged in the Wood itſelf, without ſaying in tali Villa, or Hundredo talis habetur Conſuetudo &c. cites 11 H. 6. 1. 4 H. 6. 1. Raſt. Entr. 69. and ſays, See 40 E. 3. 25. 11 H. 6. 5 ——Oaks were *left* upon the Land *for Standils*, at the laſt Felling, according to the Statute, and were of the Growth of 16 or 20 Years. Upon the Felling the Oaks in the Cloſe at the Time when theſe were left, Tithes were paid for them. All the Court held, that the felling thoſe Oaks ſo left was not Waſte, inaſmuch as it was fell'd for Acre-wood. And Lord Coke ſaid, tho' it be of the Age of 20 or 24 Years, yet if the Uſe of the Parties be to fell ſuch for ſeaſonable Wood, it ſhall not be Waſte; and if Tithes are paid for it, it appears that it is not Timber. 2 Brownl. 150. 151. Paſch. 10 Jac. C. B. Brook v. Cobb.

8. **Waſte may be committed by cutting down of certain** Pear-trees. 7 H. 6. 38.

9. So **it may be committed in [cutting down] certain** Apple-trees. 7 H. 6. 38. Br. Waſt, pl. 39. cites 44 E. 3. 44.

—Ibid. pl. 82. cites 7 H. 6. 38.——Cutting of Apple-trees growing in a Garden, is Waſte; *but if they grow* [ſcatteringly] *in diverſe Places of the Land*, the cutting them is no Waſte. Br. Waſt, pl. 143. cites 10 H. 7. 2. For the Statute is in Terris, Domibus, Boſcis & Gardinis. Ibid.——Co. Litt. 53. a. S. P.

10. **Waſt may be committed** within the Statute in an Orchard, tho' **it is** not within the Words of the Statute. 44 E. 3. 44.

11. And if the Apple-trees are abated by a great Wind, and fall upon the Crops, **and ſeveral of the Boughs fall into the Land, and the ſame Apple-trees bear Fruit 2 Years after, if Leſſee** grubs them up, **it is Waſte.** 44 E. 3 44. b. Br. Waſt, pl. 39. cites S. C.

12. **So if Leſſee** ſuffers the Timber to be uncover'd, and after Reverſion eſcheats, **if Leſſee** after abates the Timber of the Houſe, and ſells it, **it is Waſte.** But **otherwiſe it is** if it falls after the Eſcheat without Abatement; **ſo that of Timber uncover'd voluntary Waſte may be [but] not negligent.** 45 E. 3. 3. b.

13. **If a** Houſe be feeble, and the Timber periſh'd at the Time of the Leaſe, **ſo that it cannot ſtand, by which** it falls within the Term, **it is not Waſte.** * 49 E. 3. 1. † 7 H. 6. 38. **Contra** 14 H. 4. 12. * Br. Waſt, pl. 54. cites S. C.—— † Br. Waſt, pl. 82. cites S. C.——S. P. Br. Waſt, pl. 130. cites 12 H. 8. 1.

14. **If the** Poſts of the Houſe are ſtanding, and the Remnant fallen, the abating of thoſe Poſts **is not Waſte; for it is not a Houſe, and Waſte ought to be aſſign'd in a Houſe.** 40 Aſſ. 22. Br. Waſt, pl. 107. cites S. C.

15. **If the** great Timber was ſtanding at the Time of the Leaſe, and the * Rafters fallen, **it is not Waſte to ſuffer it to fall; for he cannot cover the Houſe without the Rafters.** 49 E. 3. 1. b. * Orig. is (Cheverons)

16. **If the** Timber be decay'd, and the Walls ſtanding at the Time of the Leaſe, **it is Waſte to** ſuffer the Walls to fall. 49 E. 3. 1. b.

17. **If the** Houſe **be** uncover'd at the Time of the Leaſe, **yet if it** falls for want of Covering after the Leaſe, **it is Waſte.** Otherwiſe if **it falls for want of Covering** before. * 7 H. 6. 38. **Contra Co. Litt. 53.** Fol. 818. * Br. Waſt, pl. 82. cites S. C. ——*But* if a *Frame was once covered* in the Life of the Leſſor, and the *Leſſee eraſes it* after Leſſor's Death, the Heir ſhall have Waſt. F. N. B. 60. (Q) Marg. cites 45 E. 3. 3. 20.——Br. Waſt, pl. 117. S. P. cites S. C. but ſays that M. 2 Ma. 1. it was held *e contra* by the Chief J. *of a new Frame which never was cover'd.*——But it was agreed that if a *Houſe* be *ruinous for Default of any Covering at the Time of the Death of the Leſſor, and after the Tenant ſuffers it to be more ruinous*, that of this new Ruin the Heir ſhall have Action of Waſte; for this is a Waſte which continues; for of the Putritude which came in the Time of the Heir, the Heir ſhall have Action of Waſte. Contra of that which was in the Life of his Father. Br. ibid.

18. **If a** Grange falls before the Leaſe, and after the Leaſe Leſſee makes a new Grange, and does Waſte therein, **Action lies for it.** 12 H. 4. 5. b.

19. If

Br. Waſt, pl. 54. cites S. C.

19. If the Leſſor during the Leaſe makes a Cotage upon the Land without Conſent of the Leſſee, no Waſte can be committed in it. 49 E. 3. 1.

Br. Waſt, pl. 11. cites S. C.

[19] If the Baron builds a Houſe upon Land of which he is poſſeſs'd in Right of his Wife, and dies, if the Wife commits Waſte in it, the Action lies againſt her. 9 H. 6. 52. For ſhe ought to repair it.

If Leſſee for Years builds a Houſe, it is Waſte, and to let it fall is new Waſte. Arg. 6 Mod. 312. in Caſe of Tenant v. Goldwin.

20. If a Leſſee erects a new Houſe where none was before, if he abates it, Action of Waſte lies againſt him. 17 R. 2. Fitzh. Waſt, 118. Co. Litt. 53. Hobart's Reports, Caſe 295.

S. P. F. N. B. 60 (Q) in Marg. cites 40 Aſſ. 22 Waſt 24 by Knevet. ——Br. Waſt, pl. 107. cites S. C.

21. If a Guardian abates a Houſe newly built, which was never cover'd, it is not Waſte. (It ſeems it is intended that it was erected by the Heir or his Anceſtor.) 40 Aſſ. 22. adjudged.

* Br. Waſt, pl. 69. cites 12 H. 4. 5. S. P. but there it is if the (Houſe) be ſtanding.——The Tenant muſt repair it in convenient Time. Co. Litt. 53. a.

22. If a Houſe be uncover'd by ſudden Tempeſt, but the * Timber is ſtanding, if it afterwards falls or periſhes for Default of Covering, it is Waſte. 12 H. 4. 6. Co. Litt. 53.

Br. Waſt, pl. 69. cites S. C. & S. P. per Hull.

23. But if the whole Houſe be fallen by ſudden Wind, it is no Waſt if he does * not make a new Houſe; for the ſudden Wind excuſes the Waſte. 12 H. 4. 6. Co. Litt. 53.

Godb. 209. pl. 298. S. C. and S. P. agreed accordingly. ——Eradicating or unſeaſonable Cutting of Underwoods is Waſte. D. 35. b. Marg. pl. 33. cites it as ſo held by Coke Ch. J. and the Court. Tr. 4 Jac. in C. B.

24. If a Leſſee ſtubs up an Underwood which is ſeaſonable, it is Waſte. M. 9 Jac. B. M. 11 Jac. B. between *Sir John Gage and Smith*, per Curiam. Co. Litt. 53. Hobart's Reports, Caſe 295.

A Leaſe was made of a *Manor, except all Trees and Timber.* In it was a Great Cloſe of Great Wood, Parcel of the Manor. Part of the Great Cloſe was in Paſture, and Part in Great Wood, but the greater Part was in Great Wood. The *Leſſee had a Grant of the Herbage*, and aſſign'd his Intereſt to B. and B. uſed this for his Beaſts for Part of the Year. The *Trees are cut*, and B. puts in his Beaſts to eat the Paſture, and they eat ſome of the Germens, yet he is not puniſhable. Jo. 388. Paſch. 12 Car. B. R. Clithero v. Higgs.

25. If a Leſſee puts Beaſts into an Underwood, and they crop the Germens, ſo that the Roots thereby are Aridæ & Siccæ, it is Waſte. M. 9 Jac. B. between *Palmes and Page*, by 2 againſt one. M. 11 Jac. B. between *Sir John Gage and Smith*, per Curiam.

26. The Deſtroying of Germens is Waſte. 11 H. 6. 1. b. Hobart's Reports, Caſe 295.

* Br. Waſt, pl. 91. cites 22 H. 6. 13. F. N. B. 59. (M) S. P. and in the new Notes there (e) ſays ſee Waſte aſſign'd in permitting *Wood to be unincloſed*, whereby the Cattle eat the Germens, cites 11 H. 6. 1. 22 H. 6. 12. ——See (D) pl. 9.

27. If a Man cuts Trees, and after ſuffers the Germens to be deſtroy'd, this is a double Waſte, and he ſhall render double Damages. 9 H. 6. 67. * 22 H. 6.

28. The Deſtroying of Germens, when Tenant cuts an Underwood, is Waſte; for he ought to preſerve them. Co. Litt. 43.

4 Le. 240. pl. 392. Anon. S. P. ——S. P. Hob. 234. pl. 296. Hill. 15 Jac. Per Hobart Ch. J. in Caſe of Lord Darcy v. Askwith.

29. An Action of Waſte lies of a Piſchary. Hobart's Reports, Caſe 295. Co. Litt. 53.

30. Deſtruction

30. Deſtruction of the Deer of a Park **is Waſte; for it deſtroys the Store. Hobart's Reports, Caſe** 295. [296] Hob. 234. pl. 206. in Caſe of Ld. Darcy v. Askwith.——By Dyer, It is not Waſte unleſs all the Deer are deſtroy'd. But per Manwood, It is Waſte if ſo many are deſtroy'd, ſo as the Ground is become not parkable. 3 Le. 53. pl. 76. Mich. 15 Eliz. in C. B. in **Mavaſor's** Caſe, cites 8 R. 2. Fitzh. Waſt 97. That if there be ſufficient left in a Park, Pond &c. it is enough.——Ow. 36 S. P. and ſeems to be S. C.——Dal. 100. pl. 32. S. C.

31. **If a** Houſe **be** dejected by Tempeſt, and Leſſee ſells the Timber, **it is not Waſte; for after the Dejection, of which he is excuſed by the Tempeſt, the Timber is become a Chattle, in which no Waſte can be committed.** 29 E. 3. 33. **Curia, As it ſeems it is ſo to be intended.** 40 Aſſ. 22.

32. **If a Tenant** cuts down Fruit-Trees growing in a Garden or Orchard, **it is Waſte. Co. Litt.** 53. D. 35. b. Marg. pl. 33. —See pl. 9.

33. But **if the Fruit-Trees** grow **upon any Land which the Tenant holds** out of the Garden or Orchard, **it is not Waſte. Co. Litt.** 53. D. 35. b. Marg. pl. 33. —See pl. 9.

34. **If a** Houſe **be** ruinous at the Time of the Demiſe, **yet if the Leſſee** pulls it down, **it is Waſte. Co. Litt.** 53.

35. Waſte may be of *Mills* and *Vivaries*. F. N. B. 55. (G) 56.

36. *Lopping and Topping of Aſhes and Elms* is Waſte. Adjudg'd D. 65. pl. 2. Mich. 3 E. 6. Samuel v. Johnſon.

37. Where there is *a Wood in which nothing grows but Underwood*, the *Termor cannot cut all. Contra of Underwood where Oaks, Aſhes, and other principal Trees grow amongſt them*; for there he may cut all the Underwood. Br. Waſte, pl. 136. cites 4 E. 6. F. N. B. 60. (E) S. P. The French Edition cites Paſch. 40 E. 3. the laſt Edition, cites Paſch. 41 E. 3. 25. 42 E. 3. 6. 10 H. 7. 2.

38. In Treſpaſs the Queſtion was, whether a *Copyholder* might lop off the Boughs *without a Special Cuſtom*; and it was reſolved per Curiam, That by the Common Law he *may cut off the Under-boughs*, which cannot cauſe any Waſte. But the Amputation of the Top-boughs will cauſe the Putrifaction of the whole Tree; wherefore it is Waſte as well as the Decapitation thereof &c. Cro. E. 361. pl. 21. Mich. 30 & 31 Eliz. C. B. Dawbridge v. Cocks.

39. Waſte in cutting down 300 Oaks. The Defendant, as to 200, *pleaded That the Houſes* let unto him *were ruinous* &c. *and he cut them down to repair thoſe Houſes*; and *as to the Reſidue, he cut them down, and keeps them to employ about Reparations, Tempore opportuno* &c. Upon this Plea the Plaintiff demurr'd in Law; and by all the Court, without Argument, it was held to be no Plea; for if it ſhould, every Farmer might cut down all the Trees growing upon the Land, when there were not any Neceſſity of Reparations. Wherefore it was adjudged for the Plaintiff. Cro E. 593. pl. 33. Mich. 39 & 40 Eliz. C. B. Gorges v. Stanfield. Mo. 718. pl. 1004. Paſch. 35 Eliz. in the Court of Wards, S. C. but S. P. does not appear.

Fol. 819. [F] What Act ſhall be Waſte. Of what Thing. *Things annex'd to the Franktenement.*

Of Poſts &c. fix'd in the Land, and not to the Walls by Termor, and taken off within his Term, Waſte does not lie; for the Houſe is not impair'd by it; per Kingſmill J. and Grevil Serj. Quod non negatur. Br. Waſt, pl. 104. cites 21 H. 7. 26.——Br. Chattels, pl. 7. cites S. C.

1. THE Removing of a Poſt in a Houſe **is Waſte.** 42 E. 3. 6. b.

Br. Waſte, pl. 143. cites 10 H. 7. 2.—

2. So **the Removing** of a Door. 42 E. 3. 6. **Demurrer,** 10 H. 7. **5. Co. Litt. 53.**

In Waſt of taking away Doors, the Leſſee pleaded that he erected them. The Court took a Difference between *outer Doors and inner.* Per 3 J. Leſſee may take away the inner Doors within the Term, but not the outer Doors. Mo. 177. pl. 315. Mich. 24 Eliz. Cooke's Caſe, alias, Cook v. Humphrey.

Br Waſte, pl. 143. cites 10 H. 7. 2.

3. So **the Removing of a** Window. 42 E. 3. 6. **Demurrer accordingly,** 10 H. 7. 5. **Co. Litt. 53.** Glaſs-window, tho' glaz'd by Tenant himſelf.

Br. Waſte, pl. 143. cites 10 H. 7. 2— *So, tho' annex'd by the Tenant* himſelf. Co. Litt. 53. a.

per 2. Inst. 249.

4. The Digging up a Furnace **annex'd to the Franktenement,** and ſelling it, **is Waſte.** 42 E. 3. 6. **Demurrer accordingly,** 10 H. 7. 5. **Contra** 20 H. 7. 13. b. 21 H. 7. 26. **of** Removing within the Term. **Co. Litt. 53. accordingly.**

—The Difference is between a Furnace *fix'd to the Middle*, or to the *Wall of the Houſe*; and in the firſt Caſe the Leſſee may take it away, but not in the laſt; Per Dyer & Owen J. Ow. 71. in Caſe of Day v. Auſtin.——S. C. cited per Walmſley J. Cro. E. 374.

Waſte of removing a Furnace. The Defendant demurr'd, becauſe it is removeable. Quod conceditur by ſeveral, & adjornatur. Br. Waſte, pl. 26. cites 42 E. 3. 6.

Of a Furnace, Fats &c. fix'd in the Land, and not to the Walls, by Termor, and taken within the Term, Waſte does not lie; for the Houſe is not impair'd by it; Per Kingſmill J. & Grevil Serj. Quod non negatur. Br. Waſt, pl. 104. cites 21 H. 7. 26 —Br. Chattles, pl. 7. cites S. C.——A Furnace fix'd in Medio Domus is but a Chattle, and removeable; but otherwiſe if fix'd *to the Walls*; Per Walmſley, ſaid to have been agreed in Dyer's Time. Cro. E. 374. in Caſe of Day v. Bisbitch.——D. 272. b. pl. 33. Abergavenny (Ld.) v. Plummer.——So of a *Dyer's Fatt* fix'd to the Walls, adjudg'd not removeable on an Attachment. Cro. E 374. pl. 24. Hill. 37 Eliz. C. B. Day v. Bisbitch.——Ow. 1. S. C.

Br. Waſte, pl. 143. cites 10 H. 7. 2.——Tho' annex'd by the Tenant himſelf. Co. Litt. 53. a. (c)

5. **The** Removing **of** a Bench **is Waſte.** 10 H. 7. 5.

Tho' annex'd by the Tenant himſelf. Co. Litt. 53. a. (c)——If fix'd to a Wall, it is Waſte; per Anderſon. Cro. E. 374. in Caſe of Day v. Bisbitch.——*Wainſcot* annex'd by the Leſſor or Leſſee is Parcel of the Houſe, and whether by great or little Nails, Screws or Irons, put through the Poſts or Walls of the Houſe, is all one; but if by any way whatever it be *fix'd to the Poſts or Walls* of the Houſe, it is Waſte for Leſſee to remove them, and ſhall paſs by Grant of the Houſe in the ſame manner as the Cieling and Plaiſtering. 4 Rep. 64. cites it as Reſolved, Mich. 41 & 42 Eliz. C. B. by the whole Court, in Caſe of Warner v. Fleetwood.—— Kelw. 88. pl. 3. S. P.——But per Doderidge J. Wainſcot may as well be removed by a Leſſee as Arras Hangings. Roll R. 216. in Bridgman's Caſe.

6. **If** Wainſcot **annex'd to the Houſe be** taken away, **it is Waſte. Co. Litt. 53.**

7. **So the** Removing **of** Benches **annex'd to the Houſe is Waſte. Co. Litt. 53.**

Be the Glaſs fix'd to the Windows by Nails, or

8. **It is Waſte to take away** Glaſs-windows **fix'd, and** put to the Timber of the Windows. **Tr. 9 Car. B. Rot. 1746. between** *Sir John Corbet and Sir James Stonehouſe*, **admitted in Action of Waſte, after**

Verdict

verdict upon No Waſte done; and adjudged for Plaintiff, and ſo admitted in Writ of Error upon it in B. R. Hill. 9 Car. Rot. 133.

in any other manner, by the Leſſor or the Leſſee, it cannot be removed by the Leſſee; for without the Glaſs it is not a perfect Houſe. 4 Rep. 63. b. 64. in Herlakenden's Caſe, in a Note of the Reporter, cites it as Reſolved, Mich. 41 & 42 Eliz. in C. B. per tot. Curiam, in Caſe of Warner v. Fleetwood.——S. P. Co. Litt. 53. a.

9. If the Tenant ſuffers the *Groundſels* to waſte in his Default *of Defence, or removing the Water from off them, or of Dirt or Dung, or other Nuſance, which lies or hangs upon it*, the Tenant ſhall be charged; for he is bound to keep it in as good Caſe as he took it. Br. Waſte, pl. 110. cites 5 E. 4. 89.

If by *not ſcowring Ditch or Mote* the Groundſells of the Houſe are putrify'd, Waſte ſhall be aſſign'd in Domibus pro non Scourando &c. Ow. 43. 28 Eliz. Sticklehorn v. Hatchman.

10. Of *Tables dormant* &c. *fix'd in the Land, and not to the Walls, by Termor, and taken off within his Term*, Waſte does not lie; for the Houſe is not impair'd by it; Per Kingſmill J. and Grevil Serj. Quod non negatur. Br. Waſte, pl. 104. cites 21 H. 7. 26.

Br. Chattles, pl. 7. cites S. C.—— Tables dormant fix'd, cannot be removed, and if it be, it is Waſte; per Anderſon Ch. J. Cro. E. 374. pl. 24. in Caſe of Day v. Bisbitch.

11. *The ſame* ſeems to be there of *Pale* &c. *Quære of Eſtanke.* Br. Waſte, pl. 104. cites 21 H. 7. 26.

12. *Beating down a * wooden Wall*, or ſuffering a *brick Wall* to fall, is not Waſte, unleſs it be expreſsly *alleged that the Walls were cop'd or cover'd.* D. 108. b. pl. 31. Mich. 1 & 2 P. & M. Earl of Bedford v. Smith.

F. N. B. 59. (N) in the new Notes there (g) cites S. C. and 22 H. 6. 24.——So of a *Mud-wall* is Waſte. Br. Waſte, pl. 143. cites 10 H. 7. 2.

13. If Waſte be aſſign'd in pulling up a *Plank-floor and Mangers of a Stable*, Plaintiff muſt ſhew that the ſame *were fix'd.* D. 108. pl. 31. Earl of Bedford v. Smith.

14. If Leſſee erects a *Partition*, he cannot break it down without being liable to an Action of Waſte; for he has join'd it to the Franktenement; Per Meade J. Mo. 178. in Cooke's Caſe, cites 10 H. 7.

15. *Shelves* are Parcel of the Houſe, and not to be taken away. And tho' it is not ſhew'd that the Shelves were fix'd, it ought to be intended that they were fix'd; Per Coke Ch. J. 2 Bulſt. 113. Trin. 11 Jac. in Caſe of Lady St. John v. Piott.

Cro. E. 330. pl. 8. S. C. and S. P. accordingly.

16. *Pavement* is a Structure; for they uſe Lime to finiſh it; Per Coke Ch. J. 2 Bulſt. 113. in Caſe of Lady St. John v. Piott.

Cro. J. 329. 330. Mich. 11 Jac. C. B. Pyot v. Lady St. John, S. C. and held that it is within the Intention of the Covenant for repairing Edifices and Buildings, and it is Quaſi the Building.

[G] Of

[G] Of what Things Waſte may be *for Collateral Reſpect*, and of what not.

1. **Waſte lies for** Cutting ſeveral Loads **of** Black-thorns and Underwood, **in the Generalty.** 46 E. 3. 17. b. **(So the** Quantity **makes the Waſte.)**

Cutting down Trees which are in Defence of the Houſe

2. **The Cutting of** Willows, Beeches, Birches, Apſes, Maple, **or ſuch like,** ſtanding in Defence of the Houſe, **is Waſte. Co. Litt.** 53.

in Defence of the Houſe, whereby the Houſe by Tempeſts is blown down, is Waſte. Ow. 43. 28 Eliz. Stricklehorn v. Hatchman.

Where *Willows grow within the Site of the Houſe*, it is Waſte to fell them. Hob. 219. pl. 289. Paſch. 14 Jac. Guſſly v. Pindar.——D. 35 b. pl. 33. Marg. cites it as held by Coke Ch. J. and the Court, Tr. 4 Jac. in C. B. That Waſte cannot be aſſign'd in Succidendo & Vendendo white Thorns, unleſs it be ſpecially counted that they are within View, or in Safeguard of the Houſe, or in a Field depaſtur'd for Shade of Beaſts ——Cro. J. 126. pl. 15. Trin. 4 Jac. B. R. Anon. S. P. and ſeems to be S. C.

So cutting of *Willows* growing *within* the *View of the Manor*, was awarded Waſte; Per Cur. Br. Waſte, pl. 20. cites 40 E. 3. 15.—F. N. B. 60. (A) cites 40 E. 3. S. P.——Willows within View of the Manor, which *defend [it from] the Wind*, and cut by the Tenant, is Waſte. Contra if they grow in another Place; Per Brudnel. Br. Waſte, pl. 130. cites 12 H. 8. 1.

3. **If Leſſee** cuts Houſeboot in a Place where other People have Common, **it is Waſte; for it is apparent Diſinheritance, becauſe they cannot grow again.** 46 E. 3. 17. b.

* Orig. is (Rous Buſchiall.)

4. If Leſſee **be** of a Wood whereof another has Common of Eſtovers, **and Leſſee** cuts * Thorns or Buſhes as Houſeboot, **or make other ſuch lawful Cutting, and when they are growing afterwards the** Commoner cuts them **down, the Leſſee ſhall be puniſhed in Waſte for it.** 46 E. 3. 17. b.

Br. Waſte, pl. 82. cites S. C.

5. If great Aſhes **have** uſed to be cut for ſeaſonable Wood every 10 Years, **it is not Waſte to cut them** at ſuch Age. 7 H. 6. 38.

6. [So] if Oaks **have uſed to be cut when they are** of the Age of 20 Years, **as ſeaſonable Wood, they may be cut at ſuch Age, and it ſhall not be Waſte.** But after 20 Years **they cannot be cut as ſeaſonable Wood.** 11 H. 6. 1. b.

Cro. C. 531. pl. 8. S. C. accordingly. ——Hutt 110. S. C. but not S. P.

7. Black-thorn **may be ſuch Timber** in ſome Places, **ſo that the Cutting of them will be Waſte; for if a Man in Action of Waſte aſſigns Waſte done in cutting of** 6 **black Thorns, Exiſtentes Arbores Maheremiales ſparſim creſcentes, and Defendant pleads No Waſte done, and the** * Jury find that he cut 6 black Thorns Sparſim creſcentes exiſtentes Arbores Maheremiales, **the Plaintiff ſhall have Judgment; for they may be Arbores Maheremiales in ſome Places, and now the Jury has found them to be Arbores Maheremiales. H. 14 Car. B. R. between** *Cook and Cook*, **adjudged Per Curiam in Writ of Error, this being moved for Error. Intratur Trin. 14 Car. Rot. 1446.**

*Fol. 820.

It is not Waſte to cut Thorns, unleſs they are in a Wood

ſtubb'd and digg'd up by the Roots; but if they grow on the Land, then they may be ſtubb'd, and it is no Waſte; but to cut down Thorn-trees that have ſtood 60 or 100 Years, it is Waſte. Owen 67. in Caſe of Moile v. Moile. Tr. 41 El. Per Walmſley.——Thorns in ſome Countries, where Timber is ſcant, cannot be cut down without being liable to Waſt. Arg. Het. 35.

8. **If a Man** grants a Tree to one, and then leaſes the Land to another, **and** Grantee cuts during the Leaſe, **yet no Waſte lies.** 11 H. 4. 32. b. **(It ſeems becauſe it is not leas'd.)**

9. **The** Converſion of Trees to Coal for Fewel, when there is ſufficient dead Wood, **is Waſte. Co. Litt.** 53. b.

10. [Cut-

10. [Cutting] *Haſles* is Waſte, *where there is no other Wood in this Quarter of the Wood.* Br. Waſte, pl. 21. cites 40 E. 3. 25. Per Finchden. *Haſels*, is Waſte; *but cutting* Haſels and Willows *in a Wood of Oaks, is only Underwood, and no Waſt.* Nota the Difference. Br. Waſte, pl. 143. cites 10 H. 7. 2.——So if they *grow in diverſe Places of the Land*, it is no Waſte. Ibid.

Deſtroying of a *Wood of Willows or*

11. Cutting of *Willows which ſuſtain a Bank*, is Waſte; per Brudnell. Br. Waſt, pl. 130. cites 12 H. 8. 1.

Cutting *Willows, which grew on the Bank of a River, by which the Bank fell down, and a Meadow adjoining was overflow'd*, was held by Hobart and Winch (who only were preſent) to be Waſte. Win. 15, 16. Trin. 9 Jac. Sir George Stripping's Caſe.

[H] What Act ſhall be ſaid *Waſte. For Collateral Reſpect.*

1. **The Leſſee of Land, with Mines of Coals, Iron, and Stone in the Land,** digs the Mines, and ſells the Coals, Iron or Stone, **it is Waſte.** 17 E. 3. 7. **Admitted.**

2. But **otherwiſe it is, if he** digs for his Neceſſaries without ſelling. 17 E. 3. 7. b.

3. **If a Leſſee** digs Trenches in a Meadow to let out the Water, **by which the Meadow is meliorated, it is not Waſte.** Y. 41 El. B. R. **cited to be adjudg'd in** *Altham's Caſe.* **Hobart's Reports, Caſe 295.**

This Caſe is in D. 361. b. pl. 12. Hill. 20 Eliz. by the Name of Altman's Caſe, and by the Opinion of the Court it is no Waſte.——S. P. Obiter Hob. 234. in Caſe of Darcie v. Askwith; for it is a bettering a Thing in the ſame Kind.——S. C. cited Arg. Hutt. 103. Paſch. 5 Car. in Caſe of Paſton v. Utber.

4. No *Sale* is Waſte, if the firſt Act is not Waſte. If Leſſee fell and cut Timber-Trees, and ſells them, it is Waſte; *Non quia Vendebat ſed quia Scindebat.* Godb. 28. pl. 37. 27 El. C. B. Anon.

*[I] *By whom* the Act or Thing being *done*, ſhall be Waſte. *Acts of God.*

* This is (C) in Roll, but he has no Letter to any Diviſion preceding.

1. **If a** Houſe falls by Tempeſt, **he ſhall be excuſed in Action of Waſte.** 29 E. 3. 33. **Curia. Co. Litt. 53. b.** S. P. 2 Inſt. 303.——S. P. Br. Conditions, pl. 40. cites 12 H. 4. 5.——*But if* it be *uncover'd by Tempeſt, and ſtands*, there if the *Tenant has ſufficient Time to repair it*, and does not, the Leſſor may re-enter, but not immediately upon the Tempeſt; for it is no Waſte till the Tenant ſuffers it, ſo that the Timber be rotted; per Hull; and then it is Waſte. Br. Conditions, pl. 40. cites 12 H. 4. 5.——If he *ſuffers it to continue unrepair'd, ſo that at laſt the Houſe is caſt down by a Tempeſt*, it is Waſte. Mo. 62. pl. 173. Trin. 6 Eliz. Anon.

2. **So if** Apple-Trees **are** torn up by a great Wind, **it is not Waſte,** if Leſſee after cuts them. * 44 E. 3. 44. b. † 7 H. 6. 38.

* Br. Waſte, pl. 39. cites S. C.

† Br. Waſte, pl. 82. cites S. C.

* Br. Waſte, pl. 39. cites S. C.

3. The ſame Law if a Houſe be dejected by great Wind, it is not Waſte. * 44 E. 3. 44. b. † 12 H. 4. 5. b. 6. 18 H. 6. 336. [33. b.]

† Br. Waſte, pl. 69. cites S. C.

S. P. 2 Inſt. 303.

4. So if a Houſe be abated by Lightning. 18 H. 6. 33. b. Co. Litt. 53. b.

5. [But] If a Houſe be burnt by Negligence or Miſchance, it is Waſte. Co. Litt. 53. b.

Leſſee for Years *covenanted*, upon a Penalty of 10 l. *to repair the Banks of a River.*

6. If the Banks are well repair'd by the Leſſee, and the Water notwithſtanding ſubverts them, and ſurrounds his Meadow, by which it is become rushy, it is not Waſte. Contra 20 H. 6. 1. b.

They were afterwards broken down by a *ſudden outrageous Flood.* Fitzherbert and Shelly held, That he is excuſed of the Penalty, becauſe it is the Act of God; but he is bound by his Covenant to repair it, which he muſt do in convenient Time. D. 33 a. pl. 10. 11. Paſch. 28 & 29 H. 8. Anon.

In ſuch Caſe, if Banks *on the River Trent* are *unrepair'd*, it is Waſte; per all the Juſtices; becauſe the Trent is not ſo violent, but that the Leſſee by his Policy and Induſtry may well enough preſerve the Banks, and make the Water to run within its Bounds; but the Violence of the Sea is ſuch, that it cannot be reſtrain'd by any Policy, and therefore it is no Waſte if that by Tempeſtuoſneſs breaks the Walls, and ſurrounds the Land. Mo. 69. pl. 187. Trin. 6 Eliz. Griffith's Caſe.——Dal. 70 pl. 43. S. C.

S. P. 10 Rep. 139 b. (d) in Keighley's Caſe.—*But* if Leſſee *ſuffers a little Breach in the Wall to continue*, by means whereof the Violence of the Sea afterwards breaks all the Wall, and ſurrounds the Land, it ſeem'd reaſonable to Dyer that it was Waſte; per Dyer. Mo. 62 pl. 173. Trin. 6 Eliz. Anon.

7. If the Leſſee be to ſuſtain a Wall againſt the Sea, in Defence of the Meadow, and the Sea throws down the Wall by Tempeſt, and enters and ſurrounds the Meadow, without any Default in the Leſſee, no Action of Waſte lies. 17 E. 3. 65. Co. Litt. 53.

Fol. 821.

[K] Acts *of Strangers.*

The Statute of Marlbridge prohibits that Farmers ſhall not do Waſte; and yet if they ſuffer a Stranger to do Waſte, they ſhall be charged with it; for it is preſum'd in Law, that the Farmer may withſtand it. Et qui non obſtat, quod obſtare poteſt, facere videtur. 2dly, The Law doth give to every Man his proper Action, ſo as none of them be without due Remedy; and therefore in this Caſe the Leſſor ſhall have his Action of Waſte againſt the Leſſee, and the Leſſee his Action of Treſpaſs againſt him that did the Waſte; and ſo the Loſs, as Reaſon requires, in the End, ſhall be upon the wrong Doer; and if the Leſſor ſhould not have his Action of Waſte, he ſhould be without Remedy. 2 Inſt. 145, 146.

1. If a Stranger commits the Waſte, yet an Action of Waſte lies againſt the Leſſee; for in a Treſpaſs he ſhall recover his Damages againſt the Stranger. 49 E. 3. 26. b. 5 H. 4. 2. b. 3 H. 6. 17. 18 E. 3. 14. b. Curia.

And the Leſſor cannot, in ſuch Caſe, have Treſpaſs againſt the Diſſeiſor.

2. So if a Stranger diſſeiſes Leſſee, and commits Waſte, Waſte lies * againſt Leſſee for this; for he ſhall have his Remedy againſt the Stranger. 44 E. 3. 27. b.

Br. Waſte, pl. 37. cites S. C.

* S. P. Le. 264. pl. 354. 19 Eliz. C. B. by Manwood J.

3. If a Man who has Common of Eſtovers of Land in Leaſe, and he does Waſte in cutting ſuch Wood as he ought not, Action of Waſte lies againſt Leſſee for it. (For it ſeems he may have Treſpaſs againſt Commoner;

Commoner; for he is but as a meer Stranger for this.) 46 E. 3. 17. b.

4. But if an Abater does Waſte, and after the Lord recovers againſt him in a Writ of Right of Ward (the Heir being in Ward to him) the Heir ſhall not puniſh the Lord for the ſaid Waſte done before the Recovery, tho' it was objected that the Lord ought to have his Damage for this in the Right of the Ward, if he had pray'd it. But the Reaſon there is, becauſe the Heir may have Treſpaſs againſt the Abater (which is not Law). 44 E. 3. 27. b. Curia. Br. Waſte, pl. 37. cites S. C.

5. A Guardian ſhall not be puniſh'd in Waſte for Waſte done by a Stranger. Fitzh. Na. 60. (G). (It ſeems this is a good Reaſon of the Caſe of 44 E. 3. next before). 2 Inſt. 135. S. P. of a Guardian in Socage. — Againſt Guardians and *in Chivalry* in Socage, whether *en Droit or en Fait*, and whether *of the Grant of the King or of a Subject, or by Poſſeſſion without Right*, both a Prohibition of Waſte and an Action of Waſte lies at the Common Law; but none of theſe Guardians ſhall be charged but for voluntary or permiſſive Waſte, and not for the Waſte done by a Stranger. 2 Inſt. 305.

6. If Leſſee for Life leaſes for Years, and Leſſee [for Years] does Waſte, Waſte lies againſt Leſſee for Life. 49 E. 3. 26. b.

7. If an Abbot be Guardian and his Commoigne commits Waſte, Action lies againſt the Abbot. 49 E. 3. 26. b.

8. A Guardian ſhall not be puniſh'd for Waſte done by a Stranger, becauſe it is ſo penal to him; for he ſhall loſe the Body and Land and other Damage. Co. Litt. 54. F. N. B. 60. (G) cites 44 E. 3. 17. — S. P. Tho' the Waſte be but of 20 s. Value and it ſufficeth not to ſatisfy for the Waſte, then he ſhall recover Damages of the he Waſte, over and above the Loſs of the Ward. Co. Litt. 54. a. (1).

9. Tenant by the Curteſy and Tenant in Dower ſhall be puniſh'd for Waſte done by a Stranger. Co. Litt. 54. [a]. S. P. For he in the Reverſion cannot have any Remedy but againſt the Tenant, and the Tenant ſhall have his Remedy againſt the wrong-Doer, and recover all in Damages againſt him; for voluntary Waſte and permiſſive Waſte is all one to him that hath the Inheritance. But if the Waſte be done by the *Enemies of the King*, the Tenant ſhall not anſwer for the Waſte done by them, for the Tenant has no Remedy over againſt them. 2 Inſt. 303.

10. If 2 Jointenants of a Ward are, and the one does Waſte, both ſhall be puniſh'd in Action of Waſte. Co. Litt. 54. [a]. S. P. 2 Inſt. 305. cites 3 E. 3. 18. —

So of Waſte done in other Caſes by one. See 2 Inſt. 303.

11. An Infant ſhall be puniſh'd in Action of Waſte for Waſte done by a Stranger. Co. Litt. 54. [a].

12. Baron and Feme ſhall be puniſh'd in Waſte for Waſte done by a Stranger. Co. Litt. 54. [a]. If an *Infant is Tenant by the Curteſy, or Leſſee* for Life or Years, he ſhall anſwer for the Waſte done by a Stranger, and have his Remedy over tho' ſome have holden the contrary. And ſo it is in Caſe of a *Feme Covert*, for the Privilege of Coverture and Infancy in this Caſe ſhall not prevail againſt the Wrong and Diſheriſon done to him that has the Inheritance, eſpecially when they have their Remedy over, and the Eſtate is of their own Purchaſe or Taking. 2 Inſt. 303.

13. If Baron poſſeſſed of a Leaſe for Years in Right of his Feme, commits Waſte, and after the Feme dies, Action of Waſte lies againſt the Baron, becauſe the Law gives the Term to the Baron. Co. Litt. 54.

14. If *Thieves burn the Houſe* of Tenant for Life without evil keeping of Leſſee for Life's Fire, the Leſſee ſhall not be puniſh'd for it in an Action of Waſte. 2 Inſt. 303. cites it as adjudg'd in 9 E. 2.

15. A

15. A *Termor* ſhall be puniſh'd for Waſte done by a Stranger. F. N. B. 60. (G). And the new Edition cites 44 E. 3. 17.

16. If a *Monk does Waſte* the *Abbot* ſhall be thereof *charged, tho' the Monk dies*; for the Writ ſhall be againſt the Abbot, and it ſhall be ſuppoſed the Act of the Abbot. Br. Moigne, pl. 19. cites 49 E. 3. 25.

S. P. And the Monk ſhall not be named, but if the Abbot dies, the Action does not lie againſt the Succeſſor. Br. Waſte, pl. 55. S. C. —— *But for Treſpaſs of the Commoign Action ſhall be* brought *againſt the Abbot and Commoign, and if* the *Commoign dies* the *Action is determined*; Per Belknap for Law, quod non negatur. Br Waſte, 55. cites 49 E. 3. 25. —— Br. Moigne, pl. 19. cites S. C.

[L] Acts *of him who has the Right.*

1. IF an Abbot gives Leave to his Leſſee for Life without Deed to cut Trees and ſell, or do other Waſte, yet the Succeſſor may puniſh this Waſte. Dubitatur. 10 H. 7. 3. But there the Iſſue is after taken upon the Licence. And * 42 E. 3. 22. b. is that the Succeſſor Prior of an Hoſpital cannot; but Mention is there of a Deed.

* Br. Waſte, pl. 29. cites S. C. —— Per Keble, the Licence ought to be by Deed

But Fineux contra, and that the Licence being executed as here is good; For during the Leaſe the Leſſee has no Intereſt but to lop the Trees or to take Benefit of the Shade of them for his Beaſts, and Vaviſor concordat. Br. Waſte, 143. cites 10 H. 7. 2.

Fol. 822.

2. And it ſeems if the Licence had been by Deed, yet the Succeſſor might puniſh it; for it is not lawful for the Abbot or Prior to do Waſte himſelf, and by his Licence he cannot diſinherit his Houſe. 10 H. 7. 3. Contra * 42 E. 3. 22. b. in Caſe of a Prior of an Hoſpital.

It a Prior *Licences Leſſee to cut Trees*, the ſame ſhall diſcharge him in Waſte brought by the Succeſſor. But if Leſſee *cuts down* the Trees, *and then* Prior *releaſes to him*, it will not bar the Succeſſor; Per Walmſley. Godb. 117. in Caſe of Lewknor v. Ford, cites 21 H. 1.

* Br. Waſte, pl. 29. S. C.

3. If a Man leaſes a Cloſe and an Underwood, and between them there is a Quickſet Hedge, ſo that the Beaſts put into the Cloſe cannot come into the Underwood; if the Leſſor cuts and carries away the Quickſet Hedge, by which the Beaſts put into the Cloſe enter into the Underwood, and there crop the Germens, by which the Roots of them become Aridæ & Siccæ, this Act of the Leſſor ſhall excuſe the Leſſee, ſo that he is not puniſhable for this Waſte. M. 9 Ja. B. between *Palmes and Page*, Per Curiam.

The Defendant pleaded that the Leſſor (Plaintiff) did the Waſte himſelf, and the Plea was held good. 50 H. 4. 2. b. pl. 8. —— Fitzh. tit. Bar, pl. 238. cites S. C. —— Fitzh. tit. Treſpaſs, pl 258. cites S. C.

4. If Leſſor commits Waſte, he ſhall not have Action of Waſte for it. 5 H. 4. 2. b.

5. For if the Leſſee bars the Leſſor of the Action of Waſte by this Matter, it will bar his Action of Treſpaſs which he might have againſt Leſſor. 5 H. 4. 2. b.

6. It ſeems by 5 H. 4. 2. b. that if Leſſee recovers in Treſpaſs againſt Leſſor for the Waſte, that Leſſor may after have his Action of Waſte againſt him.

7. If a Man cuts a Tree upon Land in Leaſe, by Force of a Grant of the Leſſor prior to the Leaſe, no Waſte lies againſt Leſſee for it. 11 H. 4. 32. b. For he had the Right to the Tree.

8. If

8. If a Leſſee leaſes the Land to the Leſſor and a Stranger, **no Action of Waſte lies after the 2d Leaſe ended againſt the Leſſee, for** Waſte committed during the 2d Leaſe. 30 E. 3. 16.

9. So **it ſhall be,** tho' the Leſſor be within Age at the Time of the 2d Leaſe **made to him and the other,** and he diſagrees at full Age, if he takes the Profits within Age. 30 E. 3. 16.

10. But **otherwiſe it is, if he does** not take the Profits. 30 E. 3. 16.

[M] Waſte. *Juſtifiable* [or Excuſeable as to Trees.]

See Estate B. b. 17. & Com. Dig. Estate E. 3.

1. **A Leſſee may juſtify the** Cutting of Trees for Reparation of the Houſes. * 7 H. 6. 38. **Hobart's Reports, Caſe 295.** * Br. Waſte, pl. 82. cites S. C.——

F. N. B. 59. (K)———Co. Litt. 54. b.—S. P. By the Common Law. But in ſuch Caſe the Termor ſhall *pay the Wages and Salary of the Workmen out of his own Money*, and not cut Wood to ſell to pay the Wages. Agreed. Br. Waſte, pl. 112. cites 5 E. 4. 100.——And if he cuts Trees for Reparations, and *ſuffers the Trees to lie and putrify*, it is Waſte. Br. Waſte, pl. 112. cites 5 E. 4. 100.

2. [But] **the Leſſee ſhall** not **cut Trees** to make a new Houſe where there was not any at the Time of the Leaſe. 11 H. 4. 32. b. **Hobart's Reports, Caſe 295. Demurrer.** 18 E. 3 54. b.

3. **If a Leſſee** ſuffers a Houſe to fall for Default of Covering, **which is Waſte, he** cannot cut Trees to repair the Houſe. 44 E. 3. 44. Br. Waſte, pl. 39. cites S. C.

4. **If a** Stable falls without Default of the Leſſee in the Time of the Leſſor, **the Leſſee** may take Trees in the Time of the Heir to make a new Stable, if it be of Neceſſity. **Otherwiſe not.** 11 H. 4 32. b. Br. Waſte, pl. 67. cites S. C. but ſays Quære if the Neceſſity can make Iſſue.

5. But if **the Stable falls** in Default of the Leſſee, **in Time of the Leſſor, he cannot in Time of the Heir cut Trees to make a new Stable.** 11 H. 4. 32. b. Iſſue was taken whether it was well repair'd in the Time of the Plaintiff (the Heir) and fell in the Time of the Plaintiff, in Default of the Defendant. Br. Waſte, pl. 67. cites S. C.

6. **If a** Houſe falls by Tempeſt, or be burnt by Lightning, or proſtrated by Enemies of the King, **or ſuch like,** without Default of the Leſſee, **the Leſſee may rebuild it again with the ſame Materials that remain, and may** cut other Timber **upon the Land to rebuild it. Co. Litt. 53. [a]** F. N. B. 59. (L) S. P.—If *Strangers, Enemies of the King*, deſtroy a Houſe, or by ſudden Tempeſt it be burnt down, Waſte does not lie; Quod nota. But *contra* if it be *by Enemies, traiterous Subjects* of the King. Note the Diverſity. Br. Waſte, pl. 15. cites 33 H. 6. 1.——Br. Covenant, pl. 4. S. P. as to Alien Enemies, cites 40 E. 3. 5.——Br. Waſte, pl. 19. cites S. C.

7. So **in the ſaid Caſe, if the Houſe** was ruinous at the Time of the Leaſe, and fell within the Term. **Co. Litt. 53.** Fol. 823.

This is not Waſte in the Tenant. Br. Waſte, pl 130. cites 12 H. 8. 1.

8. [But] **If the** Tenant ſuffers the Houſes to be waſted, **he cannot juſtify the Felling of Timber to repair it. Co. Litt. 53. b.** F. N. B. 59. (K) S. P.—And in ſuch Caſe the felling Timber to repair the ſame is double Waſte. Co. Litt. 53. b.

9. **The Tenant may** dig for Gravel or Clay for Reparation of the Houſe, **and it is juſtifiable as well as cutting of Trees. Co. Litt. 53. b.**

F. N. B. 60. (Q) cites 49 E. 3. 2. —Co. Litt 53. a. S. P.—

10 **If a** Houſe be ruinous at the Time of the Leaſe, tho' the Leſſee is not bound to repair it, **yet he** may cut Trees to repair it. **Co. Litt. 54. b.**

Br. Waſte, pl. 89. cites 21 H 6. 46.——Ibid. pl. 230. cites 12 H. 8. 1.——D. 36. pl. 53. Trin. 29 H. 8 Contra per 2 Juſtices in the Caſe of Maleverer v. Spink.

If the Tenant *covenants to repair ſuch ruinous Houſe*, he may take Trees for it. Br. Waſte, pl. 130. cites 12 H. 8. 1.

By the Common Law the Leſſee ſhall have them, tho'

11. **The** Cutting of Trees **is juſtifiable** for Houſe-boot, Hay-boot, Plow-boot, and Fire-boot. **Co. Litt. 54. b. Hobart's Reports, Caſe 295. Demurrer, 18 E. 3. 54. b.**

the Deed does not expreſs it; but if he *takes more than is neceſſary*, he ſhall be puniſh'd in Waſte. Br. Waſte, pl. 130. cites 12 H. 8. 1.——S. P. per tot. Cur. Tho' the Leaſe for Years be without Deed, but they differ'd in Opinion as to Fold-bote. Br. Waſte, pl. 89. cites 21 H. 6. 46.——A Termor may take Wood for them, becauſe they belong to him of common Right. F. N. B. 59. (N) And ibid. in the new Notes there (i) ſays, he may take Oaks, Elms, Aſh &c. for Repair of the Houſe, and Underwood &c. for Incloſures and Firing; but ſays, Nota that Oak, Elm, Aſh, are not Underwood, cites 21 H. 6. ——Covenant by Leſſor that Leſſee ſhall have Houſe-boot, Hay-boot, and Fire-boot, without committing any Waſte, on Pain of forfeiting the Leaſe, this is no more than what the Law appoints, and therefore the *Covenant* vain. Cro. E. 604. pl. 18 Hill. 40 El. B. R. Archdeacon v. Jennor.

If Leſſee *juſtifies* in Waſte for *cutting Oaks for Fire-boot, he muſt ſurmiſe that there was no Underwood upon the Land*; ſo it ſeems where he takes Aſhes, or other Trees which are Timber. Br. Waſte, pl. 89. cites 21 H. 6. 46.——And by the beſt Opinion, and per Newton, *Oak and Aſh under the Age of* 16 *Years*, may be cut for Fire-boot. Ibid.

Leſſee for Life or Years, by the Common Law, cannot take Fuel but of *Buſhes and ſmall Wood*, and not of Timber-Trees; *but if Leſſor in the Leaſe grants Fire-boot expreſsly*, then if Leſſee cannot have ſufficient Fuel as above &c. he may take great Trees. 3 Le. 16. Mich. 14 El. C. B. Anon.

Br. Waſte, pl. 112. cites 5 E. 4. 100. S. P—

12. **If Leſſee** cuts Trees for Reparation, and ſells them, and **after** buys them again, and employs them for Reparation, **yet it is Waſte by the Sale. Co. Litt. 53. b.**

D. 35. b. pl. 33. S. P. Trin. 29 H. 8. in Caſe of Maleverer v. Spinke.

13. **If Leſſee** cuts Trees, and ſells them **for Money**, and with the Money repairs the Houſe, **it is Waſte. Co. Litt. 53. b.**

In an Action of Waſte for cutting of Trees, the Defendant juſtifies &c.

14. **The Tenant may take** ſufficient Wood to repair the Walls, Pales, Fences, Hedges, and Ditches, as he found them; **but he cannot make new. Co. Litt. 53. b.**

That they were *to make a Fence with Pale*; and by Hubbard, That it was good, *without ſhewing that the Fence was made of Pale* &c. *and now in Decay*. Noy 23. Jenkins v. Jenkins.

15. **Leſſee may** cut a Tree, and make thereof **an Alve**, (**that is to ſay**, a Veſſel to hold Water) and fix it in the Land **to him leaſed, to water the Beaſts in the ſame Land, which is neceſſary, becauſe the Water is a great way off.** 33 Aſſ. 31. **Adjudged.**

Hob. 234. pl. 296. Hill. 15 Jac. S. C.——Hutt. 19. S. C. adjudg'd accordingly for the Plaintiff.

16. **If a Man leaſes Land with General Words of** all Mines of Coals, where there is not any Mine of Coals open at the Time of the Demiſe, and after the Leſſee opens a Mine, **he cannot juſtify the** Cutting of Timber-Trees for making of Puncheons, Croſs-Rolls, Rolls, Scoops, and other Utenſils **in and about the ſaid Mine, without which he could not dig and get the Coals out of the Mine; becauſe when a Grant is made of a Thing, all Things which are** incident and directly neceſſary **are impliedly granted alſo. But this is like to a** new Houſe built after the Demiſe, **for the Reparation of which he cannot take Timber upon the Land; and it had been Waſte to open it, if it had**

had not been granted by expreſs Words. Hobart's Reports, between *Lord Darcy and Askwith*, Caſe 295. Adjudged. The Law had been the ſame if the Mine was open at the Time of the Demiſe. Hobart's Reports, Caſe 295. Per Hob.

17. Tenant for Life may cut *Underwoods ſeaſonable* to abate at the End of 10 Years; per Wichingan, which was denied; therefore Quære. Br. Waſte, pl. 21. cites 40 E. 3. 25.

18. It was agreed, that *Tenant for Years may cut Wood*; but it was doubted of * *Tenant at Will.* But it ſeems there, that as long as Tenant at Will is not countermanded, he may cut ſeaſonable Wood &c. Br. Waſte, pl. 114. cites 8 E. 4. 6. 7.

Tenant at Will cannot juſtify cutting Underwood, without Licence;

Per Littleton. Quod fuit conceſſum. Br. Waſte, pl. 131. cites 2 E. 4. 22.

19. Where a Man *leaſes a Wood which is only Great Trees*, the Leſſee cannot cut it, but ſhall have only the Grain. Br. Waſte, pl. 126. cites 12 E. 4. 2.

20. Cutting of *Dead Wood* is not Waſte. F. N. B. 59. (M)

21. Cutting *Wood to burn, where he has ſufficient Hedgewood*, is Waſte. F. N. B. 59. (M.)

22. Leſſee for Years was to take Hedgeboot *by Aſſignment*, yet he may take it without Aſſignment; for the Affirmative does not take away the Power which the Law gives him. D. 19. pl. 115. Trin. 28 H. 8. Anon.

23. If the *Leſſor is bound in a Bond of* 100 *l.* and the *Leſſee cuts* 20 *Oaks, and ſells them, and pays the Obligee* for his Leſſor, yet Waſte lies againſt him for cutting them down, tho' the Money was applied to the Uſe and Profit of the Leſſor. D. 36. b. pl. 38. Trin. 29 H. 8. in Caſe of Maleverer v. Spinke.

24. As to the cutting Timber-trees for Repairs by Leſſee, there is no *Difference* where the *Leſſor or the Leſſee covenants to repair* the Houſes; for in either Caſe it is not Waſte, if Leſſee cuts them. Mo. 23. pl. 80. Paſch. 3 Eliz. Anon.

Dal. 28. pl. 3. S. C. accordingly.—D. 198. b pl. 53. S. C. accordingly.

—S. C. cited Hob. 173. in Caſe of Stukeley v. Butler.—If *Leſſor covenants to repair, and does not*, Leſſee may cut down Trees for the repairing the Houſes. Brownl. 240. Anon.

25. *But* there is a Difference *where Leſſor covenants by another Deed*, and where *by the ſame Deed that Leſſee ſhall be diſpuniſhable of Waſte*; for there it is a good Bar in Waſte, becauſe by the Words, which are all in the Negative, he had diſcharged him of Waſte. But *where Leſſor covenants to repair the Houſes*, it is no Diſcharge to the Leſſee by Implication or Averment, that there ſhall not be a *Circuity of Actions*. But that is where there is an Equality of the Thing to be recovered in both Actions, which is not ſo here; for in Covenant he ſhall recover only ſingle Damages, but in Waſte treble. Mo. 23. pl. 80. Anon.

Dal. 28. pl. 3. S. C and S. P. accordingly.

26. If *Leſſor excepts the Trees* in his Leaſe, the Leſſee ſhall not have Fireboot, Heyboot &c. which he ſhould have otherwiſe; and the Property of the Trees is in the Leſſor himſelf. 4 Le. 162. pl. 269. in Sir Rd. Lewknor's Caſe, Arg. cites 14 H. 8. 1 & 2. and 28 H. 8. D. 19.

D. 19. a. pl. 110. Anon. S. C. is, that upon ſuch Reſervation Waſte will not lie againſt the Tenant for cutting Trees, becauſe they are not Parcel of the Things leas'd, but that Treſpaſs lies in ſuch Caſe.

27. If a Tenant that has Boots to his Houſe *in another Man's Land*, cuts Wood for that Intent to take his Boot-wood, and *the Owner* of the Land *takes it away*, an Action of Trover and Converſion lies againſt him by the Tenant of the Land who hath ſuch Boots. Clayt. 40. pl. 69. Auguſt 1636. Coram Barkley. Anon.

28. A. hath Common of Eſtovers in the Wood of B. for Houſeboot, and he cuts down four Trees for that Purpoſe to prepare his Boots, and *in the working they prove unfit* for that Uſe, As for Poſts of a Houſe &c. It was held that A. *cannot convert* this Timber to *any other Uſe* &c. As to Cooper's-ware &c. neither can he ſell and buy other fit Wood with the Money; and he cannot inlarge the Houſe with this Timber, nor board the Sides of the Barn there which had Mud-walls, or the like before. Clayt. 47. pl. 81. Auguſt 1636. Coram Barkley, Earl of Pembroke's Caſe.

Raym. 159. Trin. 18 Car. S. C. & S. P. accordingly.— Sid. 262. pl. 12. S.C. but S. P. does not appear.—Saund. 112. Mich. 19 Car. 2. S.C. but S. P. does not appear.

29. *Rent granted in Fee*, with a *Proviſo to enter and retain till ſatisfied of the Profits*; the Grantee upon Entry cannot cut Trees or do any Waſte; Per 3 Juſtices. 1 Lev. 171. Trin. 17 Car. 2. B. R. Jemmet v. Cooly.

(M. 2) Waſte. *Lies. In what Caſes.*

1. ACtion of Waſte does *not lie but upon a Leaſe made, or againſt Tenant by the Curteſy*, or Tenant in *Dower or Guardian*. F. N. B. 58. [b] (1) 59. a.

Brownl. 241. Laſhbrooke v. Saunders, S. C. adjudg'd that the Trees were demis'd.——2 And. 133. pl. 80. Lecheford v. Saunders, adjudg'd accordingly.— Noy 5. Lichfield v. Sanders, S.C. but S.P. does not appear.——S. C. cited Poph. 194. in Caſe of Sacheverel v. Dale, ſays it was reſolv'd that the Action lies * not; for notwithſtanding this Power, the Trees are demiſed to the Leſſee alſo.

2. A *Leaſe* was made *for Years* &c. *Proviſo*, and it is agreed between the Parties, *that it ſhall be lawful for the Leſſor and his Heirs at any Time* during the Term, *to fell and carry away the Wood and Timber-trees* growing on the Lands. Adjudged this was a Covenant only, and not an Exception of the Trees; and therefore Waſte well lies againſt him. Cro. E. 690. pl. 26. Trin. 41 Eliz. C. B. Luſhford v. Sanders.

* [The Word [not] ſeems to be inſerted by the Default of the Printer, eſpecially becauſe of the Reaſon added, which is the very Cauſe of its lying.]

(M. 3) Lies. In what Caſes. *In Reſpect of the Time of its being done.*

Br Eſtrepement, pl. 8. cites S. C.

1. WHere Writ of *Eſtrepement is awarded*, and after the *Tenant does Waſte*, the Plaintiff or Demandant ſhall have *Scire facias* of this Waſte. Br. Scire facias, pl. 118. cites 14 H. 7. 7.

Br. Eſtrepement, pl. 8. cites S. C.

2. *And in Aſſiſe after Verdict*, if the *Tenant does Waſte*, the Plaintiff ſhall have Scire facias of this Waſte. Br. Scire facias, pl. 118. cites 14 H. 7. 7.

Br. Eſtrepement, pl. 8. cites S. C.

3. *Contra* of Waſte *after Verdict in Formedon*; for it is his Folly that he had not ſued Writ of Eſtrepement before. Br. Scire facias, pl. 118. cites 14 H. 7. 7.

Br Eſtrepement, pl. 8. cites S. C.

4. *But* where *a Man brings Scire facias to have Execution of certain Land, and* the Plaintiff *ſurmiſes that the Tenant has done Waſte*, and prays Scire facias

facias thereof, he ſhall not have it, but *after Writ of Eſtrepement awarded*, and was made after, he ſhall have Scire facias. Quod nota; for *Scire facias does not lie only upon Surmiſe, but upon Matter of Record and Surmiſe*, it lies well; Quod nota. Br. Scire facias, pl. 118. cites 14 H. 7. 7.

(M. 4) In what Caſes *Waſte or Treſpaſs &c.* lies.

1. IF two *Tenants in Common* are, and the *one does Waſte*, the *other ſhall not have Treſpaſs but Waſte pro indiviſo*, by expreſs Words of the Book. *But if the one cuts and carries away the other's Corn*, of this Waſte pro indiviſo does not lie, but Treſpaſs lies by Award. Quod nota. Br. Waſte, pl. 122. cites 21 E. 3. 9.

2. If Guardian in Chivalry is, and the *Trees upon the Land are abated by a great Wind*, and *a Stranger carries them away*, this is no Waſte in the Guardian, and the Heir ſhall have Treſpaſs; for they belong to the Heir. And in Caſe of a Bailiff the Lord ſhall have Action as the Heir here, and not the Guardian or Bailiff. And ſo per Knivet clearly, the Guardian is excus'd of Waſte and Treſpaſs, as here. Br. Waſte, pl. 107. cites 40 Aſſ. 22.

3. In Waſte, the Tenant ſaid that the Waſte was done by great *Tempeſt* of Wind; Judgment. And the Plaintiff ſaid that the Tenant had *covenanted by his Deed to repair it* from time to time, *and to leave it ſo at the End of the Term*; Et non allocatur; but the Plea of the Defendant is good; for in ſuch Caſe he ſhall have Action of Covenant, and not Waſte. Br. Waſte, pl. 31. cites 43 E. 3. 6.

4. Waſte does not lie againſt *Tenant at Will*; for if he cut Trees Treſpaſs lies; Per Aſcue J. Br. Waſte, pl. 88. cites 21 H. 6. 38.

5. In Debt it was ſaid Arguendo, that if a Man *claims an Infant and his Land as his Ward where he has no Right to him, and does* Waſte, he ſhall be charged for it in Writ of Waſte; but *contra where he claims it to his own Uſe without Colour of Authority*; for there Treſpaſs lies and not Waſte. Br. Waſte, pl. 135 cites 32 H. 6. 7.

6 If the *Tenant covenants to repair ſuch an Houſe and does not do it*, Action of Waſte lies; quære inde; for it ſeems that only Action of Covenant lies; for it is a good Plea that it was ruinous at the Time of the Demiſe, and he may take Trees for it; Per Brooke. Br. Waſte, pl. 130. cites 12 H. 8. 1.

7. If a Man have *Common of Eſtovers* in the Woods of another, and he who is Tenant and *Owner of the Wood cuts down all the Wood*, he who ought to have the Eſtovers ſhall not have an Action of Waſte, but ſhall have an Aſſiſe of his Eſtovers. F. N. B. 58. (I).

8. A. leaſes a Manor *except Woods and Underwoods*, Leſſee *cuts the Trees*, yet an Action of Waſte lies not againſt him; for the Thing in which the Waſte was ſuppoſed to be committed was not demiſed &c. and therefore Leſſee ſhall be puniſh'd as a Treſpaſſor and not as a Farmer. Arg. Le. 49. pl. 62. Mich. 28 & 29 Eliz. C. B. in Caſe of Lewknor v. Ford.

S. P. held per Curiam. Goldsb 1. Forſter's Caſe. —— S. P. accordingly. D 19. pl 109. and 110 in Marg. —— *But if it be by Proviſo, that the Lord may enter and carry away* all the Underwoods, Waſte lies for cutting by Leſſee. D. 19. pl. 110. in Marg.

Fol. 824 [N] Of what Waſte no Action lies for collateral Reſpect. *For the Pettineſs.*

* Br. Waſte, pl. 70. cites S. C.—— Br Waſte, pl. 10. S.P.

1. NO Action lies of a Waſte but to the Value of a Penny; for de minimis non Curat Lex. 9 H. 6. 66. b. 42 E. 3. 13. * 14 H. 4. 11.

cites 9 H. 6. 55. where the Count is Ad damnum of 1 d. But if the Jury find the Damage ad Valentiam of 1 d it is good; Per Babington. Nota Diverſity.

* Br. Waſte, pl. 123. cites S. C.—And where after Confeſſion

2. So if the Jury find the Waſte but to the Value of a Penny, the Plaintiff ſhall not have Judgment. 9 H. 6. 66. b. to the Value of 6 d. or 7 d. * 19 H. 6. 8. b. becauſe it is no Diſinheritance.

of Waſte the *Plaintiff had a Writ of Inquiry* of Damages, *and it was found* 1 *d.* Per Curiam, *no Judgment ſhall be enter'd*; and by Anderſon, if Judgment had been entered, it had been Error; for the Value of Waſte ſhall be to 40 d. at the leaſt. Noy 4. Thore v. Thomas.

* F. N. B. 60. (C) cites S. C.—— * As where the Damage was found in

3. But if in Writ of Waſte of diverſe Things, the Waſte be found in ſeveral, tho' the Damages are in every Particular but to a ſmall Sum, yet the Plaintiff ſhall have Judgment, becauſe all together makes a great Sum. * 14 H. 4. 11. b. Adjudged 9 H. 6. 66. b. Co. Litt. 54.

one Houſe to the Value of 20 d. and in another to the Value of 22 d. and in another to the Value of 12 d. But otherwiſe where the Finding is in one or two Things only to a ſmall Value. Br. Waſte, pl. 70. cites S. C.

Br. Waſte, pl. 74. cites S. C.

4. If the Jury find the Waſte in a Grange to be but to the Value of 3 s. the Plaintiff ſhall not have Judgment, becauſe the Leſſee was not bound to ſuſtain a Grange of ſo ſmall a Value. 38 E. 3. 7. b. adjudged.

F. N. B. 60. (c) ſays it has been adjudg'd Waſte.

5. The Deſtruction of Trees to the Value of 3 s. 4 d. is Waſte puniſhable. Co. Litt. 45.

S. P. 2 Inſt. 306. And ſays, the Law appoints not of what Value the Waſte ſhall be.

6. Waſte done by a *Guardian to the Value of* 20 *d.* was adjudged Waſte and the Plaintiff recover'd. F. N. B. 60. (P) cites H. 34 E. 3. and in the New Notes there (e) cites 12 H. 8. 1. 7 H. 6. 38.

[O] *What Perſon ſhall have* Action of Waſte; [*and for Waſte done before his own Time.*]

Br. Waſte, pl. 49. cites S. C.——

1. THE Ward may have Action of Waſte againſt Guardian within Age. 48 E. 3. 10. b.

He may have Action within Age, *by the Statute which wills that the Guardian render Damage to the Heir, if the Ward loſt does not ſuffice to the Value of the Damage before the Age of the Heir.* And alſo Action of Waſte lay for him at full Age *by the Common Law.* Br. Waſte, pl. 68. cites 22 H. 4. 3.——And the ſame Law againſt Tenant in *Dower*; and in thoſe Caſes the Statute ſhall not be rehears'd in the Writ; Per Hanke. Ibid.

2. The

2. The Succeſſor Abbot or Prior ſhall have Action of Waſte for Waſte done in the Time of the Predeceſſor. 18 E. 4. 16. Fitzh. Na. 59. D. *42 E. 3. 22. 10 H. 7. 2. b. † 32 H. 4. 2. b. * Br. Waſte, pl. 29 cites S. C.—— † Br. Waſte, pl. 58. cites S. C.——Waſte by an Abbot *of a Stone-wall, and permitting a Houſe to fall*, and *cutting Apple-trees &c. upon a Leaſe made by the Predeceſſor.* And per Cur. Deſtroying of *a Wall within a Houſe* is Waſte; for it is Parcel of the Franktenement. Br. Waſte, pl. 143. cites 10 H. 7. 2. b.

3. The Succeſſor Prior of an Hoſpital ſhall have Waſte for Waſte done in Time of Predeceſſor, becauſe he is not to allege the Waſte to be to his Diſinheritance, but generally to the Diſinheritance of the Houſe and Hoſpital. *42 E. 3. 21. b. 22. b. Fitzh. Na. 59. (O) * Br. Waſte, pl. 29. cites S. C.

4. But the Succeſſor of ſuch Perſon who may make a Teſtament, ſhall not have Action of Waſte for Waſte done in Time of his Predeceſſor. 2 H. 4. 2. b. Br. Waſte, pl. 58. cites S. C.

5. As the Succeſſor of a Biſhop ſhall not have Action for Waſte done in the Time of his Predeceſſor. *2 H. 4. 2. b. Coke's Litt. 53. b. Dubitatur 39 E. 3. 15. b. * Br. Waſte, pl. 58. cites S. C.—— Co. Litt. 53. b. (f) S. P.——F. N. B. 59. (O) S. P.——But if Leſſee for Life or Years of the former Biſhop, who dies, does Waſte the See being void, the Succeſſor ſhall have Action of Waſte. Co. Litt. 356. a.—— F. N. B. 112. (H) S P.

6. The ſame Law of a Succeſſor Archdeacon. 2 H. 4. 2. b. Adjudged. Br. Waſte, pl. 58. cites S. C.

7. The ſame Law of a Parſon. Co. Litt. 53. b. F. N. B 59. (O) S. P——S. P And *ſo* it is of the Succeſſor *of a Prebendary.* F. N. B. 57. (F)——Br. Waſte, pl. 58. cites M. 2 H. 4. 2. S. P

8. The ſame Law of a Maſter of an Hoſpital. Co. Litt. 53. b. F. N. B 59. (O) S. P.——The *ſame* Law *of Mayor and Commonalty.* Br. Waſte, pl. 58. cites M. 2 H. 4 2

9. The Heir ſhall not have Action of Waſte for Waſte done in the Time of his Anceſtor, becauſe his Writ ought to be That it was to his * Diſinheritance, the which he cannot ſay. † 42 E. 3. 22. ‡ 45 E. 3. 3. b. Adjudged || 11 H. 4. 32. b. 9 H. 6. 10. b. 11. Co. Litt. 53. b. 2 H. 4. 3. b. And there it is ſaid, that there was an Ordinance (now repeal'd) made 20 E. 1. call'd William Botteler, that the Heir ſhould have Action.) 38 E. 3. 24. Admitted by Iſſue. * Fol. 825. Co. Litt. 53. b. (e) S. P.—— † Br. Waſte, pl. 29. cites S. C. ‡ Br. Waſte, pl. 41. cites S. C.—— || Br. Waſte, pl. 67. cites S. C.

Lands given *to two, and the Heirs of one of them*; he that has the Fee ſhall not have an Action of Waſte upon the Statute of Glouceſter, for that they are Jointenants; but his *Heir* ſhall have an Action of Waſte againſt the Tenant for Life. Co. Litt. 53. b——But this muſt be intended for Waſte done after the Death of his Anceſtor, who was the other Jointenant. See Br. Waſte, pl. 56. cites 50 E. 3. 9.

If Leſſee does Waſte in the Life of Leſſor, the *Heir* can have no Action of Waſte for this, becauſe he *cannot recover the treble Damages*, ſo neither can the *Executor*, becauſe he cannot recover Locum Vaſtatum, the Inheritance whereof is in the Heir. Wentw. Off. of Ex. 67.——See (E) pl. 17. in the Notes.

10. So Lord by Eſcheat of a Reverſion ſhall not have Action for Waſte done before the Eſcheat. 45 E. 3. 3. b. Br. Waſte, pl. 117. cites S. C.

——See Tit. Eſcheat.

11. If the Father dies ſeiſed of a Reverſion, and then Waſte is committed, and the eldeſt Son and Heir dies before Action brought, without Iſſue, the 2d Son ſhall not puniſh this Waſte; for it is a good Plea in Action by him, That he had an elder Brother who ſurvived the Father,

Father, after whoſe Death No Waſte [was] done. 9 H. 6. 10. b. 11.

So for Waſte done between the Fine levied and the Attornment; by the beſt Opinion of the Court. Br. Waſte, pl. 50. cites 48 E. 3. 15.

12. The Alienee ſhall not have Action of Waſte for Waſte done mean between the Grant of the Reverſion and Attornment. 18 H. 6. 23.

13. So the Alienor ſhall not puniſh this Waſte. 18 H. 6. 23.

14. If *Leſſee for Life and his Leſſor join in a Leaſe for Years* by Indenture, and Leſſee for Life dies, the *ſurviving Leſſor* ſhall have the Action for Waſte done, and ſhall count that he did demiſe alone. Brownl. 238. Trin. 8 Jac. Bedell v. Bedell.

15. *Succeeding Lord* ſhall not have Waſte for Waſte done in Time of a preceding Lord. Reſolved 2 Sid. 9. Mich. 1657. B. R. in Caſe of Chamberlaine v. Drake.

S. P. Per Vaughan Ch. J. 2 Jo. 3 in Caſe of Witherhead v. Harriſon, cites S. C.

16. *Fine levied* without Conſideration or Uſe expreſs'd, is to the Uſe of the Conuſor and his Heirs, who may have Action of Waſte after the Fine for Waſte committed before, as well as he could before the Fine; Per Vaughan Ch. J. Vaugh. 43. Hill. 21 & 22 Car. 2. in Caſe of Dixon v. Harriſon, cites Sir Moyle Finch's Caſe, 6 Rep. 68. b.

[P] What Perſon ſhall have [Waſte.] *In reſpect of Eſtate.*

S. P. 2 Inſt. 301.

1. A Remainder in Fee ſhall have Action of Waſte. 45 E. 3. 3. 48 E. 3. 16. 3 H. 6. 1. 14 H. 6. 25. b. 27 E. 3. 87. b. Dubitatur 17 E. 3. 8.

* Br. Waſte, pl. 28. cites S. C. ——

2. A Remainder in Tail ſhall have Action of Waſte. * 42 E. 3. 19. 48 E. 3. 16. † 50 E. 3. 3. b. 2 H. 4. 20.

† Br. Waſte, pl. 56 cites S. C.——S. P. 2 Inſt. 301.——So where Land is *deviſed to A. for Life, Remainder to B. in Tail*, Waſte lies for B. againſt A. Hutt. 110. Cook v. Cook.

3. Reverſioner in Tail ſhall have Action of Waſte. 45 E. 3. 3. b.

* Br. Waſte, pl. 40. cites S. C. —— † Ibid. pl. 65. cites S. C. —— ‡ Ibid. pl. 6. cites S. C.——Ibid. pl. 109. S. P. cites 5 H. 7. 5.

4. Lord by Eſcheat of a Reverſion or Remainder in Fee ſhall have Action of Waſte. * 45 E. 3. 3. adjudg'd. † 11 H. 4. 10. b. ‡ 3 H. 6. 1.

See (F. a) 2. — * Br. Waſte, pl. 60. cites S. C.

5. Tenant in Tail after Poſſibility ſhall not have Action of Waſte againſt Leſſee, for in Effect he has but for Life. * 2 H. 4. 20. 22. b. 3 H. 4. 5. b. Co. Litt. 53. b.

F. N. B. 59. (F) S. P.— Co. Litt. 53. b. (d)

6. If 2 Jointenants and to the Heirs of one are, and they Leaſe for Life, they Both ſhall have Action of Waſte. 46 E. 3. 17.

Br. Waſte, pl. 56. cites S. C.—— Br. Entre Cong. pl. 113. S. P. cites it as ſaid elſewhere.

7. But if 2 Jointenants are, and to the Heirs of one, if he who has for Life does Waſte, the other who has Fee ſhall not have Waſte againſt him for Cauſe of their joint Purchaſe. 50 E. 3. 3. b.

8. But his Heir ſhall have Action for Waſte done after his Death. 17 E. 3. 36. b. 68. b. 21 E. 3. 33. b. 24 E. 3. 27. b.

——He that has the Inheritance ſhall have no Action of *Waſte by the Statute of Gloceſter*, but

but upon the Statute of *W.* 2. *he ſhall* have an Action of Waſte. Co. Litt. 200. b.——S. P. For no other Action of Waſte can he have. 2 Inſt. 403.———S. P. as to the Statute of Glouceſter, becauſe they are Jointenants, but his Heir ſhall have ſuch Action againſt Tenant for Life. Co. Litt. 53. b. (u)——Co. Litt. 247. b. S. P.

9. If Leaſe for Life be to one Remainder to the Baron and Feme and to the Heirs of the Baron, Baron and Feme may join in Action of Waſte. 17 E. 3. 7. b. 50.

10. A Purchaſor ſhall have Action of Waſte, tho' the Statute ſpeaks of thoſe who are Inheritors. 17 E. 3. 7. b. In Waſte the Caſe was, that a Man *leas'd for Years*, and *within the Term ouſted the Termor, and infeoff'd the Plaintiff*; the *Termor reenter'd*, and the *Feoffee brought Action of Waſte*, and the *Termor pleaded No Waſte* done, and *found for the Plaintiff*, and he recover'd by Award; for here needs no Attornment where the Termor was ouſted and Livery made; and the Action was brought *as Aſſignee*, and well; for he may *vouch in Præcipe quod reddat*, and is Aſſignee. Br. Waſte, pl. 72. cites 5 H. 5. 12.

11. If a Reverſion be granted to two and to the Heirs of one of them they ſhall join in Action of Waſte. Co. Litt. 53. b. F. N. B. 59. (F) cites 22 H. 1. 25.—Contra 2 Mod. 61. Curtis v. Bourn.

12. So the Surviving Coparcener and Tenant by the Curteſy ſhall join in Action of Waſte. Co. Litt. 53. b.

13. If two Coparceners are of a Reverſion, and Waſte is committed, and then one Coparcener dies, yet the Aunt and the Niece ſhall join in an Action of Waſte. * Co. Lit. 53. b. F. N. B. 60. (R) S. P. and the new Notes there (f) ſay, See Kelw. 105. a.

11 E. 2. Waſte 115. 45 E. 3. 3. b. 11 H. 4. 16. b. 48 E. 3. 14. b. 35 H. 6. 23. b. Nat. Br. 101. 22 H. 6. 12. 49 E. 3. 2.

* Treby Ch. J. much doubted of this Caſe; for all Books there cited are nothing to the Purpoſe, except one, viz. Br. Waſte 41. and he ſays that this was a ſtrange Caſe, where one of them could not recover for Part, viz. Damages. Lutw. 803. in Caſe of Eaſtcourt v. Weekes.——Doubted per 3 Juſt. 1 Salk. 187. S. C.

14. 13 *E.* 1. *cap.* 22. *Whereas two or more* * *do hold Wood, Turf-land, or Fiſhing, or other ſuch thing* † *in Common, wherein none knoweth his ſeveral, and ſome of them* ‡ *do Waſte againſt the Minds of the other, an Action may lie by a Writ of Waſte.* This Act *extends not to Caſtles, Houſes*, or other Places for the Habitation of Man; for one Jointenant or Tenant in common might have had for Reparation of them a Writ de Reparatione facienda. 2 Inſt. 403.

* Theſe Words (*do hold*) imply a Freehold at leaſt. 2 Inſt. 403.

If Woods *be letten to two, the one for Life, and the other for Years*, they are not within this Statute, in Reſpect of the ſaid Words (do hold) 2 Inſt. 403.

† Theſe Words do *include as well Jointenants as Tenants in Common*; for both of them hold in Communi, and ſo do old Books and Records term them both; but tho' the Generality of theſe Words do extend to *Coparceners*, yet in good Conſtruction they are not within the Purview of this Act, becauſe they were compellable to make Partition; for this Act extends not to them that had Remedy by the Common Law. 2 Inſt. 403.—S. P. per Fitzherbert and Baldwin Ch. J. Br. Waſte, pl. 4. cites 27 H. 8. 13. But Brooke ſays, quære at this Day; for now Writ of Partition is given between Jointenants and Tenants in Common by the Statute of 31 & 32 H. 8.

A Parſon of a Church being Tenant in Common with another ſhall have an Action of Waſte upon this Statute. 2 Inſt. 403.———F. N. B. 49. (I) S. P.———See (B) pl. 5.—And it is holden, that an Action of Waſte upon this Act is maintainable between Jointenants or Tenants in Common for Lives, and yet the Words of the Writ be, Ad exhæredationem. 2 Inſt. 403.

‡ What ſhall be ſaid Waſte or Deſtruction in a Tenant for Life &c. ſhall be ſaid Waſte within this Act. 2 Inſt. 403.

If two Tenants in Common are of a Wood, and the *one leaſes his Part to the other for Years*, and he fells the Trees and does Waſte, he ſhall be puniſh'd for the Moiety of the Waſte, and the Leſſor ſhall recover the Moiety of the Place waſted; Per Dyer and Weſton. Mo. 71. pl. 194. Trin. 6 Eliz. Anon.

And when it is come unto Judgment, the Defendant ſhall chuſe either to take his Part in a Place certain, by the Sheriff, and by the View, Oath, and He *ſhall find* ſuch

convenient Surety as the Court ſhall allow of. 2 Inſt. 404

Aſſignment of his Neighbours, ſworn and tried for the ſame Intent, or elſe he ſhall grant to take nothing from henceforth in the ſame Wood, Turf-land, and ſuch other, but as his Partners will take.

Lord Coke ſays the Defendant [Quære if it ſhould not be (The Party injur'd)] hath at this Day a further Election, either to have an Action of Waſte upon this Act, or a Writ of Partition by the late Statute. [And in the Margin cites] 28. [but it ſeems it ſhould be 31] H. 8. cap. 1. and 32 H. 8. cap. 32. 2 Inſt. 404.

This is *not to be taken literally*; for it may be that the Place waſted is more than his Portion; and therefore it *muſt be underſtood* of *ſo much as belongs to his Part.* 2 Inſt. 404.

And if he do chuſe to take his Part in a Place certain, the Part waſted ſhall be aſſign'd for his Part, as it was before he committed the Waſte. And there is ſuch a Writ in this Caſe, that is to ſay, Cum A. & B. tenent Boſcum pro indiviſo, B. fecit vaſtum &c.

15. If *Baron and Feme make a Leaſe*, and the *Baron dies*, and the *Feme brings Waſte*, this is well, for it affirms the Leaſe; for it was not void. And it is no Plea, that the Feme had nothing but in Coparcenary with one A. who is in full Life not named in the Writ &c. Br. Waſte, pl. 94. cites 22 H. 6. 24.

Br. Surrender, pl. 23. cites S. C. That *where there are 2 Coheirs*, and the *Tenant for Life grants his Eſtate to the one*, this is no Surrender but for the one Moiety; and of the other Moiety, the other may have Writ of Waſte.

16. Where a Man *leaſes for Life, and has Iſſue two Daughters*, and *dies*, and the *one takes Baron*, and the *Tenant grants his Eſtate to the Baron and Feme*, this is no Surrender; per Vaviſor clearly. And if they commit Waſte, the other Siſter ſhall have Writ of Waſte againſt them in all their Names, and the Baron and Feme ſhall be ſummon'd and ſever'd. Br. Waſte, pl. 106. cites 21 H. 7. 40.

See Le. 177. pl. 249. Paſch. 31 Eliz. B. R. Hauxwood v. Husbands.

17. If *he in Reverſion and* the *Tenant for Life join in a Leaſe* for Life, and the Tenant does Waſte, both ſhall join in Writ of Waſte, and the Tenant for Life ſhall recover the Franktenement, and he in Reverſion the Damages. And ſo from hence it ſeems, that the Leaſe is as well the Leaſe of the Tenant for Life as of him in Reverſion. Quod nota. Br. Leaſe, pl. 2. cites 27 H. 8. 13. Per Fitzh. Shelley and Baldwin.

18. *Guardian in Socage* ſhall not puniſh Waſte done by a Stranger. F. N. B. 59. (G) and in the new Notes (e) ſays, ſee 46 E. 3. 17. Perk. 113. b. 4 E. 3. 16.

19. *Leſſee for Life*, Remainder *in Tail*, the Remainder *in Fee unto the Leſſee for Life*; if he commits Waſte, he ſhall be *puniſh'd by him in the Remainder in Tail*; and yet the Leſſee for Life hath the Remainder in Fee, but there is a meſne Eſtate of Inheritance &c. F. N. B 60. (B)

So Grantee of the Reverſion *by the King*, by his Letters Patents ſhall have Waſte without Attornment. F. N. B. 60. (I)

20. *Grantee by Fine of the Reverſion* ſhall not have a Writ of Waſte againſt the Tenant, before the Tenant attorns; *but* if a *Reverſion* eſcheats to the Lord, he ſhall have Waſte without Attornment. F. N. B. 60. (I) and the new Notes there (e) cites 34 H. 6. 6. 5 H. 7. 19. Nat. Br. 269.

Deviſee of the Reverſion ſhall have Waſte.

21. *Deviſee of Reverſion* in Fee ſhall have Waſte without Attornment. F. N. B. 60. (I)

Br. Waſte, pl. 121. cites 34 H. 6. 5. 6.

Ibid. in the new Notes there (g) cites 9 H. 6.

22. *Two Coparceners* are, and *one has Iſſue, and dies*, and her Husband is *Tenant by the Curteſy*, and *commits Waſte*, his *Son* ſhall *not* have Waſte againſt him *without naming the other Coparcener*; but if he bring ſuch Writ

Writ, it ſhall abate. F. N. B. 60. (R) cites Paſch. 2 H. 6. Title Waſte.

11. b. Dubitatur; but Kelw. fol. 103. a. pl. 64 is that the *Iſſue alone* ſhall have it. 15 H. 7. 14.——In Waſte *by the Heir*, it is a good *Plea that the Plaintiff has another Coparcener in full Life not named*, Judgment of the Writ; for the one cannot have Action without the other. Br. Waſte, pl. 8. cites 9 H. 6. 11.

23. If there are 3 *Tenants in Common pro indiviſo*, and *one commits Waſte*, the other 2 ought to join in an Action of Waſte againſt the 3d. F. N. B. 60. (S) cites M. 3 E. 2. Waſte.

24. *No Perſon* ſhall have an Action of Waſte, *unleſs he has the immediate State of Inheritance*; but ſometimes another ſhall join with him for Conformity. Co. Litt. 53. b. (d)

None ſhall have Waſte, but he that has Eſtate *in Fee-ſimple or Fee-tail.*

But a *Parſon or Prebendary* ſhall have a Writ of Waſte upon their Leaſe; yet ſome ſay they have not the Fee-ſimple in themſelves alone. F. N. B. 60. (K) and the new Notes there (a) cites Fitzh. Waſte, 5. Lit. 145. Nat. Br. 36——S. P. F. N. B. 57. (F)——A * *Parſon, Vicar, Archdeacon, Prebendary, Chantry-Prieſt*, and the like, ſhall have an Action of Waſte. Co. Litt. 341. a.

* S. P. but he cannot have Writ of Right. Br. Waſte, pl. 144. cites 10 H. 7. 5.

25. If I *grant the Reverſion of* my *Tenant for Life to another for Life*, now ſhall not I have an Action of Waſte. But if I releaſe to the Grantee for Life and his Heirs, now he has the Fee-ſimple, and ſhall puniſh the Waſte done after. Co. Litt. 273. a. b.

26. In ſome Special Caſes an Action of Waſte ſhall lie, albeit the *Leſſor had nothing in the Reverſion at the Time of the Waſte done.* Co. Litt. 356. a.

As if *Tenant for Life makes a Feoffment in Fee upon Condition*, and Waſte is done, and after the *Leſſee re-enters for the Condition broken*, in this Caſe the Leſſor ſhall have an Action of Waſte. Co. Litt. 356. a.

So if *Leſſee for Life* be *diſſeiſed, and Waſte is done*, the Leſſee *re-enters*, an Action of *Waſte ſhall be maintain'd againſt the Leſſee*, and ſo in like Caſes; and yet in none of theſe Caſes the Plaintiff in the Action of Waſte had any thing in the Reverſion at the Time of the Waſte made; but theſe ſpecial Caſes have their ſeveral and eſpecial Reaſons. Co. Litt. 356. a.

27. *Leaſe for Life, Remainder to Baron and Feme in Special Tail.* Leſſee *does Waſte. Feme dies without Iſſue.* The Baron cannot have Waſte by the Statute. But Brown ſaid, If the Remainder be limited over to the Baron and his Heirs, and the Wife dies after Waſte done, he thinks the Baron ſhall have Waſte, becauſe the Tenancy in Tail after Poſſeſſion, is drown'd in the Inheritance. Quod Dyer negavit. Mo. 18. pl. 64. Mich. 2 Eliz. in an Anonimous Caſe.

28. Leaſe for Life. *Leſſee for Life leaſes for Years, and* after *ſurrenders to* him in *Reverſion in Fee.* He in Reverſion ſhall not have Waſte, becauſe the Tenant for Life, who ſurrender'd, could not have Waſte in this Caſe; per Popham. Mo. 94. pl. 232. Paſch. 12 Eliz. in Caſe of Lord Treaſurer v. Barton.

29. *So if Tenant for Life purchaſed Reverſion in Fee*, he ſhall not have Waſte during his own Life. Mo. 94. pl. 232. Paſch. 12 Eliz. in Caſe of Ld. Treaſurer v. Barton.

30. A Leaſe was made *to A. for Life*, the Remainder *to B. in Tail*, the Remainder *to the right Heirs of B. who* bargains and ſells all his Eſtate, or *levies a Fine*, with Proclamations of it *to D.* A. commits Waſte. It was holden by the Court, That D. ſhall not puniſh him in an Action of Waſte; for nothing paſſes to him but during the Life of the Grantor, viz. As to the Remainder in Tail, in reſpect of which Eſtate the Action of Waſte is only maintainable: For although that the Fee-ſimple paſſeth to the Grantee or Conuſee, yet in reſpect of that an Action of Waſte is not maintainable, untill the Eſtate-Tail be ſpent. 3 Le. 60. pl. 88. Hill. 18 Eliz. in C. B. Owen and Sadler's Caſe.

31. *A.*

31. *A. Tenant for Life* Remainder *to* B. *in Taile, B. bargain'd and ſold to J. S.* and his Heirs, *and levied a Fine* to the Uſes accordingly. *A. commits Waſte. J. S. brought Action*, and declared againſt him, but did *not ſet forth the Fine to be with Proclamations*, for which Reaſon the Juſtices thought they ought to intend it to be without Proclamation, and then they ſay, that the Bargainee is not ſuch a Grantee of the Reverſion as may have Waſte, notwithſtanding that he has the Reverſion to him and his Heirs; for his Eſtate is only for the Life of Tenant in Tail, there being no Diſcontinuance. Mo. 220. pl. 359. Mich. 27 & 28 Eliz. Owen's Caſe.

32. A Man's *Farmer committed Waſte*, and afterwards *he in Reverſion covenanted to ſtand ſeiſed to the Uſe of his Wife for Life, and after to* the Uſe of *himſelf and his Heirs*; his Wife dies; if he be in his Fee untouch'd, he ſhall puniſh the Waſte; if he be in by the Statute, he ſhall not puniſh it. Ld. Bacon on the Statute of Uſes. 353, 354.

33. *Husband and Wife* during the Coverture make a Leaſe. They ſhall join in the Action of Waſte. Brownl. 238. Anon.

Same Difference was agreed. Carth. 203. Hill. 3 W. & M. in B. R. in Caſe of Cudlip v. Rundle.

34 A Man *ſeiſed in Fee* ſhall not have an Action of Waſte for *Negligent* Waſte *againſt his Leſſee at Will*, but if Leſſee at Will *to Leſſee for Years* does ſuch negligent Waſte, the Leſſee for Years may have an Action againſt him, becauſe he *is anſwerable over* to his Leſſor. Not but that he, as well as a Tenant in Fee, might ſecure himſelf by Covenant. 1 Salk. 19. pl. 9. Paſch. 13 W. 3. B.R. Panton v. Iſham.

35. *Tenant in Tail* by Leaſe and Releaſe, or by Bargain and Sale, or by Covenant to ſtand ſeiſed, *conveys to* B. *and his Heirs*, the Eſtate Tail is not in Abeyance but in the Alienees, and not in the Tenant in Tail, and he cannot afterwards bring Waſte for Waſte done after; Per Holt Ch. J. 2 Salk. 620. Trin. 1 Ann. B. R. in Caſe of Machil v. Clark.

Litt. S. 649. 650. and Ld. Coke's Commentary upon it. Co. Litt. 345. a. b. accordingly. —— * But that Tenant in Tail cannot grant any greater Eſtate than for his own Life, was queſtion'd, per Holt Ch. J. to which the reſt of the Judges agreed; and held that his Grantee has a baſe Fee not determin'd by the Death of Tenant in Tail, but continuing in the Grantee or Releſſee &c. till actual Entry made by the Iſſue in Tail. See the Reaſons thereof, 7 Mod. 23. Trin. 1 Annæ B. R. Machil v. Clarke. ——— See S. C. accordingly, 2 Salk. 619. ——— And Matchel v. Clerk S. C. accordingly, 11 Mod. 19. ——— And Comyns's Rep. 120. S. C.

36. If there be *Tenant for Life*, Remainder *in Tail*, and the *Tenant in Tail releaſes to the Tenant for Life all his Right*, this had put the Tail in Abeyance; ſo that he could not afterwards have maintain'd an Action of Waſte; *but if the Remainder had been in Fee*, and he in *Remainder had releaſed all his Right*, the Remainder ſtill continues in the Tenant in Fee, and he may have an Action of Waſte. And the Reaſon of the Difference is this, that when the Tenant in Fee releaſes all his Right, he only confirms the Eſtate to Tenant for Life, during his Life; and for want of Words of Inheritance, it paſſes no farther Intereſt, and therefore he has ſtill a Remainder depending on an Eſtate for Life, to which an Action of Waſte belongs. But Tenant in Tail cannot by the Releaſe of all his Right paſs an Eſtate during the Life of the Releaſee, but * only paſſes an Eſtate during his own Life; and therefore having put all his Right out of him he cannot bring an Action relating to ſuch Right. G. Treat. of Ten. 119, 120.

[Q] *Againſt whom* the Action lies. *In Reſpect of the Eſtate of the Leſſee.*

Fol. 826.

1. **Action of Waſte does not lie againſt** Tenant in Tail after Poſſibility, **for the Highneſs of the Eſtate which was once in him of Inheritance, and alſo as ſome ſay, becauſe the Eſtate was not** within the Statute at the Creation. 39 E. 3. 16.

S.P. reſolved 11 Rep. 80. a. Paſch. 13 Jac. B R. in Lewis v. Bowles's Caſe.—F. N. B. 59. (P) S P.———S. P *But* ſuch Tenant ſhall not have the Trees &c. which he cuts. 4 Rep. 63. Paſch. 31 Eliz. B. R. in Herlakenden's Caſe. ——— See Tit. Tayle after Poſſibility (L) pl. 2. and the Notes there.

2. **If a** Leaſe for Life **be made** to a Villein, **and the** Lord enters, and after does Waſte, **tho' he comes in** in the Poſt, **yet Action of** [**Waſte**] **lies againſt him for Waſte done by himſelf. Co. Litt. 54.** [a].

3. **Action of Waſte lies againſt an** Occupant for Life, **becauſe he has the Eſtate of the Leſſee for Life, and holds in for Life as the** Statute **mentions. Co.** 6. *Dean and Chapter of Worceſter*, 37. **b. Reſolved. Co. Litt.** 44. **b.** 54. [a].

S. P. 2 Inſt. 301. And ſo it is of the Lord who enters on his Villein for Life.

4. **If** Leſſee for Life **be** attainted of Treaſon, **by which the Leaſe is forfeited to the** King, **who** grants it over to J. S. and he after does Waſte, **tho' he comes in** en le Poſt, **yet Action of Waſte lies againſt him. P.** 12 **Ja. B. R.** *Darcie's* **Caſe; Per Coke.**

5. **An Action of Waſte does not lie againſt** Tenant by Statute Merchant, Elegit or Staple, **becauſe it is not an Eſtate for Life or Years, and the** Statute mentions thoſe who hold in any Manner for Life or Years. **Co.** 6. *Dean and Chapter of Worceſter*, 37. **a. b. agreed. Co. Litt.** 54. **Contra Fitzh. Na.** 58 **H. and there ſaid, that in the Regiſter is a Writ againſt him; quod vide** 75. **But in the Margin, quære if it be maintainable by the Law againſt him, apud Belford, Anno** 7.

F. N B. 58. (H) S. P. and in the New Notes there (a) cites 21 E. 3. 26. that a *Scire facias* was brought againſt a Tenant *by Elegit*, who had cut Trees, *to pay the Reſidue of the Money to anſwer for the Trees cut, and* for the Plaintiff *to have his Land again*; Per Curiam. By the Statute againſt cutting Trees this is in the Nature of a Treſpaſs, and lies not in Account, nor is he puniſhable in Waſte, but in an *Action on the Caſe only.*—— Waſte lies not againſt Tenant by Elegit, but *Writ of Account*; Quod nota bene. Br. Waſte, pl. 78. cites 21 E. 3. 30.

6. **Some Books give** the Reaſon of it to be **becauſe the Conuſor, if he commits Waſte, may** have a Venire facias ad Computandum, **and ſo the Damage for the Waſte ſhall be** recoup'd. **Fitzh. Na.** 58. **b.** [**H**].

If ſuch Tenant cuts Timber *it ſinks the Debt*, and the Conuſor may have *Scire facias* ad Computandum. 3 Mod. 93. Arg. in Caſe of the Mayor and Commonalty of Norwich v. Johnſon.——— Br. Waſte, pl. 138. S. P. cites 23 H. 8.

7. **An Action of Waſte lies againſt** a Deviſee, **and the Writ may** ſuppoſe it Ex Legatione; **for it is within the Equity of the** Statute. **10 H.** 6. 8. **b. adjudg'd. Co.** 10.

Br. Waſte, pl. 132. cites S. C.—— Theloal's Dig. of Writs, lib. 10. cap. 5. S. 26. cites S. C.

8. **No Action of Waſte lies againſt** Guardian in Socage, **but an Account or Treſpaſs. Co. Litt.** 54.

S. P. contra F. N. B. 59. (E) ——

And 2 Inſt. 135 ſays, the Heir within Age ſhall have an Action of Waſte againſt the Guardian in Socage.

cage.—— But F. N. B. 59. (E) in the New Notes there, (d) it ſays that *the Heir* in this Caſe ſhall have Account or Treſpaſs, but not Waſte, and cites 46 E. 3. 17. 7 H. 6. 23. 17 E. 3. 7. 7 E. 3. 54. 2 H. 5. 7.——— And ibid. (A) in the New Notes there (d) ſays, Note, Waſte does not lie againſt Guardian in Socage, but only Account or Treſpaſs, according to the Nature of the Waſte, and ſays it was adjudg'd 16 E 3 Waſte, 100.

If *Guardian in Socage in Right of his Wife* does Waſte, the Writ ſhall be againſt the Husband only. Brownl. 239. cites M. 27 E. 1. Rot. 329.

If Guardian *in Chivalry* commit Waſte, the Heir ſhall have an Action of Waſte as well at full Age as within Age. And if a Man be in Ward unto the Lord by Reaſon of the Uſe of Lands, becauſe that certain Perſons were ſeiſed in Fee of the Lands holden by Knights Service unto the Uſe of his Father and his Heirs; now if the Guardian commit Waſte, the Heir within Age or of full Age, ſhall have the Action of Waſte againſt the Guardian, and yet the Heir has not the Reverſion of the Lands, but the Uſe only. But that is given by the Statute of 4 H. 7. cap. 17. F. N. B. 59. (A).

9. If a Man *diſſeiſes the Tenant for Life, and does Waſte*, Action of *Waſte lies againſt the Tenant for Term of Life*; for *he may have his Remedy over againſt the Diſſeiſor.* Br. Waſte, pl. 138. cites 23 H. 8.

10. If an Eſtate of Lands be made *to Baron and Feme to hold to them during the Coverture* &c. if they do Waſte, the Feoffor ſhall have Writ of Waſte againſt them. Litt. S. 380. 381.

11. If an Eſtate be made *to A. and his Heirs during the Life of B.* A. dies, *the Heir of A. ſhall be puniſhed* in an Action of Waſte. Co. Litt. 54. a. (s)

12. If a Man make a *Leaſe for Years*, and *puts out the Leſſee*, and *makes a Leaſe for Life*, and the *Leſſee for Years enters upon the Leſſee for Life, and does Waſte*, the Leſſee for Life ſhall not be puniſhed therefore. 2 Inſt. 303.

13. *Leſſee for Years* makes a *Leaſe of one Moiety to A.* and of the *other Moiety to B.* A. does Waſte; the Action ſhall be againſt both; for the Waſte of the one is the Waſte of the other. Brownl. 238. Anon.

[R] Againſt whom it lies.

*Fol. 827.

1. IF Feme Leſſee for Life takes Baron, who does Waſte, **Action lies againſt both.** 33 H. 6. 31. 17 E. 3. 68. b.

Br. Waſte, pl. 138. cites 23 H. 8.

2. [And] **if Feme Leſſee for Life takes** Baron, **who commits Waſte and dies, Action of Waſte lies againſt the Feme for it.** Time E. 1. **Fitzh. Waſte** 128.

Kelw. 113. pl. 42.— Tho' there have been Variety of Opinions in our Books.

3. If Baron and Feme Leſſees for Life **are, and** Baron does Waſte, and dies, **the Feme ſhall be puniſh'd in Waſte,** if ſhe agrees to the Eſtate. 21 H. 6. 24. b. **Cooke Litt. 54. Contra** 42 E. 3. 23. 2 H. 4. 8. **Curia. Time of E. 1. Fitzh. Waſte** 128. **Demurrer.**

Co. Litt. 54. a. (o) See the Caſes there cited in Marg.——— She ſhall be puniſh'd for the Waſte done by her Husband in like Manner as if a Stranger had done it; and after the Death of her Husband ſhe is in from the Leſſor. 2 Inſt. 303.

4. But if ſhe waives the Eſtate, **ſhe ſhall not be charged.** 21 H. 6. 24. b.

Br. Waſt, pl. 127. cites 17 E. 4. 7.

5. So upon Leaſe for Years **made to the Baron and Feme, Waſte lies againſt both.** 2 H. 4. 19. b.

6. So **upon Leaſe** for Life **to them, Waſte lies againſt both. Time of E. 1. Fitzh. Waſte** 128.

S. P. And the Writ may be Quod fecerunt vaſtum, or Quod Uxor, dum ſola fuit, fecit Vaſtum. Br. Waſte, pl. 55. cites 49 E. 3. 25. Per Haſtes and Kyrton.

7. If Feme commits Waſte, and takes Baron, **the Action ſhall be brought againſt both.** 49 E. 3. 26.

8. Te-

8. Tenant in Dower takes Baron, who does Waſte, and dies, **the Feme ſhall not be puniſhed for this.** 15 H. 3. **Fitzh. Waſte** 133.

9. **But if** Baron and Feme are Joint-leſſees for Years, **and** Baron does Waſte, and dies, **Action of Waſte lies for this againſt the Feme.** 7 H. 6. 2. b. The Feme ſhall not be puniſhed for this Waſte; Per Hanke, quod non negatur. Br. Waſte, pl. 58. cites M. 2 H. 4 2. ——Br. Waſte, pl. 138. cites 23 H. 8. that Waſte does not lie againſt the Feme. But ſays *Quære* if this be not the Waſte of both; and ſays, So ſee where there is Folly in the Feme, and where not. [Quære if this does not mean by her agreeing to the Eſtate after the Baron's Death. See pl. 3. ſupra.]

10. **If** Baron ſeiſed for Life of his Wife in Right of his Wife, does Waſte, **and after the** Feme dies, **no Action of Waſte lies againſt the Baron** in the Tenuit, **becauſe he was ſeiſed only in Right of his Wife, and the Franktenement in the Feme. Cooke Litt. 54.** S P. 2 Inſt. 306. —— S. P. 5 Rep. 75. b. reſolv'd per tot. Cur. in C. B. Mich. 35 & 36 Eliz. **Cliſton's** Caſe, alias, **Southcote v. Cliſton**, that the Writ does not lie; and the Reporter ſays, Nota Reader, this Judgment given upon Conſideration of the Statute of Glouceſter, and of Opinions Obiter in 10 H. 6. 11 & 12. by Strange and Cotteſmore. 46 E. 3. 25. 46 E. 3. Tit. Waſte in Statham.—— S. C. cited by Treby Ch. J. Lutw. 674 in the Caſe of **Baron and Barkley**; and ſaid the Reaſon is, becauſe it cannot be ſaid that the Baron tenuit ex Dimiſſione, according to the Words of the Statute.

11. But if **Baron** poſſeſs'd for Years **in Right of the Feme, does Waſte, and after Feme dies, Action of Waſte lies againſt the Baron, becauſe the Law gives the Term to him. Cook Litt. 54. b.**

12. **If** Abbot Guardian **does Waſte in** Land in Ward, **Action of Waſte lies.** 43 E. 3. 8. b.

13. [But] If **Abbot Guardian does Waſte in the Land in Ward, and** dies, **the** Succeſſor **is not puniſhable for it.** 43 E. 3. 8. b. 30. b. **adjudged. Dubitatur** 49 E. 3. 26. b. F. N. B. 60. (M) S. P. cites S. C. Br. Waſte, pl. 55. cites 49 E 3. 25. Per Belknap, pro Lege. Quod non negatur.

14 But if **Abbot Guardian does Waſte, and after** is depoſed **during his Life, Waſte lies againſt the** Succeſſor. 49 E. 3. 26. b. F. N. B. 60. (M)——But not after the depoſed Abbot's Death, without Queſtion. Br. Waſte, pl. 55 cites 49 E. 3. 25.——Waſte *againſt an Abbot by an Infant in Ward*, of Waſte done in the Tenements in Ward. The *Defendant ſaid, that the Ward fell in the Time of his Predeceſſor, who died, after whoſe Death No Waſte done*; and a good Plea, by which the Plaintiff ſaid, that He had done Waſte after. Quod nota. Br. Waſte, pl. 32. cites 43 E. 3. 6.

15. And **in ſuch Caſe the Action lies,** without naming **the Monk who was Abbot at the Time.** 49 E. 3. 26.

16. If the *King commits the Wardſhip* of the Heir in Ward unto another, and the *Committee does Waſte*, then, upon a Surmiſe made thereof in Chancery, the King ſhall ſend a Writ unto the Eſcheator to go to the Land, and ſee if Waſte be done, and to certify the King thereof in the Chancery. F. N. B 59. (B)

17. If *Eſcheators* do commit Waſte in Lands which they have in their Hands in Cuſtody, the Heir within Age, or of full Age, ſhall have an Action of Waſte, and ſhall recover treble Damages againſt them, and they ſhall ſuffer Impriſonment 2 Years at the leaſt, at the King's Pleaſure. And ſo if Eſcheators do *commit Waſte in* other *Lands, ſeiſed into the King's Hands by Inqueſt of Office.* F. N. B. 59. (B) cites Anno 36 E. 3. cap. 13.

18. And Eſcheators, or other Guardians of Lands, *in the Vacation of the Temporalities of Biſhopricks* or Abbies, ſhall do no Waſte &c. F. N. B. 59. (B) cites Anno 14 E. 3. pro Clero, cap. 4 & 5.

19. Lands

19. Lands are given *to the Husband and Wife, and to the Heirs of the Body of the Husband*, the *Remainder to the Husband and Wife, and* to *the Heirs of their 2 Bodies* begotten. The Husband dies without Iſſue. The Wife ſhall not be Tenant in Tail after Poſſibility; For the Remainder in Special Tail was utterly void, for that it could never take Effect. For ſo long as the Husband ſhould have Iſſue, it ſhould inherit by Force of the General Tail; and if the Husband die without Iſſue, then the Special Tail cannot take Effect, inaſmuch as the Iſſue which ſhould inherit the Eſpecial muſt be begotten by the Husband; and ſo the General, which is larger and greater, hath fruſtrated the Special which is leſſer; and the Wife, in that Caſe, ſhall be puniſh'd for Waſte. Co. Litt. 28. b.

20. If an *Infant* be *Guardian in Chivalry*, and does Waſte, an Action of Waſte lies againſt him. 2 Inſt. 306.

Fol. 828.

[S] Againſt whom. *In reſpect of his Eſtate.*

Le. 291. pl. 397. Arg. S. P.——S. P. 2 Inſt. 301.——S. P. 3 Rep. 23. b. in Walker's Caſe, accordingly.

1. **If** Tenant by the Curteſy grants over **his Eſtate, and** Grantee commits Waſte, **the Action of Waſte ought to be brought againſt the Tenant by the Curteſy by the Heir, and thereby he ſhall recover the Land againſt the Aſſignee. Co. Litt. 54. for the** Privity, **which is between the Heir and the Tenant by the Curteſy.**

——The Writ of Waſte ſhall always be brought againſt the Tenant in Dower, or Tenant by the Curteſy, tho' they have granted over their Eſtates to others. Fitzh. Na. B. 55. (E)——S. P. Brownl. 239. Anon.——F. N. B. 56. (F)——Br. Waſte, pl. 138. S. P. cites Old N. B. For none can be Tenant by the Curteſy or in Dower but themſelves, in whom the Law has appointed it.

The Reaſon wherefore, at the Common Law, the Action of Waſte did lie againſt the Tenant in Dower, or Tenant by the Curteſy, albeit they had aſſign'd over their Eſtates, was, *becauſe no Action of Waſte by the Common Law lay againſt the Aſſignee for Waſte done after the Aſſignment*; therefore the Action of neceſſity did, for ſuch Waſte, (after the Aſſignment) lie againſt the Tenant by the Curteſy, or Tenant in Dower, which Law continues to this Day. 2 Inſt. 300.

S. P. 2 Inſt. 301.——S. P. 3 Rep. 23. b. in Walker's Caſe.——

2. **If** Tenant in Dower grants over **her Eſtate, and after** Grantee commits Waſte, **yet an Action of Waſte lies againſt the Tenant in Dower, for the** Privity **between them.** 30 E. 3. 16. b. 38 E. 3. 23. **Adjudged.**

9 Rep. 142. a. in Beaumont's Caſe—Le. 291. pl. 397. Arg. S. P.——Brownl. 239. Anon.——Br. Waſte, pl. 66. cites 21 H. 4. 18, 19.——It lies againſt her, and not againſt the Grantee; for the Grantee cannot be Tenant in Dower; and *Confirmation by the Heir to the Tenant in Dower is no Bar in this Action*; becauſe it ſhall not change her Eſtate. Br. Waſte, pl. 76. cites 38 E. 3. 23.

The *Husband levied a Fine, and took back an Eſtate for Life, Remainder to his Son*, and died. The *Son endows the Mother, who aſſigns over* her Eſtate. Adjudg'd that Waſte lies againſt her as Tenant in Dower. F. N. B. 56. (E) in the new Notes there (a) cites 26 E. 3. 76.——See the Note to pl. 1.

Le. 291. pl. 397. Arg. S. P.—S. P. 2 Inſt. 301.—S. P. 3 Rep. 23. b. in Walker's Caſe.——

3. But **if Tenant by the Curteſy, or Tenant in Dower, grant over their Eſtate, and Grantee does Waſte,** the Aſſignee of the Reverſion **(be the Aſſignment made before or after the Waſte done)** ſhall have **Action of** Waſte againſt the Aſſignee, **becauſe the** Privity is deſtroy'd. **Co. Litt. 54.**

——F. N. B. 56. (E) S. P. For one cannot hold by the Curteſy but of the Heir &c.——He can hold of none but the Heir, and his Heirs by Deſcent. Co. Litt. 54 a. 316. a——*But if Feoffee of the Baron endows the Feme*, and ſhe aſſigns over her Eſtate, Waſte lies for him againſt the Wife; for the Plaintiff ſhall not ſuppoſe in his Writ, That ſhe held in Dower of him Ex Aſſignatione; but only that ſhe held in Dower of his Heritage. F. N. B. 56. (E) in the new Notes there (b) cites 38 E. 3. 23. adjudged.

4. If Leſſee for Life grants over his Eſtate upon Condition, and after Grantee commits Waſte, and Grantor enters for the Condition broken, he cannot be charged for the Waſte committed by the Grantee. 30 E. 3. 16. b. Contra Co. Litt. 54. The Action ſhall be brought againſt the Grantee. And ſo it is in Caſe of Tenant for Years. 2 Inſt. 302.——S. P. And the Place waſted ſhall be recover'd. Co. Litt. 54 a. (q).——S. P. 5 Rep. 12. b. in Saunders's Caſe, cites 30 E. 3. 16. and Fitzh. Waſte, 26.

5. So if Leſſee for Life makes Feoffment upon Condition, and Feoffee commits Waſte, and after Leſſee re-enters for the Condition broken, Action of Waſte does not lie againſt him for the Waſte committed by the Feoffee. Contra 39 Aſſ. 15. by Tank.

6. If Leſſee for Life or Years aſſigns over his Term, and after takes the Profits, Action of Waſte lies againſt him by the Statute. Co. Litt. 54. S. P. And ſo it is of mean Aſſignees; the Action lies againſt him that takes the Profits; but this is by the Statute of 11 H. 6. cap. 5. For in that Caſe the Pernor of the Profits did not hold the Land. 2 Inſt. 302.

If *Tenant for Life or Years does Waſte, and grants over* his Eſtate, the Writ lies againſt him who did the Waſte, and not againſt the Grantee. F. N. B. 56 (A)——S. P. but if the Waſte be done after the Alienation made, then it lies not againſt the Tenant. F. N. B. 60. (L) but ſays, tamen Quære.

7. If Leſſee for Life and for Years after his Death, commits Waſte, and dies, his Executor ſhall not be charg'd for it. Contra 46 E. 3. 31. b. admitted. Br. Waſte, pl. 48. cites S. C.

8. If Villein does Waſte in the Land to him leas'd, and the Lord enters, the Action does not lie againſt the Lord for it. 48 E. 3. 19. b. Co. Litt. 54.

9. If 2 Jointenants do Waſte, and after the one enters into Religion, Waſte lies againſt the other alone. 49 E. 3. 5. b.

13. It does not lie againſt Tenant at Will. 48 E. 3. 25. Br. Waſte, pl. 52. cites S. C. that Caſe lies, but not Waſte.——If *Tenant at Will* to him and his Heirs, *according to the Cuſtom, or another Tenant at Will cuts Trees*, Action of *Waſte does not lie, but Treſpaſs*; Per Aſcough Juſt. which was not denied by the other Juſtices, nor it is not expreſs'd if he ſhall have Treſpaſs *Vi & Armis*. Br. Treſpaſs, pl. 147. cites 21 H. 6. 36.——Br. Waſte, pl. 88. cites S. C.——Tenant at Will cut down Trees, Leſſor brought Treſpaſs Vi & Armis againſt him, and held good, and Judgment accordingly. 4 Le 167. pl. 271. Trin. 29 Eliz. C. B. Walgrave v. Somerſet.——Goldsb. 72. pl. 17. S. C. accordingly, becauſe otherwiſe he ſhall have no Action; for Waſte is not maintainable.——Co. Litt. 57. a. S. P. and cites S. C.

It lies not againſt Tenant at Will *for Permiſſive Waſte*, either *by Common Law or by Statute*. Arg. Show. 315. in Caſe of Cudlip v. Rundle.

11. It lies againſt Leſſee for a * Year, tho' the Statute mentions Years. Contra † 48 E. 3. 25. * S. P Or for half a Year. 2 Inſt. 302.—— S. P. Per Brooke Ch. J. by the Equity of the Act. Pl. C. 178. a. Mich. 4 of Mar. Arg. in Caſe of Hill v. Grange.——S. P. And ſo tho' he holds only for 20 Weeks, Pl. C. 467. Per Plowden, in his Notes at the End of the Caſe of Eyſton v. Studde.

† It lies againſt Leſſee for a Year, and ſo from Year to Year. Br. Waſte, pl. 52. cites S. C.

12. It does not lie againſt Tenant after Poſſibility. 11 H. 4. 14. b. 12 H. 4. 3. b. 10 H. 6. 1. for the Inheritance which once was in him. 18 E. 3. 32. b. See (Q) pl. 1.——Br. Waſte, pl. 43. S. P. cites 45 E. 3. 25.——S. P. Ibid. pl 100. cites 39 E. 3. 16.——4 Rep. 63. in Herlakenden's Caſe, S. P. cited to have been held accordingly by Wray Ch. J. and Manwood Ch. B. in a Caſe referr'd to them between Moyle and Finch.—— S. P. But it lies againſt his Aſſignee. 2 Inſt. 301.

The Prohibition of Waſte lay not againſt *Tenant in Tail apres Poſſibility* (whoſe State was created by Act in Law) becauſe the original Eſtate was not puniſhable of Waſte. 2 Inſt. 145.—See Tit. Tayle after Poſſibility (L) pl. 2. and the Notes there.

13. If Leſſee for Life, Remainder in Tail, Remainder in Fee to the Leſſee are, and he does Waſte, he in Remainder in Tail ſhall have F. N. B. 60. (B)——

* Br. Waſt, pl. 56. cites S. C. have Action of Waſte, tho' he himſelf has Fee. 42 E. 3. 19. * 50 E. 3. 3. b. Dubitatur † 2 H. 4. 22. b.

† Br. Waſte, pl. 60. cites S. C. where the Point ſeems fully admitted.—See (F. a) pl. 2. in the Notes.

Lands were given to A. and B and the Heirs of *their two Bodies* A. *died without Iſſue*, and the Remainder of the Half *reverted* to the Donor.

14. If a Man deviſes Land to 2 in Tail, and after the one Deviſee dies without Iſſue, by which the Reverſion in Fee of one Moiety reverts to the Heir of the Donor, but the other Deviſee is Tenant for Life of the whole, and after he commits Waſte, Action of Waſte lies againſt him by the Heir of the Donor for the one Moiety. M. 9 Jac. B. between *Manning and Manning*, Per Curiam.

He brought Waſte againſt B. of Houſes and Lands to him demiſed, and agreed that the Writ was good; but it was queſtion'd if the Count ſhall be general, or of a Half only, notwithſtanding that both were Tenants in Common of the Reverſion. 2 Brownl. 133. Mich. 9 Jac. C. B. Mallet v. Mallet.

No Action of Waſte *lay before the Statute of Glouceſter*

15. *Statute of Glouceſter*, 6 E. 1. *cap* 5. Enacts, That *a Man from henceforth ſhall have a* * *Writ of Waſte in the Chancery againſt* † *him that* ‡ *holds by Law of England*,

but againſt Tenant in Dower and Guardian, and *by the Statute Action* of Waſte is *given againſt Tenant by the Curteſy* Tenant *for Term of Life and* Tenant for Term of *Years*. Br. Waſte, pl. 88. cites 21 H. 6. 38. —Lord Coke ſays a Reaſon is requir'd, that ſeeing as well the Eſtate of the *Tenant by the Curteſy*, as the *Tenant in Dower* are created by Act in Law; wherefore the Prohibition of Waſte did not lie as well againſt the Tenant by the Curteſy as the Tenant in Dower, at the Common Law; and the Reaſon is this, for that *by having of Iſſue the State of Tenant by the Curteſy, is originally created*, and yet after that *he ſhall do Homage alone* in the Right of his Wife, which proves a larger Eſtate; and ſeeing at the Creation of his Eſtate he might do Waſte, the Prohibition of Waſte lay not againſt him after his Wife's Deceaſe, but in the Caſe of Tenant in Dower, ſhe is puniſhable of Waſte at the firſt Creation of her Eſtate. 2 Inſt. 145 ——But 2 Inſt 299. ſays that at the Common Law Waſte was puniſhable in 3 Perſons, (viz.) Tenant in Dower, Tenant by the Curteſy, and the Guardian, but not againſt Tenant for Life, or Tenant for Years; and the Reaſon of the Diverſity was, for that the Law created their Eſtates and Intereſt, and therefore the Law gave againſt them Remedy; but Tenant for Life and for Years came in by Demiſe and Leaſe of the Owner of the Land &c. and therefore he might in his Demiſe provide againſt the doing of Waſte by his Leſſee; and if he did not, it was his Negligence and Default.

* Neither this Act, nor the Statute of Marlbridge, doth create new Kind of Waſtes, but give new Remedies for old Waſtes, and what is Waſte and what not, muſt be determined by the Common Law. 2 Inſt. 300. 301.

† If 2 are *Jointenants* for Years or for Life, and one of them does Waſte, this is the Waſte of them both as to the Place waſted, notwithſtanding the Words of the Act are (him that holds) 2 Inſt. 302.

‡ Here Tenant by the Curteſy is named for 2 Cauſes. 1ſt For that albeit the common Opinion was, that an Action of Waſte did lie againſt him, yet ſome doubted of the ſame in Reſpect of this Word (tenet) in the Writ, for that the Tenant by the Curteſy did not hold of the Heir, but of the Lord Paramount; and after this Act the Writ of Waſte grounded thereupon doth recite this Statute. 2dly. For that greater Penalties were inflicted by this Act than were at the Common Law. 2 Inſt. 301.

* A Leſſee *for his own Life*, or for *another Man's Life*,

Or * *otherwiſe for Term of Life, or for Term of Years, or a Woman* † *in Dower.*

is within the Words and Meaning of this Law, and in this Point this Act introduces that which was not at the Common Law. 2 Inſt. 301.

Feme Leſſee for Life takes Husband, the *Husband does Waſte*, the *Wife dies*, the *Husband ſhall not be puniſhed* by this Law; for the Words of this Act be (a Man that holds &c. for Life) and the Husband held not for Life; for he was ſeiſed but in the Right of his Wife, and the Eſtate was in his Wife. 2 Inſt. 301.

He that hath an *Eſtate for Life by Conveyance at the Common Law, or* by *Limitation of Uſe*, is a Tenant within this Statute. 2 Inſt. 302.

Tenant *for Years of a Moiety*, 3d or 4th Part, *pro indiviſo*, is within this Act; and ſo it is of a Tenant by the *Curteſy, or* other Tenant *for Life of a Moiety* &c. 2 Inſt. 302.

† This is to be underſtood of all the 5 Kinds of Dowers whereof Littleton ſpeaks, viz Dower *at Common Law*, Dower *by the Cuſtom*, Dower *ad oſtium Eccleſiæ*, Dower *ex Aſſenſu Patris*, and Dower *de la Pluis beale*; and againſt all theſe the Action of Waſte did lie at the Common Law. 2 Inſt. 303.

If Tenant *in Dower* be *of a Manor*, and a *Copyholder* thereof *commits Waſte*, an Action of Waſte lies againſt Tenant in Dower. 2 Inſt. 303.

16. Where

16. Where *Tenants in Common* are *for Life*, the one ſhall not have Treſpaſs of Trees cut againſt the other, but ſhall have Waſte pro indiviſo, tho' they are only Tenants for Term of Life &c. but the one may have Treſpaſs of Corn cut againſt the other. Br. Waſte, pl. 79. cites 21 E. 3. 29. Br. Treſpaſs, pl. 117. cites S. C.

17. One *Coparcener before Partition* makes Feoffment to another, and one of them does Waſte in the Trees, Waſte lies. 11 Rep. 49. a. in Liford's Caſe, cites 29 E. 3. 19.

18. If a Man takes *upon him to be Guardian of the Heir of* W. N. *where he is not Guardian of Right*, and he occupies and receives &c. and cuts Trees, *he ſhall be charg'd in Action of Waſte*, if he does Waſte. Br. Waſte, pl. 142. cites 32 H. 6. 7. *Contra where he enters as Treſpaſſor, and claims to his own Uſe* &c. Ibid.

19. If one *does Waſte, and aſſigns over his Term*, yet the Action lies againſt him to recover the Place waſted. Br. Pleadings, pl. 6. cites 24 H. 8.

20. If *Guardian in Chivalry grants over* his Eſtate [to one] who does Waſte, the Writ of Waſte ſhall be brought againſt the Grantee, and not againſt the Guardian, and it is not like to Tenant in Dower, or by the Curteſy. F. N. B. 56. (A) Ibid. in the new Notes there (a) ſays, See accordingly 17 E. 3. 13. 43 E. 3. 15. 42 E. 3. 23. 44 E 3. 21. 48 E. 3. 19. 12 H. 4. 4. ——— At the Common Law, if the *Guardian en Droit* had *aſſign'd over* his Eſtate and Intereſt, the Heir ſhould have had an Action of Waſte for Waſte done after the Aſſignment againſt the *Aſſignee*; for he *was Guardian in fait*, and ſo within the Rule of the Common Law. 2 Inſt. 300.

21. *But* if the *Guardian does Waſte and then grants over* his Eſtate, the Writ lies againſt him who did the Waſte, and not againſt the Grantee. F. N. B. 56. (A). But Co. Litt. 54. a. (k) is contra, viz. That if a Guardian of a Ward does Waſte and aſſigns over, Action of Waſte lies againſt the Aſſignee.

22. The Heir at full Age ſhall have an Action of Waſte againſt *the King's Committee* &c. F. N. B. 59. (E).

23. A Writ of Waſte ſhall be maintainable againſt one upon a *Leaſe made to him until he be promoted to a Benefice*, and the Writ ſhall ſuppoſe *quod tenet ad terminum Vitæ*. F. N. B. 60. (N). Co. Litt. 42. a. (c).

24. If the *Heir* had *granted his Reverſion expectant upon an Eſtate in Dower or* by the *Curteſy*, the Grantee ſhould not have had an Action of Waſte againſt Tenant in Dower or by the Curteſy at the Common Law, for that the Privity was deſtroy'd; therefore the Grantee in an Action upon the Statute of Glouceſter recites the Statute. 2 Inſt. 301.

25. Tenant by the Curteſy or other *Tenant for Life makes a Leaſe for Years*, he in the *Reverſion confirms it*, Tenant by the Curteſy [does Waſt and] dies, an Action of Waſte lies againſt the Leſſee. 2 Inſt. 302.

26. A. made a *Feoffment* in Fee *to the Uſe of himſelf and his Wife, and* to *his Heirs*, there were *Underwoods* on the Lands which were *uſually cut at* 21 *Years* growth; *A. ſuffer'd them to grow* 25 *Years, and then died*; Per tot. Cur. this ſhall bind the Wife; for where the Law limits a time for Tenant for Life to fell Underwood, if it be not fell'd in that time, it ſhall not be fell'd by a Tenant for Life afterwards, but it ſhall be Waſte. Godb. 4, 5. pl. 6. Hill. 23 Eliz. C. B. Anon.

27. If *Tenant in Tail* grants all his Eſtate, *his Grantee* is diſpuniſhable of Waſte; ſo ſuch *Grantee's Grantee* is alſo diſpuniſhable; Per Clark J. 3 Le. 121. pl. 173. Trin. 27 Eliz. B. R. in an Anonimous Caſe. S. P. Arg. Le. 291. Anon.

28. *B. Leſſee for Years*, the *Reverſion to A. in Fee*; *B. aſſign'd all his Term* and Intereſt *to J. S. reſerving all Trees* growing and being on the Lands, and afterwards he committed Waſte in cutting down the Trees; *Tenant for Years or for Life aſſigns over* his

Leaſe for Years, or Eſtate for Life *excepting the Timber Trees*, and after Waſte is done in felling down the Trees, the Action of Waſte is maintainable againſt the Aſſignee, for as to the Leſſor they are not ſever'd from the Land. 2 Inſt. 302.

A. brought an Action againſt J. S. It ſeem'd agreed, that if the Reſervation was good, then the Action would lie againſt the Aſſignee; but to prove it void, it was inſiſted that what a Man cannot grant he cannot reſerve; ſo that becauſe the Leſſee could not grant the Trees he cannot reſerve them. As to the Point of Law the Court was divided. Goldsb. 63. pl. 23. Trin. 29 Eliz. * Forſter's Caſe.

* Cro. E. 17. pl. 10. Forſter v. Spooner and Aford S. C. and the Court divided. —— Le. 48. pl. 72. Lewknor v. Ford, S.C. and the Court divided as to this Point. —— 4 Le. 162. pl. 269. Sir Richard Lewknor's Caſe S. C. adjornatur. —— 4 Le. 225. pl. 362. S. C. adjornatur. —— S. C. cited 5 Rep. 12. b. Trin. 41 Eliz. in Saunders's Caſe as adjudg'd Paſch. 28 Eliz. C. B. that the Action was well maintainable againſt the Aſſignee; becauſe the Exception was utterly void.

29. *Leſſee for Years* of Lands *bought Trees with Liberty to cut them down within* 80 *Years*. Afterwards the *Leſſee bought the Inheritance*, and *deviſed to his Wife for Life*, Remainder *to the Plaintiff in Fee*, and *made his Wife Executrix and* died; She cut down the Trees; Adjudg'd, that an Action was maintainable; for tho' the Trees were once Chattels in the Leſſee, yet by purchaſing the Inheritance they are again united to the Land. Ow. 49. Paſch. 36 Eliz. Anon.

30. If Leſſee for 100 Years *grants Part of his Term* to another and he commits Waſte the Action ſhall be brought againſt the firſt Leſſee. Brownl. 238. Anon.

31. *Leſſee for Years* makes a *Leaſe of one Moiety to A.* and of the *other Moiety to B.*—A. does Waſte, the Action ſhall be againſt both; for the Waſte of one is the Waſte of the other. Brownl. 238. Anon.

32. *Tenant for Life without Impeachment of Waſte leaſes for Years*, or otherwiſe, and Leſſee for Years commits Waſte, he in Remainder in Fee ſhall not have Action of Waſte; for this Leaſe was derived out of the Eſtate for Life privileged, and if Waſte lay it ſhould be brought againſt the Tenant for Life who made the Leaſe, and he was diſpuniſhable. Jo. 61. pl. 2. Mich. 22 Jac. C. B. in Caſe of Bray v. Tracy.

33. A *Condition in a Leaſe* was *Not to do Waſte*. It was ruled that this Condition *extends to the Aſſignee* without naming him, and that as inherent to the Land. Clayt. Rep. 126, 127. pl. 125. March 1647. before Germin J. Ward v. Waddington.

(S. 2) Againſt whom. *Executors &c.*

S.P. 2 Inſt. 302.

1. WASTE lies *againſt one Executor alone* without naming his Companion, if the Waſte was done by him alone. D. 90. pl. 6. Marg. cites 3 E. Waſte 3.

S. P. 2 Inſt. 302. And ſo of Adminiſtrators. —— S. P. Went. Off. Exec. 127. ——

2. If *Termor does Waſte*, and makes Executors, and dies, the Action of *Waſte* is loſt; for it *does not lie againſt the Executors*, but for Waſte done by themſelves, and not for the Waſte of the Teſtator; for it is as Treſpaſs which is an Action perſonal, which dies with the Perſon. Br. Waſte, pl. 138. cites 23 H. 8.

S. P. Co. Litt. 53. b. (g).—But Brownl. 239. Anon. ſays, that an Action of Waſte lies againſt Executors for Waſte committed by Teſtator.

S.C. 3 Mod. 90. Hill. 1 Jac. B. R.

3. Executor *de ſon tort of a Term* is chargeable in Waſte. 3 Lev. 35. Mich. 33 Car. 2. C. B. Mayor &c. of Norwich v. Johnſon.

It was objected in Error, That if the Plaintiff is intitled to this Action, it muſt be by the Statute of Glouceſter;

Glouceſter; but that it will not lie againſt the Defendant even by that Statute, becauſe the Action is thereby given againſt the Tenant by the Curteſy, in Dower, for Life or Years, and treble Damages &c. and that the Defendant is neither of theſe; and that it being ſo penal a Law, ſhall be taken ſtrictly. But per Cur. This is a Remedial and yet a Penal Law, and therefore ſhall have a favourable Conſtruction. And the Judgment was affirm'd.——Comb. 7. S. C and Judgment affirm'd accordingly.

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* [T] *At what Time* it may be *brought.* Impediments of the Action.

* This is (E) in Roll.

Fol. 829.

1. IF Leaſe be made for Life, the Remainder for Years, * Action of Waſte lies againſt Leſſee for Life, notwithſtanding the Remainder for Years; For De Minimis non curat Lex. 46 E. 3. 17. Co. Litt. 54.

S. P. For the Recovery therein ſhall not deſtroy the Term for Years.

2 Inſt. 301.——F. N. B. 59. (H) cites S. C.— * Remainder *in Fee.* Co. Litt. 54. a. (t)

2. But if there be Leſſee for Life, Remainder for Life, Action of Waſte does not lie during the Continuance of the meſne Remainder. 48 E. 3. 16. Contra * 50 E. 3. 4.

But in ſuch Caſe an *Injunction* has been granted out of Chancery. Mo. 554. pl. 748. Paſch. 41 Eliz. by Ld. Keeper Egerton. Anon.

* Br. Waſte, pl. 56. cites S. C. where Perſay held it did not lie; but Belknap contra. But Brooke ſays that the Law at this Day ſeems to be with Perſay.——2 Inſt 301. ſays it does not lie, becauſe the Eſtate of him in the Remainder would be deſtroy'd.

3. So if Leſſee for Life be, the Remainder for Life, the Remainder in Fee to another, he in Remainder ſhall not have Action of Waſte againſt the firſt Leſſee, during the Continuance of the Remainder for Life. Co. Litt. 54. Contra 27 E. 3. 87. b.

S. P. held accordingly. 5 Rep. 92. b. Mich. 35 & 36 Eliz C. B. Paget's Caſe, alias, Paget v. Cary — S. P. by Perſay; but Belknap contra Br. Waſte, pl. 56. cites 50 E. 3. 3. and Brooke ſays the Law, as it now is, is with Perſay.———F. N. B. 58. (C) ſays that it lies notwithſtanding; and at 59. (H) ſays it appears by the Regiſter that the Writ is maintainable, tho' the mean Remainder for Life be between the Tenant for Life and him in Reverſion. But it is ſaid in the new Notes there (a) ſee Br. Waſte, 56. contra 48 E. 3. 16. 50 E. 3. 4. 11 E. 3. 3. 9. Perk. 8. 7 H. 6. 36. Nota bene.———For if he ſhould have Action againſt the firſt Leſſee, then the Eſtate of him in Remainder ſhould be * deſtroy'd; and ſuch Conſtruction muſt be made to preſerve the Eſtate of a Stranger, who is in no Fault; but if Remainder-man for Life dies, then the Waſte is puniſhable as well before as after his Death. 2 Inſt. 301.——S. P. accordingly, 5 Rep. 76. b. 77. a Mich 35 & 36 Eliz. C. B Paget's Caſe.——*So* if *Remainder-man for Life ſurrenders* his Eſtate to him in the Remainder or Reverſion in Fee. 5 Rep. 76. b. Mich 35 & 36 Eliz. C. B. in Paget's Caſe.—And F. N. B. 58. (C) in the new Notes (b) ſays ſee 20 H. 6 36. That Waſte does not lie till after the Death, or Surrender of the particular Eſtate; and cites Co. Litt. 59. a.——And Co. Litt. 54. a. (t) ſays, That where it is ſaid in the Regiſter, and in F. N. B. that Waſte does lie, it is to be underſtood after the Death or Surrender of the mean Remainder.

But tho' he that has the Inheritance cannot have Action of Waſte during the Life of the Remainder-man for Life, yet it was reſolved That he may ſeiſe Timber-Trees cut down by the Tenant for Life; and alſo that a Trover and Converſion would lie for all of them, tho' he never ſeiſed Parcel of them; For by the Cutting them down an abſolute Property is veſted in the Plaintiff, unleſs they had been cut down for Reparations, and ſo employ'd in convenient Time. All. 81, 82. Mich. 24 Car. B. R. Udall v. Udall.———S. C. cited by Ld. C. Nottingham, 2 Show. 69. in Caſe of Abrahal v. Bubb.———S. C. cited per eundem. 2 Freem. Rep. 54 in S. C. And that Roll was of Opinion, that an Action of Trover would lie for the Reverſioner againſt Tenant in Tail, after Poſſibility of Iſſue extinct; and he declar'd he was himſelf of that Opinion, becauſe he had only an Impunity if he committed Waſte, but no Intereſt in the Trees.

* S. P. 10 Rep. 44 b. in Jenning's Caſe, cites 11 E. 3. Tit. Reſceipt, 118. S. P.

4. But if Leſſee for Life be, the Remainder for Life, after the Death of the Remainder Action of Waſte lies againſt Leſſee for Waſte committed

Mo. 38. S. P. Arg. ——See the

committed during the Continuance of the Remainder. **Contra** 50 E. 3. 4.

Note to pl. 3.——*So* where a *Leaſe* was made *for Years, Remainder for Life*, the *Remainder in Fee*; Leſſee for Years does Waſte. The Leſſee for Life in Remainder dies. The Remainder in Fee ſhall have Waſte, for Waſte done during the mean Remainder for Life. Mo. 18. pl. 64. Mich. 2 Eliz. Anon.

5. **If a** Feme, Leſſee for Life, takes Baron, **and after** Leſſor confirms the Eſtate of the Baron **to have for** his Life; **by which the Baron has a Reverſion for Life; yet if Waſte be committed after, the Action lies againſt Baron and Feme, and this** Reverſion **is not** any **Impediment.** 17 E. 3. 68. b.

Co. Litt. 299 b. S. P. becauſe the Baron himſelf did the Waſte and the Wrong, and therefore ſhall not excuſe himſelf for doing the Waſte, in reſpect that he himſelf has the Remainder.

6. **If Leſſee** for Life, and for a Year after, **commits Waſte, Action of Waſte lies againſt him.** 39 E. 3. 25. b.

Defendant pleaded that the Leaſe was *to him, his Heirs, and Aſſigns for Life, and a Year after*, and demanded Judgment of the Writ. But Thorp ſaid, That in this Caſe the Plaintiff could not have other Writ than what he had, and that Defendant might ſave his Eſtate by Proteſtation; and ſo he did, and pleaded Nul Waſte done, Priſt; and the others e contra. Br. Waſte, pl. 101. cites S. C.——Theloal's Dig. of Writs, Lib. 9. cap. 7. S. 7. cites S. C.

7. **If a** Man leaſes for Life, and after grants the Reverſion for Years, **and after Leſſee for** Life commits Waſte, **no Action of Waſte lies againſt him for the Reverſion for Years.** H. 10 Ja. B. **between** *Poyne and Dockwra*, **per Curiam. Co. Litt.** 54. [a]

For he himſelf has granted away the Reverſion, in reſpect whereof he is to maintain the Action. Co. Litt 54. a. Ibid. 273. a.

8. But if **a Man leaſes** for Life or Years, and after grants a Leaſe to commence after the End of the firſt Eſtate, **Action lies againſt the firſt Leſſee, notwithſtanding this future Intereſt. Co. Litt.** 54. [a] **And the Term ſhall be ſaved in this Caſe.**

Brownl. 240. S. P. accordingly. Anon.

9. In Waſte *by an Abbot againſt Tenant for Life of the Leaſe of his Predeceſſor*, it is a good *Plea that J. Predeceſſor of the Plaintiff, and the Covent by Deed*, which he ſhews, *granted the Reverſion to W. N. for Term of his Life, to which the firſt Tenant attorn'd*, he then being Tertenant, *which W. N. is yet in full Life*; for where there is a *meſne Remainder, or Reverſion for Life*, there he who has the Fee ſhall not have Waſte; for then he ſhall recover the Land, and defeat the meſne Intereſt, which ſhall not be ſuffer'd. Br. Waſte, pl. 111. cites 5 H. 4. 8. 9.

10. If *Feoffee of* Land *upon Condition* be, and the *Feoffor enters, and does Treſpaſs*, and afterwards the *Condition is broken*, and the *Feoffor enters*, yet the Feoffee ſhall have an Action of Treſpaſs againſt the Feoffor, notwithſtanding that he hath not the Land wherein the Treſpaſs was done; Cauſa patet. Perk. S. 97.

11. Where a *Leaſe* is made *to the Husband and Wife* for Life or Years, there the Wife ſhall not be puniſh'd after the Death of her Husband for *Waſte done by the Husband.* F. N. B. 59. (I)

F. N. B. 59. (I) in the new Notes there (b) ſays See the contrary Kelw. 113. 19 E. 3. Breve 246. But 11 H. 4. 3. per Cur. 19 H. 6. 5. ſeem to accord.

12. If a Man leaſes *to A. during the Life of B.* the *Remainder to him during the Life of C.* if he commits Waſte, an Action of Waſte ſhall lie againſt him. Co. Litt. 299. b.

So if a Leaſe be made *to A. for his Life*, the Remainder *to A. for the Life of B.* if A. does Waſte, an Action of Waſte doth lie againſt him; for the Wrong-Doer hath both the Eſtates in him; and of that Opinion was Sir James Dyer Ch. Juſt. of C. B. Paſch. 18 Eliz. 2 Inſt. 301.

13. *Leaſe*

13. *Leaſe for Years* or Life, *Remainder to a Baron and Feme in Special Tail. Leſſee does Waſte*, and the *Feme dies without Iſſue*. The Baron ſhall not maintain any Action upon the Statute. Mo. 18. pl. 64. Mich. 2 Eliz. Anon.

But Brown ſaid, that if the *Remainder* be limited over *to the Baron and his Heirs*, and the Feme dies after the Waſte done, the Baron (as he apprehends) ſhall have Action for this Waſte done in the Life of his Feme, becauſe the Eſtate of Tenant in Tail after Poſſibility is drown'd in the Inheritance. But Dyer denied it. Mo. 18. pl. 64. Mich. 2 Eliz. in an Anonymous Caſe.

14. Leſſor *covenants* with Leſſee *not to bring Action of Waſte during 2 Years* againſt him, and after, during the 2 Years, Leſſee does Waſte; Leſſor may, after the Expiration of the 2 Years, bring Action of Waſte for the Waſte done within the 2 Years; for the Covenant is *no Diſpenſation* as to the Waſte, as it was ſaid, but with his Complaint during the 2 Years. Mo. 18. pl. 64. Mich. 2 Eliz. Anon.

But otherwiſe it is where one makes a *Leaſe for 2 Years, diſpuniſhable of Waſte*; for there he has diſpenſed with the Waſte, and not with the Action only. Mo. 18. pl. 64. Mich. 2 Eliz. Anon.

15. Leſſee for Life *without Impeachment of Waſte, Leſſee and Reverſioner join in a Leaſe for Years*; Leſſee is diſpuniſhable of Waſte during the Life of the Tenant for Life, but after his Death he is puniſhable; for, as Dyer and Brown ſaid, tho' at firſt it ſhould be ſaid to be the Leaſe of Tenant for Life, and the Confirmation of him in Reverſion, yet by ſuch Death it is alter'd into another Nature, and ſhall be ſaid the Leaſe of him in Reverſion. Mo. 72. pl. 196. Trin. 6 Eliz. Nudigate's Caſe.

Dal. 72. pl. 52. S.C. accordingly.

16. A. ſeiſed in Fee makes *Leaſe for Years*, and afterwards conveys the Reverſion to the *Uſe of himſelf for Life without Impeachment of Waſte*, Remainder in Fee; Leſſee for Years commits Waſte; he ſhall not have the Privilege to be diſpuniſhed of Waſte, but after the Death of him in Reverſion for Life he ſhall be puniſh'd. Jo. 51. pl. 2. Mich. 22 Jac. C. B. Bray v. Tracy.

Cro. J. 688. pl. 4. S. C. but that is only upon the Point of a Leaſe for Years to A. Remainder for Life without Impeachment of Waſte to B. Remainder in Tail to C. but ſays nothing of the Conveyance ſubſequent to the Leaſe for Years. The Court held that the Plaintiff ſhould recover; for tho' in the Life of B. the Termor by his Aſſent might have committed Waſte, and he had not been puniſhable afterwards, yet when he is dead he that committed the Waſte has done it to the Diſheriſon of him in Remainder, and it is all one as if it had been done after the Death of Tenant for Life.——Win. 79. Paſch. 22 Jac. C. B. adjornatur.—Ibid. 86. Trin. 22 Jac. adjudg'd for the Plaintiff.

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*[U] *How* it ſhall be *brought*. In what Caſes *in the Tenet*.

* This in Roll is (F) See (S) pl. 4.—(A a) (B. a) (G. a) pl. 2. 4——

1. IF Leſſee for Life does Waſte, and grants his Eſtate, yet Action lies againſt him * in the Tenet. 40 E. 3. 33. b. 41 E. 3. 23. The Reaſon is there given, becauſe it is the Form. (But it ſeems the Reaſon is, becauſe otherwiſe he ſhall not recover the Place waſted.) 46 E. 3. 25. b. 48 E. 3. 19. b. Contra 43 E. 3. 16.

Br. Waſt, pl. 33. S. P. cites 43 E. 3. 8.——

* Br. Waſt, pl. 47. cites 46 E. 3. 25.—It ſhall be in the Tenet during the Term. Br. Waſte, pl. 51. cites 48 E. 3. 18. Per Finchden.——S. P. Theloal's Dig. of Writs, lib. 10. cap. 21. S. 10. cites 40 E. 3. 33. 41 E. 3. 33. 45 E. 3. 15. and 48 E. 3. 19. ——S. P. Becauſe in the Eye of the Law he is Tenant as to the Action of Waſte, and againſt him that was the Wrong-doer did the Action accrue, which he cannot avoid by his Aſſignment, and againſt him ſhall the treble Damages be recover'd, and the Place waſted. And ſo it is of meſne Aſſignees, a juſt Interpretation that he that did the Wrong ſhould anſwer the ſame; and this is the Cauſe that general Non-tenure is no Plea in an Action of Waſte, but ſpecial Non tenure may be pleaded as the granting over of his Eſtate before which No Waſte done. 2 Inſt 302.

In

In Waſte it is no *Plea that the Defendant had nothing in the Land the Day of the Writ purchas'd*; For if *he does Waſte, and grants his Eſtate over*, yet Waſte lies againſt him; For the Grantee may ſay that No Waſte done after the Grant made to him, and the other is at no Miſchief if he has done no Waſte; For he may ſay that ſuch a Day he granted over his Eſtate, before which Grant no Waſte done, Per Finchden clearly, and the Action of Waſte was Quas tenet. And yet *Non-tenure is no Plea*; For by him Waſte is only Treſpaſs, and by recovering againſt him the Grantee ſhall loſe the Place waſted; for the Plaintiff has elder Title than the Grantee. Br. Waſte, pl. 22. cites 40 E. 3. 33.

Waſte quas *tenet*; the *Defendant ſaid That he had nothing the Day of the Writ purchas'd, nor ever after*, Judgment of the Writ, and no Plea; for if a Man does Waſte, and grants his Eſtate over, the *Writ ſhall ſay that he held as long as the Term continued*, and by this the Grantee, who is not Party to the Writ, ſhall loſe the Place waſted. Br. Waſte, pl. 25. cites 41 E 3. 18.

S. P. 2 Inſt. 305.——S. P. Theloal's Dig. of Writs, lib. 10 cap. 21. S. 11. cites 43 E. 3. 15. 46 E. 3. 25. and 48 E. 3. 19.

2. **If a** Guardian commits Waſte, and grants his Ward **over, the Ward ſhall have Waſte during the Infancy in the Tenet againſt the firſt Guardian for the ſaid Waſte.** 43 E. 27. b.

3. [And] **if the Ward brings it againſt any** during his Nonage, **it ſhall be in the Tenet.** 43 E. 3. 15. b.

——S. P. Per Finchden. And yet if he was Guardian before the Writ purchas'd, he ſhall not be *charg'd* but for his own Time, and *every Guardian for his own Time*. Br. Waſte, pl. 33. cites 43 E. 3. 8.

4. **If** Feme Leſſee for Life grants her Eſtate **over,** and after takes Baron, **the Action ſhall ſuppoſe that** tenent. 46 E. 3. 25. b.

Fol. 830.

5. **If** Leſſee for Life does Waſte, and after aliens, **and Leſſor enters for the Forfeiture, the Writ ſhall be in the Tenet.** 8 H. 6. 10.

Br. Waſte, pl. 84. cites S. C. but takes Notice only of Leſſee for Years, and which was the principal Point of the Caſe, and that in ſuch Caſe the Writ ſhall be in the Tenet; but that in Caſe of *Leſſee pur auter Vie where Ceſty que Vie dies*, it ſhall be in the *Tenuit*.

Br. Waſt, pl. 103. cites S. C.

6. **There** is not any Writ in Chancery in the Tenuit againſt a Tenant for his own Life. 14 H. 6. 14.

7. In Writ of Waſte in the Tenet, *the Defendant may ſay that he has ſurrender'd* to the Plaintiff, Judgment of the Writ in the Tenet, and yet the Surrender goes in Bar. Theloal's Dig. of Writs, lib. 15. cap. 4. S. 7. cites Mich. 10 H. 7. 11.

Br. Brief, pl. 193. cites S. C.——*But* where a Man *leaſes for Years, and brings Writ quas Tenet* of the Waſte &c. and the *Term expired pending the Writ*, yet the Writ quas tenet is good, quod Cur. conceſſit. Br. Waſte, pl. 95. cites 14 H. 8. 10. 11.

8. Waſte *in Lands Quas tenet pro termino Annorum*, and *counted that he leas'd to the Defendant* 10 H. 7. *for Term of one Year, to commence at Eaſter next after, to continue for one Year, and ſo the next Year, and ſo from Year to Year as long as the Parties pleaſe, by Virtue of which Poſſeſſion* &c. *he occupied by the Space of* 24 *Years, and aſſign'd the Waſte certain* &c. The *Defendant pleaded No Waſte* done, and *found for the Plaintiff*. And the Action was brought Anno 14 H. 8. And per tot. Cur. the *Count has abated the Writ; for where it is Tenet, and is after* 30 *Years after the making, and counts of* 24 *Years*, therefore this is a Determination of the Leaſe a long Time before the Writ purchas'd, and therefore *ſhall be Tenuit*, and *not Tenet*. Br. Waſte, pl. 95. cites 14 H. 8. 10. 11.

9. If a *Leaſe for Life* be made *upon Condition that if the Leſſee do ſuch an Act, his Eſtate ſhall ceaſe*, and he does commit ſuch an Act, the Writ ſhall be brought againſt the Leſſee in the Tenet, tho' his *Eſtate is ended*. Brownl. 239. Anon.

[U. 2] In the *Tenuit.*

[1] 7. SO it ſhall be againſt Leſſee for Years after the Term paſs'd. 41 E. 3. 23. 43 E. 3. 13. b. 46 E. 3. 25. b. * 48 E. 3. 19. b. † 14 H. 6. 14. S. P. Br. Waſte, pl. 95. cites 14 H. 8. 10. 11. —S. P.

Ibid pl. 25. cites 41 E. 3. 18.—* Br. Waſte, pl. 51. cites 48 E. 3. 18. Per Finchden.
† Br. Waſte, pl. 103. cites S. C.

[2] 8. But if it be not brought in the Tenuit, yet if there are any Words in the Writ which imply that it is paſt, it is good, as Quas ei dimiſit. 43 E. 3. 13. b. Theloal's Dig. lib. 10. cap. 5. pl. 23. cites S. C.

[3] 9. After the Death of Ceſty que Vie it ſhall be brought againſt the Tenant pur auter Vie in the Tenuit. * 46 E. 3. 25. b. † 14 H. 6. 14. S. P. Br. Waſte, pl. 95. cites 14 H. 8. 10. 11.—S. P. Br. Waſte, pl. 25. cites 41 E. 3. 18.

* Br. Waſte, pl. 47. cites S. C. And per Perſay, if Leaſe be made *to the Feme, and ſhe takes Baron, who does Waſte*, and the *Feme dies*, Waſte againſt the Baron ſhall be quod tenuit.
† Br. Waſte, pl. 103 S P. For he may hold over the Term, cites S. C.

[4] 10. If Tenant pur auter Vie does Waſte, and aliens, and Leſſor enters for the Forfeiture, the Writ ſhall be againſt him in the Tenuit. 8 H. 6. 10. Br. Waſt, pl. 84. cites S. C.

[5] 11. If Waſte be brought againſt a Guardian after full Age of the Ward, the Writ ſhall be in the Tenuit. 41 E. 3. 23. 43 E. 3. 15. b. 48 E. 3. 19. b. 12 H. 4. 3. b. Br. Waſte, pl. 33. S. P. cites 43 E. 3. 8 per Finchden. ——

S. P. Theloal's Dig. of Writs, lib. 10. cap. 21. S. 11. cites 43 E. 3. 15. 46 E. 3. 25. and 48 E. 3. 19.

[6] 13. So it ſhall be in the Tenuit if it be brought after full Age againſt a Guardian for Waſte before Aſſignment over. 43 E. 3. 15. b. 41 E. 3. 23.

[7] 14. If Abbot or Prior Guardian does Waſte, and after is depoſed, the Action lies againſt the Succeſſor in the Tenuit. 49 E. 3. 26.

[8] 15. If Feme Leſſee for Years does Waſte [and] the Term incurs, ſhe takes Baron, the Writ ſhall be againſt Baron and Feme, and ſhall ſuppoſe that they tenuerunt. 46 E. 3. 35. b. (Quære this, for it ſeems it ſhould be that the Feme tenuit dum ſola fuit, if ſuch Writ may be added).

[9] 16. If Feme Tenant pur Auter Vie does Waſte [and] Ceſty que Vie dies, the Femes takes Baron, the Writ ſhall be that the Feme tenuit, 46 E. 3. 25. b.

10. If the *Leſſee makes a Feoffment, and the Leſſor re-enters*, the Action of Waſte ſhall be *Tenuit, becauſe the Leaſe is determined.* And *where he continues it, it ſhall be* quas *tenet*; note the Diverſity. Br. Waſte, pl. 95. cites 14 H. 8. 10. 11. S. P. Br. Waſte, pl. 25. cites 41 E. 3. 18.

11. If Tenant does Waſte, and then *ſurrenders* to his Leſſor, the Writ ſhall be in the Tenuit, cites 14 H. 6. 14. as ſome held, but ſays, that others held it ſhould be in the Tenet, whether he be Tenant for Life or Years. F. N. B. 60. (L) in the New Notes there (b). S. P. And if he in the *Reverſion agrees thereunto*, he ſhall not have an Action of Waſte in the Tenuit, for he cannot by his own Act alter the Form and Nature of his Action from the Tenet to the Tenuit; and he cannot plead, That before ſuch Surrender No Waſte was done. 2 Inſt. 304.

12. If Grantee of a Term *upon Condition* does Waſte, and after the Grantor enters for Condition broken, Action of Waſte ſhall be maintainable againſt the Grantee in the *Tenuit*. 5 Rep. 12. b. in Sanders's Caſe, cites 30 E. 3. 16. Fitzh. Waſte 26.

13. A. was *Leſſee for Years* and *deviſed his Term to B. and made C. his Executor*, and died, *C. does Waſte, and aſſents to the Deviſe*. In this Caſe, tho' between the Executor and Deviſee, this has Relation, and the Deviſee is in by the Deviſor, yet Action of *Waſte ſhall be maintainable againſt the Executors in the Tenuit*. Sic dictum fuit. 5 Rep. 12. b. Trin. 41 Eliz. C. B. in Saunders's Caſe.

[U. 3] *Holds of him.* [*De illo Tenet*].

[1] 17. IF a Leſſor brings Waſte, **the Writ ſhall be Quod fecit vaſtum &c. in terris which he holds of him.** 3 H. 6. 1.

[2] 18. But **if he in** Remainder **brings Action of Waſte, the Writ ſhall not be which he holds of him, becauſe he does not hold of him.** 3 H. 6. 1.

Br. Waſte, pl. 6. cites S. C.

[3] 19. So if ſuch Remainder eſcheats, **and the** Lord **brings the Action of Waſte, the Writ ſhall not be which he holds of him.** 3 H. 6. 1.

4. If the *Father leaſes for Life and dies*, and afterwards *his Heir confirms the Eſtate* of the Leſſee for his Life, he ſhall have Action of Waſte, quas tenet of his Demiſe; becauſe the firſt Leaſe is determined by the Confirmation; Per Dyer and Brown. Mo. 72. pl. 196. Trin. 6. Eliz. in Nudigate's Caſe.

5. If there are two *Jointenants of Land limited to them and the Heirs of one*, and they *join in a Leaſe for Years*, and the *Tenant for Life dies*, the other ſhall have Action of Waſte of his Demiſe. Mo 72. pl. 196. Per Dyer and Brown, Trin. 6 Eliz. in Nudigate's Caſe.

Fol. 831. [W] *How* it ſhall be brought. *Ex Cujus Dimiſſione.* [*Or otherwiſe.*]

As in Waſte it was ſaid that where *Leaſe is made to Baron and Feme, and the Heirs of the Baron*, and the *Baron diſcontinues to J. N. in Fee*, and *J. N. leaſes to the Baron and Feme for Life*, and the *Baron dies*, the Action of Waſte ſhall not ſuppoſe the Feme to be in of the Leaſe of J. N. becauſe *ſhe is remitted*, and therefore ſhe may plead this Matter to the Writ; quod non negatur. Br. Waſte, pl. 46. cites 46 E. 3. 20. —— Br. Remitter; pl. 8. cites S. C. —— Theloal's Dig. of Writs, lib. 11. cap. 52. S. 19. cites S. C.

1. THE **Writ ought to ſuppoſe the Demiſe** by him of whoſe Leaſe he is in; As after Diſcontinuance of an Eſtate and new Leaſe made, **if Leſſee be** remitted, **the Writ ſhall ſuppoſe him in of the Leaſe** of the Eigne Leſſor. 86 E. 3. 20.

S. P Brownl. 238. Anon. * Br. Brief, pl. 510. cites S. C. and ſays that he and the others leaſed, and therefore He leaſed. —— Br. Waſte, pl 44. cites S. C. and 45 E. 3. 19 ——

2. **If** 4 Jointenants leaſe for Life, and after 3 of them releaſe to the 4th, **the** 4th **ſhall have Action of Waſte, and ſhall ſuppoſe that the Defendant holds of his Leaſe; (for after the Releaſe he is in by the firſt Feoffor.)** * 46 E. 3. 17.

Theloal's

Theloal's Dig. of Writs, Lib. 11. Cap. 52. S. 18. cites S. C.——Br. Jointenants, pl. 70. cites S. C.

3. If 2 Coparceners leaſe for Life, and after the one dies without Iſſue, the other ſhall have Action of Waſte, ſuppoſing that he holds of her Demiſe. 46 E. 3. 17. (Quære this; for ſhe has a Moiety as Heir to her Siſter.) Theloal's Dig. of Writs, Lib. 11. Cap. 52. S. 18. cites S. C. and 33 H. 6. 4.—— *So* if the Leaſe had been *for Years*. F. N. B. 55. (C) in the new Notes there (b) cites 46 E. 3. 17. a. 35 H. 6. 39. a. Per Priſot.—*But* if Waſte be brought, ſuppoſing that A. and B. leaſed to the Defendant *for Life, Remainder to the Plaintiff*, it ſeems a good Plea That A. leaſed it ſole, *abſque hoc* that A. and B leaſed it. Ibid. cites 6 H. 4. 5.

4. The Writ may ſuppoſe that Defendant holds for Life by Fine levied between one J. Deforceant and the Defendant and her Baron, and to the Heirs of the Baron, whoſe Heir the Plaintiff is, without ſuppoſing that Defendant holds of the Leaſe of any. 17 E. 3. 36. b.

5. If a Man deviſed to another, at the Common Law, for Life Land deviſable; if the Heir brought Action of Waſte, the Writ ſhould be Ex Legatione. 10 H. 6. 8. b. Theloal's Dig. of Writs, Lib. 10. Cap. 5. S. 26. cites S. C.——The Writ Ex Legatione was held good, tho' the Statute mentions Ex Dimiſſione. Br. Waſte, pl. 132. cites S. C.——Hutt. 110. Cook v. Cook, S. P. but the Words there are Ex (Diviſione) inſtead of Ex (Legatione.)——Cro. C. 531. pl. 8. S. C. but S. P. does not appear.

6. If a Man leaſes to one for Life, and after grants the Reverſion to another for Life, the Remainder in Fee to a 3d, and Leſſee attorns; after Death of the Leſſee, if Reverſioner for Life enters, and Remainder-man in Fee brings Waſte againſt him, He ſhall ſuppoſe him in of a Leaſe, tho' the Grant was of a Reverſion. 17 E. 3. 7. b.

7. So if I leaſe for Life, the Remainder to another for Life, the Remainder to another in Fee, if he in Remainder in Fee brings Waſte againſt him in Remainder for Life, after Death of the Leſſee, the Writ ſhall ſuppoſe that he holds of my Leaſe. 17 E. 3. 7. b.

8. In Waſte *againſt Leſſee for Life, of the Leaſe of the Plaintiff*, the Tenant *pleaded That the Plaintiff granted by Fine the Reverſion of the ſame Tenements to the Tenant, which after the Death of one C. to him ought to revert for his Life, and ſo the Writ ought to be Quæ tenet ratione Conceſſionis, and not Dimiſſionis.* But the Writ was awarded good; for one ſhall not have Writ *Ratione Conceſſionis*, but where he who brings the Writ has the Reverſion by the Grant of another. Theloal's Dig. Lib. 11. Cap. 52. S. 8. cites Paſch. 4 E. 3. 132.

9. If the *Father makes a Leaſe to the Feme for Life, and dies*, and the *Son confirms it to her and her Husband for their Lives*, yet Waſte lies. Quod tenent ad Terminum of their Lives, Ex Dimiſſione of the Son. F. N. B. 57. (C) in the new Notes there (a) cites 6 E. 3. 9. and 16 E. 3. 68. b.

10. A *Feme, after the Death of her Baron, brought Waſte on a Leaſe made by her and her Baron during the Coverture*; and the Writ was adjudged good. Theloal's Dig. Lib. 11. Cap. 52. S. 21. cites Mich. 22 H. 6. 28. *But* where the Defendant *pleaded* that the *Leaſe was made by the Plaintiff and her Baron, and by a Siſter of the Plaintiff and her Baron, which Baron is yet alive &c abſque hoc that it was made by the Baron only*, this was adjudg'd a good Plea. Theloal's Dig. Lib. 11. Cap. 52. S. 21. cites Mich. 22 H. 6. 28.

11. In Waſte *by an Abbot* againſt Tenant for Life, *of the Leaſe of his Predeceſſor*, the Tenant *pleaded that the Predeceſſor and his Covent leaſed* to him for Life, and ſhew'd the Deed ſeal'd with the Covent-Seal, abſque hoc that the Predeceſſor alone leaſed &c. Judgment of the Writ. And held

held no Plea; for it might be intended the ſame Leaſe. Theloal's Dig. Lib. 11. Cap. 52. S. 23. cites Trin. 5 E. 4. 43.

Dal. 72. pl. 52. S C by Dyer and Browne accordingly.—Mo. 72. pl. 196. Nudigate's Caſe, S. C. accordingly.—If *Leſſee for Life and his Leſſor join in a Leaſe for Years* by Indenture, and Leſſee for Life dies, the *ſurviving Leſſor* ſhall have the Action for Waſte done, and ſhall count that he did demiſe alone. Brownl. 238. Trin. 8 Jac. Bedell v. Bedell.

12. *J. S. Leſſee for Life*, the *Reverſion to A.*——*A. and J. S. join'd in a Leaſe for Years* to W. R.——*J. S. died.* W. R. committed Waſte. *A. brought* Action of *Waſte, ſuppoſing it to be Ex Dimiſſione propria, without ſhewing the Special Matter in the Count.* The Defendant *traverſed the Demiſe* of the Plaintiff. Dyer and Brown held the Writ and Count good enough, and the Plea not good; for tho' during the Life of J. S. it was only the Confirmation of A. yet by the Death of J. S. it is become in Law the Demiſe of A. But Weſton and Walſh e contra. D. 234. b. 235. a. pl. 18. Mich. 6 & 7 Eliz. Newdigate v. Haſtings.

2 And. 131. pl. 75. Anon. but ſeems to be S. C. It was agreed that the Writ and Count were both ill; for the Uſe accrued by him that was and is Tenant, and not by the Vouchee, and therefore the Writ and Declaration in this Point ought to have agreed. And in this Caſe, if the Writ had been general, (as it was at the Common Law, and as this Writ is) and the Declaration had been Special upon the Caſe, it had been good; tho' it is not properly demiſed according to the Writ, and tho' the Eſtate of the Feme is not made by the Party, but by the Statute of 27 H. 8. of Uſes.

13. In Waſte *againſt D. and his Wife*, the *Writ was general, that ſhe held Ex Dimiſſione of G. her former Husband*, and the *Declaration was ſpecial*, (viz.) *That G. infeoff'd ſeveral*, in order *to make them Tenants to the Præcipe, that a Common Recovery might be had* againſt them, *wherein they ſhould vouch G. who ſhould vouch the common Vouchee*, and this was to be *to the Uſe of G. for Life, and after of the Wife for Life*, Remainder to G.'s right Heirs. Upon Nul Waſte pleaded, the Plaintiff had a Verdict. It was moved that this Writ did not warrant the Declaration; For the Writ ought to be ſpecial, or to have ſuppoſed the Demiſe of the Feoffees; For as this Caſe is, the Land and Uſe are in the Feoffees till the Recovery, which is a Limitation of the Uſe by them, and not by the Vouchee; and it being G.'s own Feoffment, (wherein the Feme cannot take by immediate Conveyance from her Baron) it ought always to ſuppoſe the Gift and Demiſe from the Feoffees. Cro. E. 722. pl. 52. Mich. 41 & 42 Eliz. C. B. Greenfield v. Dennis & Ux'.

14. If *Tenant in Tail in Remainder* brings an Action of Waſte againſt Tenant for Life, the Writ may be, Which he holds of the Tenant in Tail, altho' they hold of him in the Reverſion in Fee. Brownl. 239. Anon. ſays it was adjudged Paſch. 1 Jac. that the Writ was good.

[X] How it ſhall be brought. *Ex Aſſignatione.*

As where Waſte was brought *againſt Tenant for Term of Years, Ex Legatione of his Anceſtor*, it was awarded good, tho' the Statute ſpeaks of Ex Dimiſſione only; and the Writ lies Ex Aſſignatione alſo; Quod nota. Br. Waſte, pl. 132. cites S. C.

1. THE Writ may be Ex Aſſignatione, as the Caſe lies. 10 H. 6. 8. b.

S. P. Br. Waſte, pl. 76. cites 38 E. 3. 23.—But *Remainder-man* ſhall never have it Ex Aſſignatione, but it ſhall be *Quas tenet Ex Hereditate ejus.* Ibid.

2. If a Man leaſes, and grants over the Reverſion, the Grantee in Waſte ſhall ſuppoſe that he holds Ex Aſſignatione of the Grantor. 46 E. 3. 17.

3. If

3. If a Reverſion be to 2, and the Heirs of one, and he who has Fee releaſes to the other, if he brings Waſte he ought to ſay Quod tenet ex Aſſignatione. 46 E. 3. 17.

4 If the Aſſignee of a Reverſion who comes in by the Statute of Uſes, brings Action of Waſte againſt a Leſſee, he need not to name himſelf Aſſignee; but in his Count he may ſhew the ſpecial Matter, tho' the Form of the Regiſter be to name himſelf Aſſignee &c. at the Common Law, becauſe he comes in by an Act in Law. Hill. 10 Car. B. R. between *Stonehouſe and Corbet*, adjudg'd Per Curiam in Writ of Error upon a Judgment in Bank, and then ſaid Per Curiam to be the common Courſe ſince the Statute of Uſes. Intratur Hill. 9 Car. Rot. 133.

Cro. C. 381. pl. 9. S. C. but S. P. does not appear.—— Ibid. 400. pl. 9. S. C. but S. P. does not clearly appear. —— Jo 354. pl. 1. Corbett v. Stonehouſe, S. C. but S. P. does not appear.

5 Where *a Man leaſes for Life, and after makes Livery to another in Fee by Aſſent of the Termor*, the Feoffee ſhall have Waſte *ex Aſſignatione Reverſionis, without ſhewing Deed*; for this Matter amounts to a Grant of Reverſion without Attornment. Br. Waſte, pl. 47. cites 46 E. 3. 25.

6. A Man leas'd Land deviſable for Term of Life, and after *deviſes the Reverſion* by his Teſtament, and died, and the *Deviſee brought* Writ of *Waſte* ex Aſſignatione, and no Exception taken; for it is as a Grant. Br. Waſte, pl. 121. cites 34 H. 6. 5. 6.

7. If *after the Husband's Death the Heir infeoffs a Stranger* in Fee, *who aſſigns Dower* to the Wife, and ſhe commits Waſte, the Writ ſhall *mention that ſhe held* in Dower *of the Gift of her Husband by the Aſſignment of a Stranger of whom the aforeſaid Feme held in Dower of the Aſſignment which the Heir of the Husband hath made to the ſaid Stranger* ad Exheredationem of him who bringeth the Writ. F. N. B. 55. (G)

S. C. cited D. 206. b. in Caſe of Darrel v. Wyburn. — See ſuch Writ D. 208. pl. 17. in Caſe of Paine v. Sydney.

8. If a Feme holds in *Dower of the King*, who has the Reverſion, and the *King grants the Reverſion in Fee to a Stranger*, and afterwards the Feme commits Waſte, the Grantee ſhall have Waſte, and the Writ ſhall *mention how ſhe holds of the King, and that he granted the Reverſion to a Stranger &c. and that ſhe, who held in Dower of the Stranger of the King's Grant, hath committed Waſte &c.* F. N. B. 55. (G)

9. An Abbot made a *Leaſe* for Years *to commence 5 Years after*, and *before the Commencement he granted the Land to K. H. 8. who granted it to J. S. and* before the Term commenc'd *J. S. infeoff'd A. B.* The *Term commenc'd*, and the *Leſſee enter'd and did Waſte.* A. B. brings Waſte, ſuppoſing by the Writ that the Tenant held ad Terminum annorum de Præfato A. B. ex Aſſignatione J. S. of whom the ſaid Defendant held for the ſame Term ex Aſſignatione Domini Regis H. 8. of whom the ſaid Defendant held for the ſame Term ex Aſſignatione quam Abbas fecit eidem Regi H. 8. And held good (tho' there was no Tenure by the Leſſee of the Abbot or the King, or his Patentee, becauſe the Alienations were made before the Commencement of the Term;) For there is no other Form in the Regiſter. D. 206. b. pl. 11. Mich. 3 & 4 Eliz. Darrel v. Wyburn.

F. N. B. 55. (G) in the new Notes there (b) cites S. C. and ſays that *ſo* it is if *Leſſor enters on the Leſſee, and makes Livery* &c. and cites 5 H. 5. 12.

10. A. and B. are Parceners in Fee; *A. leaſes her Part to C.* and *B. leaſes her Part to D.* and then *both Leaſes come to E.* Afterwards *A. conveys the Inheritance to B.* E. does Waſte. B. declares *ex Aſſignatione, and alſo ex Dimiſſione.* Judgment was given in C. B. for the Plaintiff, and affirm'd in Error. Ow. 11. Mich. 33 & 34 Eliz. B. R. Wardford's Caſe.

Cro. E. 290. pl. 10. Warneford v. Haddock, S. C. accordingly.

11. It ſeems that Writ of Waſte ſhall *never* be ex Aſſignatione, *but where the Reverſion is granted over.* See Hutt. 110. in Caſe of Cook v. Cook.

(X. 2) How it ſhall be brought. *Ex Hereditate.*

1. THE *Baron levies a Fine*, and *takes back an Eſtate for Life, Remainder to his Son in Tail*, and dies. The *Son endows his Mother, who aſſigns over* her Eſtate. The Son brings Waſte againſt her as Tenant in Dower, and adjudg'd that it lies. But it ſeems alſo that he ſhall have a *general Writ, ſuppoſing that ſhe held in Dower of his Heritage.* F. N. B. 55. (E) in the new Notes there (a) cites 26 E. 3. 76.

And yet he may have a Writ, making *Mention of the Recovery*; but ſuch Writ ſhall ſuppoſe that ſhe held of his Heritage; and it ſeems good as well as in Caſe of a Feoffee, or where the *Diſſeiſor of the Husband aſſigns Dower.* Ibid. cites 38 E. 3. 23. 14 E. 3. Brief 273. 282.

2. A. ſeiſed of a Manor made a *Leaſe* thereof *to J. S. and his Feme for the Life of the Feme, Remainder to the right Heirs of the Baron*, and after the *Baron made Feoffment to the Uſe of himſelf and Wife for their Lives*, the *Remainder to his right Heirs*, and dies. The Feme holds in, and does Waſte in a Park Parcel of the Manor. The Queſtion was, whether the Writ of Waſte ſhall ſuppoſe that ſhe held ex dimiſſione A. or of the Baron. And the Court was of Opinion that the Writ ſhall be general (that is to ſay) *that ſhe holds ex Hereditate of the Heir*, who is the Plaintiff, *without ſaying ex Dimiſſione of any*; For ſhe is not in by the Feoffor nor by the Feoffees, but by the Statute of Uſes; and therefore it ſeems the Writ ſhall be ex Hæreditate. Dal. 100. pl. 32. 15 Eliz. Vavaſor's Caſe.

S. C. 3 Le. 53. pl. 76. Mich. 15 Eliz. C. B. and ſeems to be taken out of Daliſon, which contains the ſame and ſome Things more.——
S. C. 2 Le. 222. pl. 282. Hill. 16 Eliz. C. B. reported in much the very ſame Words as in 3 Le.

3. The *Feoffee* ſhall ſay that the *Tenant in Dower holds ex Hæreditate*; Per Dyer. Dal. 100. pl. 32. cites 6 E. 3.

4. *Where the Eſtate is made and created by the Law*, the Writ ſhall ſay that he holds *ex Hæreditate*; Per Harper. Dal. 100. pl. 32.

Fol. 832.

[Y] How it ſhall be brought. *Fecit vaſtum.* [*In the Singular Number.*]

1. IF Feme commits Waſte, and takes Baron, the Writ may ſuppoſe Quod fecerunt vaſtum. 49 E. 3. 26.

Br. Waſte, pl. 55. cites S. C.——
M. a Feme had a Leaſe of Land for Life, and took A. to Baron, who did Waſte. A Writ was brought, ſuppoſing that the Baron fecit Vaſtum, which was objected to, becauſe being charg'd in Right of his Feme, it ought to have been Fecerunt vaſtum; for ſo is the Form in the Regiſter, and in N. Br. and to this Opinion the Court agreed. Cro. E. 356. pl. 15. Mich. 36 & 37 Eliz. C. B. Sacheverel v. Bagnall.

2. So it may be in ſuch Caſe, that the Feme only did the Waſte. 49 E. 3. 26.

Br. Waſte, pl. 55. S. P. cites S. C.

3. If *Baron and Feme Leſſees for Life do Waſte*, the Writ ſhall be Quod fecerunt Vaſtum, ſo as it is as well the Waſte of the Wife as of the Huſband. 2 Inſt. 303.

[Z] How

[Z] How it ſhall be brought. [*To the*] *Diſinheritance.* [*Of whom*]. See (F. a) pl. 2.—(X) pl. 7.

1. IF it be brought by Baron and Feme, upon Leaſe of the Feme, for Waſte before Coverture, it ſhall be to the Diſinheritance of the Feme. 40 E. 3. 18. S. P. Br. Waſte, pl. 27. cites 42 E. 3. 18.

2. [So] in Writ brought by Baron and Feme upon Leaſe by Feme for her own Life before Coverture, this may ſuppoſe the Diſinheritance to the Feme; for ſhe has Reverſion and ſhall enter for Forfeiture. 42 E. 3. 18. Br. Waſte, pl. 27. cites S. C.

3. [So] If Baron and Feme bring Writ of Waſte for the Inheritance of the Feme, the Writ ought to be to the Diſinheritance of the Feme; for if it be to the Diſinheritance of the Baron and Feme, the Writ ſhall abate. 8 H. 6. 9. adjudg'd. Br. Waſte, pl. 83. cites S. C.

4. [So] If a Remainder eſcheats to the Baron and Feme in Right of the Feme, and they bring Waſte afterwards, the Writ ſhall be to the Diſinheritance of the Feme. 3 H. 6. 2. Exception was taken to the Writ becauſe it was *ad Virum & Uxorem* (the Demandants) *reverti debent* tanquam Eſcaeta ſua, whereas it ſhould be (as it was inſiſted) ad Uxorem reverti debent tanquam Eſcaeta of the Feme; becauſe the Inheritance was her's and the Baron had nothing but in Right of his Feme; Sed non allocatur. And thereupon the Defendant pleaded another Plea. Br. Waſte, pl. 6. cites 3 H. 6. 1.

5. In Waſte by two *where the one has only for Life and the other has the Fee*, the Writ ſhall be ad Exhæredationem of him that has the Fee. Theloal's Dig. of Writs, lib. 10. cap. 23. S. 2. cites Paſch. 18 E. 2. Brief 835.

6. In Waſte *by Baron and Feme upon Leaſe* made *by them both*, the Writ was *ad Exhæredationem of the Feme*; and held good. Theloal's Dig. lib. 10. cap. 26. S. 2. cites Mich. 5 E. 3. 213.

7. In Waſte by *Baron and Feme ad Exhæredationem of them both*, it ſhall *not be intended their joint Purchaſe till* it be *ſpecially ſhewn*. Theloal's Dig. 99. lib. 10. cap. 9. S. 10. cites Mich. 10 E. 3. 536. Ibid. Lib. 10. Cap. 26. S. 7. cites S. C.

8. In Waſte *by Baron and Feme, and a third Perſon on a Demiſe made by them three*, the Writ was *ad Exhæredationem of all three*, and adjudg'd good. Theloal's Dig. lib. 10. cap. 23. S. 24. cites Mich. 14 E. 3. 213. Brief 282.

9. *Aunt and Niece* ſhall have *Waſte* jointly for Waſte *done after the Deceaſe of the other Siſter; and for Waſte done before* the Aunt may *count of Waſte done to her own Diſheriſon only*, and all in one Writ. See Kelw. 105. b. pl. 17. Caſus incerti temporis, cites 45 E. 3. 3. pl. 11. Waſte, and 35 H. 6. 23. Per Forteſcue; and 11 H. 4. 16.

10. *Every kind of Action of Waſte* muſt be ad Exhæredationem. Co. Litt. 285. a.

[Z. 2] Brought *by Spiritual Corporation.*

Br Waſte, pl. 29. cites S. C.

[1] 5. IF Prior of an Hoſpital brings Waſte for Waſte in Time of his Predeceſſor, **the Writ may ſuppoſe the Waſte to be to the Diſinheritance** Domus & Hoſpitalis prædicti, **without ſuppoſing it to be to the Diſinheritance** Hoſpitalis Eccleſiæ. 42 E. 3. 21. b. 22.

* Br. Waſte, pl 80. cites S. C. — † Writ of Waſte by an Abbot ſhall be *ad Exhæredationem Domus.* Br. Abbe, pl. 2. cites S.C.

[2] 6. **If an** Abbot brings **Waſte, the Writ may be to the Diſinheritance** of the Church **without ſaying to the Diſinheritance** Abbatiæ Domus & Eccleſiæ. * 7 H. 6. 18. b. **adjudg'd.** † 9 H. 6. 25. b.

3. Waſte by the Prioreſs of C. *in a Manſion*, and a good Aſſignment; for the *Statute ſpeaks of Domibus*, and a *Manſion is Domus*, and it was *in Exheredationem Prioreſſæ de C.* Br. Waſte, pl. 144. cites 10 H. 7. 5.

4. A Writ of Waſte brought by a *Biſhop* was to the Diſinheritance *Epiſcopi*; But whether well or not was not adjudg'd, or whether it muſt be ad Exhæredationem *Eccleſiæ*; for the Regiſters vary. See D. 129. pl. 64. Biſhop of Carliſle v. Smith.

See (B. a)

[A. a] How it *may* be brought.

And. 231. S. P. Anon. —* Brownl. 241. Trin. 12 Jac. S. C. accordingly. —Hob. 84. pl. 112. S. C.

1. **THO' the** Eſtate **be** executed by the Statute of Uſes, **yet there may be** a general Writ and ſpecial Count. **Hobart's Reports** 115. **between** * *Skeate and Oxenbridge.*

2. **If the** Writ mentions that A. being ſeiſed of the Land ſince 27 H. 8. infeoff'd B. to Uſes &c. **and derives under it, tho' the Writ** does not mention that the Feoffment was to B. in Fee, **yet inaſmuch as the** Uſe has been to make the Writs ſo ever ſince the Statute, **it is to be allow'd, tho' it was not in Fee to B. but an Eſtate for Life of B. it will paſs. Hobart's Reports** 115. **between** *Skeate and Oxenbridge.* **But the** Declaration **upon it** ought to allege the Feoffment to be in Fee.

3. In Waſte *againſt Feme on a Leaſe made to herſelf for Life*, ſhe *pleaded that the Leaſe was made to her and her Baron for their 2 Lives, and that after the Baron's Death no Waſte was done*, and ſo did not plead to the Writ; but it was ſaid the Writ had been better if the Leaſe had been ſuppos'd to the Baron and Feme. Theloal's Dig. lib. 11. cap. 52. S. 7. cites Mich. 3 E. 3. 109.

4. Waſte *by the Feoffees in Uſe againſt the Leſſee for Years of Ceſty que Uſe*; and it lies well, Per Cur. tho' no Form of Writ be thereof given in the Regiſter or in the Statute. But quære the Form of this Writ; for it was cum W. & N. fuerunt Seiſiti ad uſum C. and did not ſay of what Eſtate; and therefore ill in this by ſeveral. Br. Waſte, pl. 2. cites 26 H. 8. 6.

S. P. Br. Brief, pl. 6. cites 2 H. 6. 10. — Br. General

5. In a Writ of Waſte, if the Premiſſes of the Writ recite *Quod non liceat alicui facere Vaſtum in Domibus, Boſcis & Gardinis*, [and] in the End of the Writ it is ſaid that the Defendant *hath done Waſte in Lands*, Houſes, Woods, Gardens, *and Exile of Men*; ſo as there is *more in the End*

End of the Writ than is in the Premiſſes, yet the Writ is good; And *ſo if leſs* be in the End of the Writ than is recited in the Premiſſes, yet the Writ is good; As if it be recited Quod cum Proviſum ſit, quod non liceat alicui facere Vaſtum &c. in Terris, Domibus, Boſcis, & Gardinis; and in the End it is recited Quod Defend' *fecit Vaſtum in Terris* only, *or in Boſcis* only, *or in Domibus only*, yet the Writ is good. F. N. B. 56. (I)

Brief, pl. 3. cites S.C. Br. Waſt, pl. pl. 5. cites S. C.

6. Note, that the Action of Waſte *againſt the Guardian* is general, Fecit vaſtum &c. de Terris &c. quas habet vel habuit in Cuſtodia de hæreditate prædict' which Writ doth extend as well to the Guardian *in Socage as in Chivalry*. 2 Inſt. 305.

7. If *Leaſe* be made *to Huſband and Wife for Life, and for* 20 *Years after their Death*, the Wife dies and Waſte is committed, the Wife ſhall not be named in the Writ nor the Term after her Death. Brownl. 238. Trin. 8 Jac. in Caſe of Bedell v. Bedell.

8. A Man after the Statute of 27 H. 8. makes a *Feoffment* in Fee *to the Uſe of himſelf for* Term of his *Life, and after* his Deceaſe *to the Uſe of J. S. and his Heirs*. The *Feoffee does Waſte*, and *J. S. brought his Action* of Waſte. And now if his Writ ſhall be general or ſpecial was demurr'd in Judgment. And Hutton and the other Juſtices were clearly of Opinion that the *Plaintiff ought to have a ſpecial Writ*; and ſo it was adjudged afterwards. Het. 79. Hill. 3 Car. C. B. Foſſam's Caſe.

This is only a Tranſlation of Dal. 5. pl. 7. Paſch. 3 E. 6. Anon. but was the Caſe of Terrel v. Terrel.—— D. 93. b. pl. 25. 26. 27. Mich. 1 Mar. S C. by the Name of **Terrel v. Terrel**; and becauſe the Writ original recited that W. R. and W. S. were ſeiſed of the Land &c. to the Uſe of J. T. Father of the ſaid J. T. (the Plaintiff in the Action) and A. his Wife, and of the Heirs of J. the Father, *without ſhewing in the Writ what Eſtate the Feoffees were ſeiſed of*, but afterwards in the Aſſignment it was ſhewn certain, In Dominico ſuo ut de Feodo; And alſo becauſe it was *not alleged How the Uſe of the particular Eſtate commenc'd*, neither in the original Writ nor in the Aſſignment of the Waſte; And alſo in aſſigning the Waſte, he alleg'd *the Statute of* 27 *H.* 8. for the Execution of the Eſtate, *and ſhew'd the Death of J. the Father, and the Survivor of the ſaid A. and the Deſcent of the Reverſion to him as* Son and *Heir, by which the ſaid A. held to her for* Term of her *Life, the Reverſion to him*, without ſaying *Spectant' vel pertinent'*. And afterwards Judgment was revers'd for the ſaid Errors.

(A. a. 2) *Abatement of* the *Writ*.

1. IN Waſte *againſt* 3, *one of the Defendants died after Writ of Inquiry awarded*, by which the Writ abated. Theloal's Dig. lib. 12. cap. 2. S. 6. cites Mich. 34 E. 1. Brief 854.

2. In Waſte *againſt Baron and Feme upon Leaſe to both*, the *Baron pleaded that the Leaſe was made to him alone* &c. and the *Feme* by Attorney *pleaded that ſhe had nothing* &c. and becauſe the Plaintiff did not deny the Leaſe to the Plaintiff alone, the Writ was abated. Theloal's Dig. lib. 11. cap. 52. S. 12. cites Paſch. 6 E. 3. 250.

3. In Waſte *againſt Tenant for Life on the Leaſe of W. the Plaintiff*, the Tenant *pleaded that W. and A. his Wife leas'd to him* &c. and held a good Plea to the Writ, *without ſhewing what Eſtate they leas'd*. Theloal's Dig. lib. 11. cap. 52. S. 16. cites Trin. 10 E. 3. 525. and 46 E. 3. 20.

So *againſt Leſſee for Years*, where the Action was brought by the Son of W. and the Defendant *pleaded that A is yet living* &c. Judgment if &c. and held a good Plea. Theloal's Dig. lib. 11. cap. 52. S. 28. cites Hill. 15 E. 2. Waſte 116.

4. In Writ of Waſte *in* 3 *Vills*, *No ſuch Vill as to one of the Vills* abates the whole Writ; Adjudg'd. Theloal's Dig. lib. 11. cap. 11. S. 6. cites Paſch. 17 E. 3. 31. and ſo agreed Trin. 2 H. 6. 11.

5. In Waſte *againſt Tenrnt in Dower, ſuppoſing that ſhe held a Manor in Dower*, the Defendant *pleaded that ſhe held Parcel of this Manor in Frankmarriage &c. and not in Dower* ; Judgment of the Writ, and held a good Plea in Abatement of all. Theloal's Dig. lib. 16. cap. 10. S. 8. cites Mich. 18 E. 3. 32.

6. The Writ was *againſt 2 of Land, which they hold for their Lives of the Leaſe of A. made to them and one G. Anceſtor of the Plaintiff, and to the Heirs of G.* &c. The Tenants *pleaded that the Leaſe* (which they ſhew'd) *was made to them 2 only for their Lives, the Remainder to C. and his Heirs* ; Judgment of the Writ, and held a good Plea. Theloal's Dig. lib. 11. cap. 52. S. 17. cites Trin. 24 E. 3. 21.

7. Waſte of *a Leaſe to the Defendant and the Plaintiff, and to the Heirs of the Plaintiff*, where *it was to the Defendant for Life*, the *Remainder to the Plaintiff in Fee*, and therefore the Writ was abated ; And per Mombray, where Leaſe is made to ſeveral, and to the Heirs of the one, he ſhall not have Writ of Waſte. Br. Waſte, pl. 97. cites 24 E. 3. 27.

8. Waſte *againſt Executors*, and *in the Percloſe it was, That the ſame Executor did Waſte not naming his proper Name*, and yet the Writ awarded good, and the Defendant pleaded to the Writ becauſe *it is not declared in the Writ, that the Executer held of any Leaſe* ; and yet the Writ good, becauſe the Plaintiff *counted that he leaſed to the Teſtator*, and the Executor repreſents the Eſtate of the Teſtator, and yet becauſe it was *brought againſt the Defendant as Executor of the Leſſee where he was Executor of the Executor of the Leſſee*, therefore upon this Exception the Writ was abated ; quod nota. Br. Waſte, pl. 75. cites 38 E. 3. 17.

9. In Waſte *by him in Remainder* he ought to ſhew Deed of Remainder, and ſo he did ; and *the Deed was J. de T. and the Writ was J. T.* and Exception taken for the Variance, & non allocatur ; for it is not like to Debt upon Obligation. Br. Waſte, pl. 28. cites 42 E. 3. 19.

Br. Office & Off. pl. 58. cites S. C.

10. Waſte was brought *by J. Archdeacon of D. of the Leaſe of his Predeceſſor*, the *Proceſs iſſued to the Sheriff to enquire of Waſte return'd*, the *Original was, that the Defendant did Waſte in Tenements which J. S. Predeceſſor of the Plaintiff leaſed to the Defendant ad exhæredationem ipſius Archidiac.* where he does not determine if the Waſte was in the Time of the Predeceſſor or in the Time of the Plaintiff, and the *Writ of Inquiry* of the Waſte *was* Quod *Venire facias* coram te 12 *&c. qui nec querentem nulla affinit. attingant*, and *did not ſay eundem querentem nec Defend' nulla affinit. attingant*, and therefore ill ; For in this Writ the Sheriff is Judge and Officer, and the Party may challenge and have Attaint ; for which Default, and becauſe *it is not expreſſed in the Original nor in the Verdict, if the Waſte was in the Time of the Predeceſſor, or in the Time of the Plaintiff*, therefore *Mention was made in the Roll of thoſe Matters by ſpecial Entry, and another Writ awarded to inquire of the Damages and thoſe Matters ſpecially put in the Writ* ; quod nota. Br. Waſte, pl. 58. cites M. 2 H. 4. 2.

11. Waſte *ſhall be brought in Vill or Hamlet* &c. or the Writ ſhall abate as it ſeems there ; And *yet* per Hank. *if the Place where* &c. *be a Manor or ſuch a Place*, the Writ is well brought ; and after they were at Iſſue if it was a Vill or not ; and Hank. ſaid, now the Waſte ſhall be tried by this Inqueſt ; quod conceditur per Thirning Ch. J. Br. Waſte pl. 61. cites 7 H. 4. 8.

Br. Variance pl. 30. cites S. C. —— *But it was ſaid that if the Grant had been by Deed the Plaintiff might have averr'd that R. had nothing.*

12. In Waſte the *Writ ſuppoſed that the Plaintiff had the Reverſion of the Aſſignment of J. who had it of the Aſſignment of W. and ſhew'd Fine of the firſt* Aſſignment *and Deed of the ſecond Aſſignment to himſelf*. Tik. ſaid, the *Fine proves that J. had the Reverſion of the Aſſignment of W. and R.* and the *Writ ſuppoſes it to be by W. only* ; Judgment of the Writ, and therefore the Writ was abated, notwithſtanding the *Plaintiff had averr'd that R. had nothing in the Reverſion, but W. only* ; For as his Grantor ſhall be eſtopp'd, ſo he ſhall be eſtopp'd. And *a Stranger to the Fine pleaded it to the Writ by Reaſon of the ſhewing of the Plaintiff*. Br. Waſte, pl. 64. cites 11 H. 4. 1.

13. In

13. In *Waſte*, the Plaintiff *counted in Aſhes and Thorns*, and the Defendant pleaded it to the Count becauſe the *Thorns are not Waſte*; and there it was argued, that it goes to the Writ; and it ſeems that there is no other Judgment upon Plea to the Count, but quod querens nihil capiat per Breve, and therefore ſee that for Fault in the Count the Writ ſhall abate. Br. Count, pl. 8. cites 9 H. 6. 10.

14. The Defendant demanded Judgment of the Writ becauſe it is *brought of Waſte in A. and* B. and *ſaid that B. is a Hamlet of A. and not a Vill by it ſelf*, and this *goes* to *all the Writ*; Per Babbington, Martin, and Paſton; and Iſſue was taken if it was a Vill by it ſelf or not. Br. Waſte pl. 9 cites 9 H. 6. 42.

15. Where Waſte is brought of Waſte *in a Houſe and in breaking of a wall, where it does not lie of the Houſe*, yet the Writ ſhall not abate in all; For it does not lie but by Surmiſe in Writ or Declaration, contra if it was confeſſed by the Party; note the Diverſity. Br. Waſte, pl. 94. cites 22 H. 6. 24. Br. Brief, pl. 188. cites S. C.

16. Waſte *againſt a Feme of a Demiſe to her ſo long as ſhe ſhall live ſole*, and therefore the Writ ill; per Cur. For it *ſhall be for Term of Life and the Declaration ſhall be ſpecial*. Br. Waſte, pl. 102. cites 37 H. 6. 26. S. P. Theloal's Dig. of Writs, lib. 9. cap. 7. S. 8. cites 37 H. 6. 29.

6. 29. —— So of a Leaſe *Quamdiu ſe bene geſſerit*. Br. Waſte, pl. 102. cites 37 H. 6. 26. —— S. P. Theloal's Dig. of Writs, lib. 9. cap. 7. S. 8. cites 37 H. 6. 29.

17. Writ of Waſte *againſt Tenant Pur auter Vie*, does not abate by the *Death of Ceſty que Vie*. Theloal's Dig. lib. 12. cap. 10. S. 9. cites Hill. 9 E. 4. 53.

18. If Waſte be brought *by Baron and Feme in Remainder in eſpecial Tail*, and *hanging the Writ the Feme dies without Iſſue*, the Writ ſhall abate, becauſe every Kind of Action of Waſte muſt be ad Exhæredationem. Co. Litt. 285. a.

19. An Action of Waſte is brought againſt the Leſſee for Years, or againſt Tenant Pur term d'auter Vie, and *hanging the Action the Term expires*, or Ceſty que Vie dies, yet the Writ ſhall not abate, for that an Action of Waſte lies only for the Damages in thoſe Caſes, which he ſhall recover in that Action then depending. 2. Inſt. 304.

[B. a] The *Count*. [And where *General or Special*, tho' the Writ is General.]

See (S) pl. 14. in the Note. (A. a) (A. a. 2) pl. 16.

1. **If Waſte be** brought for ſuch Trees whereof the cutting of every particular Tree will be Waſte, **there the Count ſhall be** that he cut ſo many Trees, **ſo that Damages may be more certainly tared. 46 E. 3. 17. as White Thorns. 11 H. 6. 1.** It was agreed, that where the Plaintiff *aſſigns Waſte in diverſe Things*, he *ſhall ſhew the Value of each Thing by it ſelf*. Br. Waſte, pl. 9. cites 9 H. 6. 42.

2. But where **the Action is brought for ſuch Trees whereof the cutting of every Particular is not Waſte,** but the Waſte conſiſts in the Multitude, **there** * **he ſhall not count of ſo many Trees, but** of ſo many Loads, **as of ſo many Loads of Black Thorns. 46 E. 3. 17. adjudg'd.** * Fol. 853.

3. If **Waſte be brought** for Waſte in Germens, **he ſhall** not **count** in permitting the Wood to be unincloſed, ſo that **the Beaſts have eat the** Germens

Germens, but he ſhall count generally that he has deſtroy'd the Germens. 11 H. 6. 1.

4. So if a Stranger comes upon the Land, and does Waſte, the Count ſhall not be in permitting the Stranger &c. but generally. 11 H. 6. 1.

5. A Man may have Action of Waſte, and Count *upon divers Leaſes.* F. N. B. 60. (F) cites M. 44 E. 3. 17. See 34 H. 8. 12.

Br. General Brief, pl. 21. cites S. C.—Theloal's Dig. of Writs, Lib. 9. Cap. 7. S. 7. cites S. C. and 7 H. 7. 2. and 14 H. 8. 11.

6. Waſte quod tenuit ad Terminum Annorum, and counted of a Leaſe *for Term of Life to the Teſtator, and half a Year over*, by which the *Defendant pleaded this to the Writ, becauſe it is not Ad Terminum Annorum*; and yet well; for there is no other Writ but for Term of Life or Years, and therefore *he ſhall have General Writ and Special Count.* Br. Waſte, pl. 48. cites 46 E. 3. 31.

Br. Brief, pl. 6. cites S. C.—Br. General Brief, pl. 3. cites S. C.—Theloal's Dig. of Writs, Lib. 9. Cap. 7. S. 14. cites S. C. and M. 30 E. 3. Brief 303.

7. *Battery of Villeins, or conſtraining them to do more Services than they ought, per quod receſſerunt*, is Waſte; and the Writ was Vaſtum in Hominibus, and counted of Villeins as above, and good; for the Writ ſhall be general, and the Count ſpecial, and ſo good, notwithſtanding that it was not Exilium de Hominibus. Quod nota. And it was brought in 4 Vills, and the Defendant ſaid that no ſuch Vill as the one &c. And per Marten, This goes to all the Writ, without anſwering to the Waſte in the reſt. Br. Waſte, pl. 5. cites 2 H. 6. 10. 11.

8. *Writ* of Waſte *is* Quod fecit *Vaſtum*, and yet he may *count of ſeveral Waſtes.* Br. General Brief, pl. 9. cites 4 H. 6. 11.

S. P. ibid. pl. 15. cites Lit. Tenant for Years, Lib. 1. Cap. 7. And the Count ſhall not abate the Writ; for there is no other Form of Writ in this Caſe, and yet the Writ is falſe; for it contains more than is true.——S. P. Godb. 115. pl. 136. Arg in Caſe of **Lewkner v. Ford**, cites 40 E. 3. 41 E. 3. 18.——4 Le. 226. in S. C. Arg. cites the Same Caſes.——S. P. F. N. B. 60. (D) cites Litt. 14. but adds Quære.——S. P. Co. Litt. 52. b. 53. a.

9. In Waſte the Writ ſhall be *Ad Terminum Annorum*, and ſhall count *for one Year, or* for *half a Year.* Br. General Brief, pl. 6. cites 8 H. 6. 34.

S. P. Brownl. 239. Anon.

10. If *Leaſe* is made *to a Feme as long as ſhe ſhall live ſole, or* to a Man *as long as he ſhall behave himſelf well*, and the Tenant does Waſte, the Writ ſhall be general, Quas *Tenet ad terminum Vitæ*, and there Declaration ſhall be ſpecial. Br. General Brief, pl. 11. cites 37 H. 6. 26.

11. Waſte, and *aſſign'd Waſte in a Kitchen in permitting it to fall, by reaſon that he did not lay Stones under the Walls of the Kitchen, viz. the Groundſels.* The Defendant demanded Judgment of the Count; for it is not Waſte; for the Tenant is not bound to more than to keep it in ſuch Caſe as he took it. And the Declaration is, That the Ill came after the Leaſe by Sufferance of the Tenant; and it was held that *it goes only to the Action for this Part, and the Writ is good for the reſt*, (for the Plaintiff aſſign'd other Waſtes alſo) by which the Defendant paſs'd over, and pleaded No Waſte done. Br. Waſte, pl. 110. cites 5 E. 4. 89.

12. In Waſte, if the Plaintiff counts of a Sale, he need not *ſhew to whom he ſold.* Br. Waſte, pl. 112. cites 5 E. 4. 100.

13. Waſte by the Prioreſs of C. *in a Manſion*, and a good Aſſignment; For the *Statute ſpeaks of Domibus*, and a *Manſion is a Houſe*, and it was *in Exheredationem Prioreſſæ de C.* and *did not ſay predict'*; and yet good; for it ſhall be intended the Plaintiff, and if he brings it as Parſon Imparſonee, the Prioreſs ſhall be named accordingly. Br. Waſte, pl. 144. cites 10 H. 7. 5.

14. In

14. In Waſte he may declare upon *a Leaſe for a Year, and ſo from Year to Year, as long as both Parties pleaſe*, and count that he held for 10 Years; per Brudnell and Pollard. But Brooke and Fitzherbert contra, and that it is only a Leaſe at Will. Quære. Br. General Brief, pl. 20. cites 14 H. 8. 10.

15. Waſte was aſſign'd in *Amputando & Decapitando* 40 *Fraxinos & 20 Ulmos pretii &c.* and held good. D. 65. pl. 2. Mich. 3 E. 6. Samuel v. Johnſon.

16. If *Eſtates* of Lands be made *to the Husband and Wife*, to have and to hold to them *during the Coverture*, if they ſhall do Waſte, the Feoffor ſhall have a Writ of Waſte againſt them, ſuppoſing by his Writ Quod *tenet ad terminum Vitæ* &c. But in his Count he ſhall declare *how and in what manner the Leaſe was made.* Litt. S. 380. and S. 381.

17. A *Leaſe* was made to endure *from ſuch a Feaſt unto ſuch a Feaſt*, the Writ ſhall ſuppoſe Quod tenet ad terminum Annorum in that Caſe, and by the Count the Special Matter ſhall be ſhew'd. F. N. B. 60. (N)

18. If the *Grantee of the Reverſion brings Action of Waſte againſt Aſſignee of Tenant by the Curteſy*, the Plaintiff muſt rehearſe the Statute. Co. Litt. 316. a.

19. In Waſte &c. the *Writ was*, That the *Defendant committed Waſte in the Land*, and *in the Declaration he aſſign'd the Waſte in felling Trees.* It was held that this would not maintain the Writ; but if he had aſſign'd the Waſte in *digging Clay, Chalk, or Stones*, or the like, this is Waſte in the Land. Mo. 73. pl. 200. Trin. 6 Eliz. Anon. S. P. Brownl. 239. Anon.

20. In Waſte the Plaintiff *declared of a Demiſe of a Moiety of the Manor of Woolverton, and of a Moiety of the Wood call'd Woolverton-Wood, and other Lands*, and *aſſign'd the Waſte* in cutting down Oaks *in a certain Wood call'd Woolverton-Wood, Parcel of the Premiſſes*, which it could not be; For this Wood could not be Parcel of the Manor of Woolverton, and of the other Lands demiſed with the Manor; and for this and other Cauſes the Count was held inſufficient by the whole Court. 3 Leon. 9. pl. 23. 7 Eliz. C. B. Tindal v. Cobb. Bendl 141. pl. 200. S. C. and the Pleadings, and ſays the Plaintiff could not have Judgment, becauſe his Count was inſufficient. ——S. C. cited Mo. 388. in **Perrot's** Caſe, as adjudged; and ſays he thinks the Judgment well given, becauſe there is *no Moiety or Half-part known, and ſo no Place certain where the Waſte was aſſign'd*; but if he had aſſign'd the Waſte in Bl. Acre, Parcel of the Manor, in cutting Trees there, tho' his Writ be of a Demiſe of a Moiety, yet the Aſſignment will be good; but Damages ſhall be given according to a Half-part of the Trees, and not of more by this Writ. It ſeems if he will bring a new Action upon the Statute of W. 2. cap. 22. when 2 or 3 &c. he ſhall recover treble Damages for the other Half-part of the Trees.

21. In Waſte the Plaintiff *declared*, That *Seiſitus fuit of the Land, and leaſed it to the Defendant for Years, who committed Waſte ad Exhæreditationem of the Plaintiff.* Upon Nul Waſte pleaded, Judgment was given for the Plaintiff. It was aſſign'd for Error, that the Declaration was Quod ſeiſitus fuit, and did *not ſay of what Eſtate*, and ſo it might be of an Eſtate for Life. Shute and Clench J. held the Declaration good, becauſe the Allegation of Seiſin is not material, when it might be left out. Beſides it is help'd here by the ſubſequent Words, (viz.) Ad Exhæreditationem of the Plaintiff, which explains how he was ſeiſed; and being but Form, it is help'd by the Statute of Jeofails. Gawdy doubted. Et adjornatur. Cro. E. 57. pl. 6. Paſch. 29 Eliz. B. R. Aſton v. Whetenal. Godb. 121. pl. 142. Tildall v. Aſhton, S. C. reports that Suit J. thought it a Fault incurable; and that Clench J. thought it was help'd by the Statute of 18 Eliz. which Suit J. denied; and that it was adjourn'd.

22. In Error to reverſe a Judgment in Waſte, the Exception was, that the Plaintiff had *aſſign'd the Waſte in a Houſe*; and *by his Title it appear'd that he had only 2 Parts of the Reverſion of the ſaid Houſe.* Sed non allocatur; Ow. 11. Wardford's Caſe, S. C. accordingly.

allocatur; For tho' he has but 2 Parts, yet he ſhall puniſh the Defendant for Waſte done in that which was held of the Plaintiff; and the Meſſuage being intire, he cannot aſſign the Waſte otherwiſe, and his Count was according to his Title. Cro. E. 290. pl. 10. Hill. 34 & 35 Eliz. B. R. Warneford v. Haddock.

23. Lands were given to A. and B. and the Heirs of *their 2 Bodies*. A. *died without Iſſue*, and the Remainder of the half *reverted* to the Donor. He brought Waſte againſt B. of Houſes and Lands to him demiſed, and agreed that the Writ was good. But it was queſtion'd if the Count ſhall be general, or of a Half only, notwithſtanding that both were Tenants in Common of the Reverſion. 2 Brownl. 133. Mich. 9 Jac. C. B. Mallet v. Mallet.

24. In Waſte the Plaintiff *counted that the Defendant plow'd up his Land, which was paſturable, & ſic fecit Vaſtum*. After Verdict for the Plaintiff *it was moved in* Arreſt of Judgment, *That the Plaintiff* in his Declaration *does not ſo much as allege a Waſte done*, but leaves it abſolutely uncertain; and that the Verdict does not help it; For that only ſays that the Defendant did it Modo & Forma prout in Narratione. Now the Ploughing of Paſture may or may not be Waſte, and to make it ſuch it ought to have been ſo Time out of Mind; and it is not enough to ſay that it was Paſture-Ground Diu ante. Jones J. ſaid, That Arable and Paſture-Ground are convertible, and what is the one this Year, may be the other the next, and the Law does not ſo much diſtinguiſh; and therefore Judgment was ſtay'd. 2 Show. 8. pl. 4. Paſch. 30 Car. 2. B. R. Gunning v. Gunning.

25. The Declaration was *that the Defendant*, who was Leſſee, *did fell the Trees* &c. And this was held not good, *without ſaying that he cut them down* &c. Clayt. Rep. 126. pl. 225. March 1647, Ward v. Waddington.

See (N. a) —(O. a)

(B. a. 2) *Proceſs* and *Proceedings*.

* If the *Defendant* be *return'd Nihil* &c. ſo as peradventure he was never ſummon'd, nor any other Writ ſerved, whereby he might have Notice, yet a Writ of Enquiry of Waſte ſhall be awarded by this Branch; for here it is not ſpecified that Iſſues ſhould be return'd &c. but generally, and by the Writ, the Waſte ſhall be inquir'd of by the Oath of 12 Men, where the Defendant, or any for him, may attend if he will, and the Jurors may find againſt the Plaintiff. 2 Inſt. 389.

1. 13 *E.* 1. cap. 14. ENacts, That *of all manner of Waſte done, to the Damage of any Perſon, there ſhall from henceforth be no Writ of Prohibition awarded, but a Writ of Summons; *ſo that he, of whom Complaint is, ſhall anſwer for Waſte done at any Time. And if he come not after the Summons, he ſhall be attach'd; and after the Attachment he ſhall be diſtrained.*

If the Defendant *appears* upon the Diſtreſs, *and pleads*, *and after makes Default*, the Plaintiff ſhall not by this Branch have a Writ to inquire of the Waſte, becauſe it is out of the Words and Purview of this Act. 2 Inſt. 390.

*And if he come not after the Diſtreſs, the Sheriff ſhall be commanded that * in proper Perſon he ſhall take with him* 12 *&c. and ſhall go to the Place waſted*;

* Here are three Things to be obſerved, 1ſt. That the Sheriff ought to go in proper Perſon; for that tho' in Rei veritate he is no Judge, yet this Writ is in Nature of a Commiſſion unto him, and he is in loco Judicis, and therefore he ought to go in propria Perſona. 2dly, Where ſome have holden that the Sheriff may inquire upon this Writ, by the Oath of † 6 or 8 Perſons, it appears that there *ought not to be under* 12; for the Words of this Branch are Aſſumptis ſecum 12; Yet this is but an Inqueſt of Office; for it is taken Sans miſe des parties; that is, without any Iſſue join'd. 3dly, The Sheriff *muſt go Ad locum vaſtatum*,

vaſtatum, together with the Jurors, and view the ſame; for Iſta cadunt potius ſub Viſu, quam ſub Auditu. 2 Inſt. 390.

† It was agreed by the whole Court, that if 6 of the Jury are examin'd upon a Voire dire, if they have ſeen the Place waſted, that it is ſufficient; and the reſt of the Jury need not be examin'd upon a Voier dire, but only to the Principal. Godb. 209. pl. 298. Mich. 11 Jac. in C. B. Gage v. Smith.

And ſhall inquire of the Waſte done, and ſhall return an Inqueſt; and after the Inqueſt return'd they ſhall paſs unto Judgment; like as it is contain'd in the Statute of Gloncester.

If the *Waſte* be *aſſign'd in divers Towns*, the Sheriff and the *Jurors muſt view all the Places waſted in every of the Towns, but* he *may inquire thereof in any one of the Towns*; and this Copulative doth ſo knit the Words together, as he cannot inquire of it in a Foreign Town. 2 Inſt. 390.

View in Waſte for the aſſeſſing of Damages, ſhall be of *every Parcel*. Agreed by all. D. 204. a. Marg. pl. 1. cites Paſch. 41 Eliz. C B. Letchford v. Sanders.

2. Waſte *againſt two by the Biſhop ad Exhæredationem Eccleſiæ*, and *Proceſs continued till the Grand Diſtreſs returned*, and the *one came*, and the *other made Default*, and he who appeared was compelled to anſwer alone; For the Proceſs is determined againſt the other. Br. Waſte pl. 99. cites 39 E. 3. 15.

3. If the *Iſſue* be *taken out of the Point of the Writ*, *as* upon *Confirmation*, *Releaſe*, or the like, there needs not the View, or Claim of the View in Venire facias; For the Waſte is not denied, but where Bar is pleaded; ſo in Aſſiſe; Per Pigot, quod non negatur. Br. Waſte, pl. 113. cites 7 E. 41.

In ſuch Caſe the Jury ought not to have the View of the Place waſted, nor to inquire of that but of Damages. D. 204. Marg. cites it adjudg'd Hill. 33 Eliz. Anon.——But by Anderſon and Walmſley, if the Iſſue be join'd upon ſuch collateral Point, as whether he entred as Executor or as Legatee, yet the Jurors ought to have the View for the giving of Damages; So if the Waſte be confeſs'd or found by Verdict, but otherwiſe if it be adjudg'd upon Demurrer; but Glanvil contra. D. 204. Marg. pl. 1. cites Paſch. 41 Eliz. C. B. Letchford v. Sanders. —— 2 And. 133 pl. 80. S. C. —— Cro. E. 690. pl. 26. S. C. ——Poph. 194. S. C. ——Brownl. 241. Laſhbrook v. Saunders, S. C. [but in neither of the laſt mention'd Books does the S. P. appear.]

4. In an Action of Waſte the *Jurors ſhall have a View* of the Place waſted &c. as an Incident to the Action of Waſte; for in the Action at the Common Law the Jurors ſhould have had the View. 2 Inſt. 300.

It was agreed by the whole Court, if the Jury be *ſworn that they know the Place*, it is ſufficient, *altho'* they be *not ſworn that they ſaw it*, and altho' that the Place waſted be *ſhewed to the Jury by the Plaintiff's Servants*, yet if it be *by the Commandment of the Sheriff*, it is as ſufficient as if the ſame had been ſhewed unto them by the Sheriff himſelf. Godb. 209. pl. 298. Mich. 11 Jac. in C. B. Gage v Smith.

5. In an Action of Waſte there ſhall be *Summons and Severance*; for the Writ is ad Exhæredationem, and the Action of Waſte is a Plea real. 2 Inſt. 307.

6. Tho' the *View* in Action of Waſte was *not return'd on the Proceſs on which the firſt Jurors* appear'd, and were ſworn, and *tried the Iſſue*; yet it was reſolved to be good enough, becauſe, altho' the Jurors ought to have the View, yet it was *not neceſſary for the Officer to return it, but the Court on the Trial ought to examine* the Matter, whether the Jurors have had the View or not; For on the Trial ſix Jurors at leaſt ought to have had the View, or elſe the Jury ſhall not be taken, cites 9 H. 6. 95. b. And in 24 E. 3. 26. a Day of Continuance was given, Eo quod the Jurors had not the View, & interim videant &c. And *in an Aſſiſe the View of the Jurors is requiſite; but it is never return'd*; For perhaps neither the Sheriff nor the Officer knows, whether the Jurors have had the View or not. For the Words of the Writ are, *Et interim videant* &c. and not, *Et interim haberi fac. viſum.* So that the Jurors may view the Place waſted when the Officer is not preſent, and therefore the Officer is not obliged to return the View, but it ought to be examined on the Trial and

and the Party may make his Challenge to the Jurors for that Cauſe, if ſix of them at the leaſt have not had the View; And if the Officer had return'd that they had the View, yet if it appear'd on the Trial by Examination, that they had not had the View, the Return would be to no Purpoſe, nor conclude any of the Parties, Plaintiff, or Defendant. 2 Saund. 254, 255. Mich. 22 Car. 2. Greene v. Cole.

7. 4 & 5 *Ann. cap.* 16. *S.* 8. Enacts, that *in any Actions in any of her Majeſty's Courts at Weſtminſter, where it ſhall appear to the Court that it will be neceſſary that the Jurors ſhould have the View of the Place in Queſtion, the Courts may order ſpecial Writs of Diſtringas or Habeas Corpora, by which the Sheriff or other Officer ſhall be commanded to have 6 out of the firſt 12 of the Jurors, or ſome greater Number, at the Place in Queſtion, ſome convenient Time before the Trial, who ſhall have the Matters in Queſtion ſhewn to them by two Perſons in the Writ nam'd, to be appointed by the Court.*

(B. a. 3) Pleadings.

1. IN Waſte againſt *Tenant for Years of the Leaſe of the Plaintiff himſelf*, the Defendant *pleaded* that the Plaintiff *Nil habuit in Tenementis, but jointly with his Wife in Tail &c.* and held a good Plea. Theloal's Dig. lib. 11. cap. 44. S. 6. cites 4 E. 3. Iter Darby, Brief 747.

2. In Waſte *againſt Baron and Feme on a Leaſe to them both made by the Plaintiff's Father*, the Tenants *pleaded that the Plaintiff's Father Ne leſſa pas to them Modo & Forma* &c. and held a good Plea. Theloal's Dig. lib. 11. cap. 52. S. 25. cites Paſch. 6 E. 3. 260.

3. In Waſte *againſt Tenant in Dower*, ſhe *pleaded a Grant made* to her *by the Heir to hold without Impeachment of Waſte, and averr'd that he had Aſſets by Deſcent*; and the Opinion was that it is no Plea; for the Statute of Glouceſter ſpeaks of Warranty with Aſſets to bar the Tail, and not of Grant with Aſſets. Br. Waſte, pl. 76. cites 38 E. 3. 23.

4. It was agreed that the *Heir* ſhall not have Action of Waſte *of Waſte in the Time of his Father*, but in his own Time, and Iſſue taken accordingly. Br. Waſte, pl. 76. cites 38 E. 3. 23.

Br. Monſtrans, pl. 17. cites S. C.

5. In Waſte by him in Remainder, he ought to *ſhew Deed of Remainder*, and ſo he did. Br. Waſte, pl. 28. cites 42 E. 3. 19.

S. C.——He ſhall ſhew the Deed, *if it be demanded* by the Tenant; but Per Finch, he need not ſhew it till then. Br. Monſtrans, pl. 15. cites 41 E. 3. 23.——S. P. Br. Variance, pl. 108. cites 10 H. 6. 8. For this Action is not properly founded upon the Deed.

Br. Waſte, pl. 127. cites S. C.

6. In Waſte the Plaintiff *counted upon a Leaſe for Years* by him made to the Defendant, and that he did Waſte; and the *Defendant was not ſuffered to ſay* that *he did not leaſe for Term of Years, but that he did not leaſe Modo & Forma* &c. For if he leaſes for Life or in Fee, the Defendant may plead it, and traverſe the Count &c. Br. Negativa &c. pl. 7. cites 43 E. 3. 13.

Br. Nontenure, pl. 55. cites 44 E. 3. 21.——* Br. Nontenure, pl. 7. cites 40 E. 3. 33.

7. Waſte *againſt A. of Tenements which he held of the Leaſe of E. who held them for Term of Life of the Leaſe of his Father.* The *Defendant ſaid that he had * nothing in the Tenements the Day of the Writ purchas'd, nor ever after, but E. was and is Tenant*; Judgment of the Writ, & non allocatur, by which he *ſaid that E. was Tenant the Day of the Writ purchas'd, abſque hoc that he ever any thing had of the Leaſe of E.* which was held a good Plea, and the other maintain'd his Writ; Quod nota, and

yet

yet Non-tenure is no Plea in Waſte, but it ſeems that this amounts to, That E. Non dimiſit modo & forma. Br. Waſte, pl. 35. cites 44 E. 3. 5.

8. Waſte *to Part*; *the Defendant pleaded that the Tenants died in the laſt Peſtilence, and he could not yet find new Tenants*, and *as to a Grange that the Plaintiff by Indenture is bound to deliver Timber to him for Reparation in ſuch a Wood, and did not*; Judgment &c. and there it is held, that if it be upon the Land leas'd he may take it, notwithſtanding the Indenture, and therefore this is no Bar; by which he *ſaid that there was no Timber upon the Land leas'd*, and that the Wood out of which &c. is not in his Leaſe; by which the *Plaintiff replied that he offer'd Timber, and the Plaintiff would not take it unleſs he could have more, which he had no Need of*, Priſt, and the others econtra. Br. Waſte, pl. 36. cites 44 E. 3. 21.

9. In Waſte, the *Tenant ſaid that as to the Wood it is excepted in the Deed of Leaſe, and ſo Ne dimitta pas*; but he anſwered to the Remainder; and the *Plaintiff ſaid that he leas'd the Wood by another Leaſe*, and *the others econtra*. Br. Waſte, pl. 38. cites 44 E. 3. 34. 35.

10. *Where the Tenant juſtifies the Abatement of ſo many Trees for Reparations*, the *other may ſay that he abated ſo many more beſides*; Per Cur. Br. Waſte, pl. 38. cites 44 E. 3. 34. 35.

11. Waſte *againſt Tenant for Term of Life of his Leaſe*, who *ſaid that the Plaintiff had nothing in Reverſion*; and admitted for Plea, *without anſwering to the Leaſe, and without ſhewing how the Reverſion is out of him.* Quod mirum! Br. Waſte, pl. 45. cites 46 E. 3. 20.——But contra 8 H. 6. 15.

Waſte *by the Heir againſt his Father, upon a Gift to the Father and Mother, and to the Heirs of the Mother*; the *Tenant ſaid that he diſcontinued to R. in the Life of the Feme, abſque hoc that the Plaintiff any thing had in the Reverſion the Day of the Writ purchas'd, or after*, and held double; by which he *ſaid as above, and ſo in Reverſion* &c. and then well; And Per Martin and others, *Nothing in Reverſion only is a good Plea there. Contra where the Plaintiff counts of his own Leaſe, or of the Leaſe of his Anceſtor*; *but* it is a good Plea *in Waſte ex Aſſignatione, upon Grant of Reverſion to the Plaintiff.* Note the Diverſity. Br. Waſte, pl. 85. cites 8 H. 6. 13.——S. P. Br. Double, pl. 42. cites 8 H. 6. 13.——. And in Waſte *againſt Tenant by the Curteſy*, it is a *good Plea that he diſcontinued in Fee to R. in the Life of the Feme, and after R. leas'd to him for his Life, ſaving the Reverſion, and ſo Nothing in Reverſion the Day of the Writ purchas'd* &c. Br. Waſte, pl. 85. cites 8 H. 6. 13.——And *where the Plaintiff counts of his own Leaſe, or of his Anceſtors*, the Tenant *may ſay* Quod *non dimiſit, and ſhew how the Heir has granted the Reverſion to another to whom he attorn'd, after which Attornment No Waſte done.* Br. Waſte, pl. 85. cites 8 H. 6. 13.

Riens en le Reverſion is a good Plea in Waſte, Per Beaumond. And Walmſley took a *Diverſity* when the *Waſte* is *brought by the firſt Leſſor himſelf*, and when it is brought *by the Grantee of a Reverſion*; in the one Caſe it is good, but not in the other; and cited 5 H. 5. 12. Br. Waſte 72. and 46 E. 3. 20. Br. Waſte 45. And note, if they warrant that Difference, the Reaſon is becauſe of the Contract and Privity between the Parties at the making of the Leaſe. Noy 53. Arden's Caſe.

In Action of Waſte brought by the Leſſor againſt the Leſſee, the Leſſee *in Reſpect of Privity* cannot plead Riens en le Reverſion, but he muſt ſhew How and by what Means the Reverſion is diveſted out of him; but if the *Grantee of a Reverſion brings an Action of Waſte*, the Leſſee may plead generally that he has nothing in the Reverſion. Co. Litt. 356. a. (h)

12. Upon *Recovery* in Waſte *by Default*, and Writ of Inquiry of Waſte &c. the *Plaintiff ſued Execution* by Scire facias; and the *Defendant ſaid that the Day of the Writ purchas'd he was Villein to J. N. and held in Villeinage, and yet holds*; Judgment if Execution; and the beſt Opinion was, that it is no Plea; for *it is a ſpecial Non-tenure, which is no Plea in Waſte* nor in Scire facias &c. Br. Waſte, pl. 51. cites 48 E. 3. 18. Br. Scire facias, pl. 49. cites S. C.

13. *Quid Juris clamat*; the *Tenant ſhew'd how the Grantor leas'd to him by Indenture ſhewn to the Court for 40 Years, and granted to him to repair the Houſe within the firſt Year*, and *ſaving to him the Advantage of the Indenture, if the Houſe after falls in his Default, Ready to attorn*, and the Attornment taken accordingly, and the ſaving enter'd of Record; and this ſeems to be a Bar in Waſte after. Br. Waſte, pl. 53. cites 48 E. 3. 31. 32.

It is a good Plea in Waſte, *that the Houſe was ruinous at the Time of the Demiſe, and thereof fell.* Br. Waſte, pl. 130 cites 12 H. 8. 1. ——*Or that the Houſe or Trees fell by Wind or Tempeſt.* Ibid.

14. Waſte *againſt Tenant for Life*, and *aſſign'd the Waſte in a Grange, Hall, and Cotage*; and *as to the Grange and Hall the Defendant ſaid that they were feeble, and the Timber periſh'd at the Time of the Demiſe, ſo that they could not ſtand, by which they fell*; and *to the Cotage that the Plaintiff made it after the Leaſe without Gree of the Defendant*; Judgment ſi Actio, and admitted for a good Plea; and it is no *Replication* for the Plaintiff to ſay *that the Defendant by his Deed had covenanted to repair the Houſe in as good Plight as they were at the Time of the Demiſe*; for of this lies Covenant; for it requires but ſingle Damages, and of Waſte lies treble Damages; quod nota. Br. Waſte, pl. 54. cites 49 E. 3. 1.

15. Waſte *againſt Tenant for Years of the Leaſe of his Anceſtor of Waſte in a Hall, Kitchen, Stable and Oaks*; and *as to the Hall the Defendant ſaid, that the Anceſtor ſold it in his Life-time to T. P. who pulled it down after the Death of his Anceſtor*; and *as to the Stable, that the Timber was putrified in the Life of the Anceſtor, which fell in the Time of the Anceſtor*; and *as to the Oaks, that he cut them for the Stable, and made a new Stable of them*, and *as to the reſt No Waſte* done; And as to the Sale of the Hall the whole Court was againſt the Plaintiff except Hank; And per Hill, *if the Anceſtor was Tenant in Tail, the Sale or Gift was colourable to be avoided*, but of Fee-Simple not; and it is not ſaid Preciſely that the Heir in Tail ſhall avoid it. Br. Waſte, pl. 67. cites 11 H. 4. 32.

S. P. For per Hull, the Entry is all the Matter; For the Tempeſt is not Waſte, unleſs the Defendant permits the Timber to rot after the Tempeſt. Br. Double Plea, pl. 30. cites S. C.

16. In Waſte the Defendants *ſaid*, as *to the Grange that the Moiety was decayed before the Leaſe, and the other Moiety was uncovered by Tempeſt, and before the Defendant could repair it the Plaintiff enter'd and was ſeiſed the Day of the Writ purchaſed*; Judgment Si Actio; and per Hank, the laſt *Plea is double*, the *Tempeſt and the Entry*; but Hull contra. Br. Waſte, pl. 69. cites 12 H. 4. 5.

17. Where a *Leaſe* is *upon Condition, that if the Tenant ſuffers Waſte he may enter*, there he cannot enter for uncovering by Tempeſt, unleſs he ſays, that the *Leſſee had ſufficient Time after* to repair it, and did not; Per Hull, clearly. Br. Waſte, pl. 69. cites 12 H. 4. 5.

18. The Plaintiff alleged Waſte *in Exile of a Villein*, the Defendant demanded Judgment of the Writ, becauſe he *did not ſhew in what Place* he exiled him, & non allocatur; For it is no Plea Quod non exilivit, or Quod non ſuccidit Arbores, but ſhall ſay, No Waſte done Prout &c. Br. Waſte, pl. 9. cites 6 H. 6. 42.

19. The *Defendant pleaded to the Writ becauſe the Waſte is brought in A. and* he *ſaid that there are two A.'s and none without Addition*; and no Plea per Cur. For the *Plaintiff ſhall recover Per Viſum Juratorum*; quod nota. Br. Waſte, pl. 9. cites 9 H. 9. 42.

20. Waſte, *that he permitted a Houſe to be uncover'd, by which the Timber became rotten and corrupt.* Markham ſaid, *the Day of the Writ purchaſed the Houſe was ſufficiently repair'd*; and the beſt Opinion was, that it is no Plea; for it is in a manner double, the one that if the Waſte was done that it is amended, and the other that there never was Waſte. But if he had *ſaid that after the Waſte it was ſufficiently repair'd, before the Writ purchaſed*, it ſeems to be a good Plea. Br. Waſte, pl. 86. cites 19 H. 6. 66.

21. Waſte *againſt Tenant in Dower in Land in D. Quas tenet ex hæreditate of the Plaintiff.* The *Defendant ſaid that N. Father of the Plaintiff, whoſe Heir* &c. *infeoff'd W. in Fee*, abſque hoc *that ſhe held in Dower ex Hæreditate of this Plaintiff*; and then well, by reaſon of the Traverſe.

Quære

Quære if *Riens in Reverſion* had not been a good Plea. Br. Traverſe per &c. pl. 363. cites 20 H. 6. 19.

22. Waſte *againſt J. W. Chaplain*, and *counted that he leaſed for Term of Life by Deed.* The *other ſaid that there is in the ſame Vill a College*, call'd the Hoſpital of Mary Magdalen, *of which College the Tenements where* &c. *are Parcel, which of ancient Time has been founded of a Maſter, Brothers and Siſters; and that the Plaintiff and all his Anceſtors, and all thoſe whoſe Eſtate he has in the Manor of D. have uſed, Time out of Mind, when the Maſter dies, to put in another Maſter without Preſentation to the Ordinary*, and *the Hoſpital voided by the Death of B. and the Plaintiff by the Deed &c. gave and granted the ſaid Hoſpital to the Defendant Habend' for Term of his Life, and was put in peaceable Poſſeſſion*, Judgment ſi Actio. And the beſt Opinion of the Court was, that it is no Plea; for he *does not anſwer to the Leaſe of the Plaintiff*; for this Matter is only a Preſentation, and he has no Livery of Seiſin as upon a Leaſe, nor the Fee or Franktenement, or Reverſion, is not or ever was in him who made the Collation, but reſted in the Houſe. Quod nota. By which the Defendant *ſaid as above, abſque hoc that the Plaintiff leaſed for Term of Life, prout* &c. Br. Waſte, pl. 87. cites 21 H. 6. 2. Br. Traverſe per &c. pl. 80. cites S. C. —Theloal's Dig. lib. 11. cap. 52. S. 20. cites S. C.

23. Waſte in 10 Aſhes. The *Defendant ſaid that the Plaintiff gave them to R. C. and commanded the Defendant to cut and deliver them to the ſaid R. C.* by which he did ſo, Judgment ſi Actio. The Plaintiff *ſaid that he did not cut by his Command.* Per Newton & Paſton, This is Negative pregnant, by which he *ſaid that he did not command him.* Quod nota. Br. Negativa &c. pl. 21. cites 21 H. 6. 4.

24. Where a *Leaſe* is *by Deed without Impeachment of Waſte*, or by Grant *to be diſcharg'd of Waſte*, all *by one and the ſame Deed*, the *Tenant may rebut*, and plead in Bar by it, and *ſhall not be drove to his Writ of Covenant*; per Paſton, quod Fulthorp & Aſcue J. conceſſit. Brooke makes a *Quære* if he ſhall be drove to Writ of Covenant, *if* it be granted *by another Deed.* Br. Waſte, pl. 89. cites 21 H. 6. 46. Br. Barre, pl. 30. cites S. C. And Brooke ſays it ſeems to him, that if the Grant be by another Deed, it may well be pleaded in Bar alſo.

25. *Where the Defendant juſtifies the Waſte for cutting of Aſhes for Fireboot, he ought to ſurmiſe that there was no Underwoods upon the Land* &c. And *the ſame* Law ſeems to be *where he takes Beeches or other Trees which are Timber*; by the beſt Opinion of the Court. Br. Waſte; pl. 89. cites 21 H. 6. 46.

26. Waſte *in a Houſe, and alſo in a Wood, by which he cut the Trees and ſold them* &c. The *Defendant as to the Houſe ſaid* that *No Waſte* done, and *to the Trees that the Houſe was ruinous in Groundſels at the Time of the Demiſe, by which he cut for Reparations, and put the Trees in the Grounſels.* And per Cur. *This is a good Plea where the Plaintiff counts generally of cutting of Trees* without more. But *contra where he counts of Sale*, as here; for there *he ſhall anſwer to the Sale*, by which Catesby juſtified as above, *abſque hoc that he ſold them*, and good Reaſon; for the Writ of Waſte is Quod non liceat alicui vaſtum, venditionem ſeu Deſtructionem facere in Terris, Domibus, Boſcis &c. Br. Waſte, pl. 112. cites 5 E. 4. 100. In Waſte, for *Trees cut and ſold*, the Defendant muſt anſwer to *both*; for the Sale is traverſable; and admit that he cuts and ſells, and buys them again, and beſtows them upon the Repairs of the Houſe, yet the Tort which is ſuppoſed in the Sale is not anſwer'd; per Montague. And Knightley ſeem'd to be of the ſame Opinion, and he ought alſo to conclude that it is the ſame Waſte. D. 35. b. 36. a. pl. 33, 34. Trin. 29 H. 8. in Caſe of Maleverer v. Spinke. —— D. 90. b. pl. 8. Mich. 1 Mar. in Caſe of Mervin v. Lyds.

27. *Ne venda pas is no Plea, but ſhall juſtify* as in the Plea above, *abſque hoc that he ſold, or ſhall ſay No Waſte done generally.* Br. Waſte, pl. 112. cites 5 E. 4. 100. Per Choke J.

28. In

28. In Treſpaſs it was agreed, that *Tenant for Years may cut Wood*, but it was doubted of *Tenant at Will.* But it ſeems that as long as Tenant at Will is not countermanded, he may cut ſeaſonable Wood &c. Littleton ſaid then he *ought to ſay that they have uſed ſuch Cuſtom in the Country to cut Underwoods*; for otherwiſe the Juſtification is not good. Quære inde. Br. Waſte, pl. 114. cites 8 E. 4. 6. 7.

29. Waſte *againſt Tenant for Life for digging* Clay, viz. *Gravel.* The *Defendant juſtified by Command of the Plaintiff.* And the beſt Opinion was, that it is no Plea; for the Leſſor himſelf cannot juſtify to dig it, therefore his Command is void; As if I command J. S. to kill my Father, which he does, I ſhall have Appeal; and in Formedon Writ of Eſtrepement is delivered to the Tenant, the Demandant cannot command him to cut the Trees, but the Eſtrepement lies; for thoſe Commands are void. Br. Waſte, pl. 108. cites 2 H. 7. 14.

The Leſſor was ſeiſed in Fee, but in his Leaſe did not except the Gravel, and ſo his Command during the Leaſe is not good. And by Townſend, this Gravel is Part of the Inheritance, and he cannot grant his Inheritance by Parol only without Deed. See the Year-book.

30. In Waſte the Defendant pleaded *Accord*, that he ſhould repair the Flood-gates of the Mill, which he has done, and no Plea; for in Action Perſonal or Mixt, the Accord is no Plea; and this by Judgment. Br. Accord &c. pl. 13. cites 11 H. 7. 13.

Ibid. ſays the Caſe was argued again 13 H. 7. 20. but not adjudg'd; but the beſt Opinion is that it is no Plea —— S. C. cited Arg. 9 Rep. 78. a. in Peytoe's Caſe, Mich. 9 Jac. C. B. But Ibid. 78. b. The Court ſaid that the Caſe of 11 H. 7. 13. b. was ill printed; for, 1ſt. If it had been adjudg'd really in 11 H 7. the ſame Caſe would not have been argued again in 13 H. 7. 2. And in 16 H. 7. Tit. Warranty 97. in Fitzh. it was held that in Action of Waſte againſt Leſſee for Years, Accord is a good Plea; which the ſame Judges would not have done if they themſelves had adjudg'd the ſame Caſe to the contrary, in ſo ſhort a Time before; And that diligent Search had been made by the Prothonotaries for the Record of the ſaid Caſe of 11 H. 7. and no ſuch could be found. And that in Hill. 6 E 6 reported by Serjeant Bendloes, [Bendl. 35. pl. 60] that in Action of Waſte againſt Leſſee for Years, Accord is a good Plea.——An Accord is no Plea to an Action of Waſte *in the Tenet.* 2 Inſt. 307.——S. P. Becauſe the Action is mixt with the Realty, and therefore is no Bar for the Perſonalty; for Omne majus trahit ad ſe Minus. 6 Rep. 43. b. 44. a. Mich. 3 Jac. C. B. in Blake's Caſe. —— Cro. J. 100. pl. 29. in the Caſe of Alden v Blague, S. C. it was ſaid by Daniel J. that in Waſte *againſt Tenant for Years*, Accord is a good Plea; but *not againſt Tenant for Life.*

31. Waſte was aſſign'd *in Boſcis*, viz. *in Succidendo & Vendendo decem Quercus &c.* where in Truth the Defendant had *only lopp'd and ſhred them*; and it ſeems he may well plead No Waſte done, and give this ſpecial Matter in Evidence. D. 92. pl. 16. Mich. 1 Mar. Anon.

32. Waſte was aſſign'd in *pulling down Unum Murum ligneum, and* in *permitting a Brick-wall to fall* down, *and in Erumpendo & Diſtrahendo the Planks and Mangers in a Stable, without ſaying that they were fix'd to the Freehold, and how*; and therefore it was held not to be Waſte, and the ſame as to the *Walls*, it *not* being *expreſsly alleg'd that they were cop'd* or cover'd. D. 108. pl. 31. Mich. 1 & 2 P. & M. The Earl of Bedford v. Smith.

33. *W. brought Waſte againſt* the Defendant *Tenant for Life, by Reaſon of a Remainder to him limited by Uſe*, and *aſſign'd the Waſte in Proſternendo Horreum.* The Defendant *pleaded* in Bar, *that the great Timber of the ſaid Barn, at the* Time of the *Death of her Husband, was ſo rotten* &c. *that it could not be repair'd*; this was taken to be a good Plea, and Iſſue taken upon the Matter. Mo. 54. pl. 158. Paſch. 3 Eliz. Ward & Uxor' v. Dettenſam.

34. Waſte was aſſign'd in *breaking down a Copper of Lead fixed to the Ground by the Leſſee for Years*; The Defendant *pleaded* in Bar, *that the Copper was deviſed to him by the Termor, and that he took it with the Aſſent of the Executor*, and carried it away; The Plaintiff travers'd the Deviſe, upon which they were at Iſſue. This Iſſue was held a Jeofail, but there being other Iſſues, a new Venire facias iſſued as to them. The Reporter

porter ſays, Quære well if the Plaintiff upon this Plea, by which the Waſte is confeſs'd, ſhould not have Judgment to recover. D. 272. b. pl. 33. Paſch. 10 Eliz. Lord Abergaveney v. Plomer.

35. *Leſſee covenanted* in the Leaſe *to repair* the Buildings *at his own Coſts and Charges when* it ſhould be *neceſſary*; and afterwards he *cut down Timber-trees* growing on the Farm, *to repair the Buildings decay'd by Age or Tempeſts*, and us'd them in the Reparations; whereupon Waſte was brought againſt him. The Defendant pleaded the aforeſaid Matter in Bar; The Plaintiff replied, and ſet forth the Covenant as above. D. 314. pl. 94. Trin. 14 Eliz. Anon. The Reporter ſays, Quære bene.

36. In *Waſte for cutting down* 10 *Oaks*, the Defendant, *as to* 3 *of them, pleaded that he cut them down to make Poſts, and that he had made* 6 *Poſts, which he ſet in the Ground to divide Seperalia Clauſa ibidem*; but did *not allege* the Number of Cloſes, or *that they had been uſed to be divided, or that he had employ'd all the* 3 *Oaks* to make Poſts. And *as to the Reſidue he juſtified*; *for that they were dry, hollow, and rotten at the Top, not being ſufficient Timber* for Building, *without ſaying as uſual, that they were dead, not bearing Fruit nor Leaves in Summer &c.* And as to the 3 Trees, the Court were of Opinion for the Plaintiff, that the Juſtification was not good for the Reaſons before mentioned; but the Ch. Juſtice Dyer inclin'd that the laſt Juſtification amounted to the ſame as that the Trees were dead, not bearing Folia in Ætate exiſten' Maheremium, but that ſaying that they are not ſufficient Timber for Building, is not good Form; for they may ſerve for other Uſes, as for making Poſts, tho' not for Building. D. 332. pl. 26. Paſch. 16 Eliz. Manwood v. Mynn.

Mo. 101. pl. 246. Manwood's Caſe, S. C. ſays the Waſte was aſſign'd likewiſe, in other Things, as Digging of Clay and Selling it, and in Plowing of Meadow; and that it was adjudg'd that the Plaintiff recover. —

Bendl. 217. pl. 251. S. C. and the Pleadings, and ſays the Plaintiff had Judgment.—D. 332. b. S. C. ſays there was another Fault in the *Plea*; for it was, *that the Occupiers of the ſaid Land did uſe ingredi & egredi* (per) *Poſtes prædictos*, whereas this could not be; but it ſhould have been (inter) Poſtes prædictos.

37. The Plaintiff made a *Leaſe for Years to A.* and *before the Expiration* thereof, *he made another Leaſe* of the ſame Lands *to B. the Defendant to begin preſently*, and then *brought Action* of Waſte againſt him *for Waſte done during the firſt Leaſe*. The Court ſaid, that in ſuch Caſe it would not be ſafe for him to plead *No Waſte done*, for it will be found againſt him. And if he ſhould plead the Special Matter as aforeſaid, (viz.) That the firſt Leaſe was in Being at the Time of the Waſte done, after the Expiration whereof no Waſte was done; this would be good if the 2d Leaſe was not by Indenture, otherwiſe he will be eſtopped by the Indenture, and then the Waſte will charge him. And if Defendant pleads the Special Matter, the Plaintiff by his Replication may eſtop him to plead any other Beginning of the Term than the Letter of the Indenture purports, and it will be no Departure, becauſe it ſtrengthens the Declaration. 3 Le. 203. pl. 256. Trin. 30 Eliz. C. B. Thorpe v. Wingfield.

38. *Ancient Demeſne* is no good Plea in an Action upon the Statute of Glouceſter; For it is only a Perſonal Action, and the Statute is beneficial for the Commonwealth. Per tot. Cur. præter Walmſley. Ow. 24. Paſch. 36 Eliz. C. B. Owen's Caſe.

39. Waſte for *cutting down* 300 *Oaks*; the Defendant *pleaded as to* 200 of them, *that the Houſes leaſed were ruinous* &c. *and that he cut them down to repair the Houſes*, and *as to the Reſidue, that he fell'd and keeps them to employ about the Reparations Tempore Opportuno.* And all the Court, without Argument, held it no Plea; For if it ſhould be good, every Farmer might cut down all the Trees on his Farm, when there was no Manner of Occaſion to repair. Cro. Eliz. 593. pl. 33. Mich. 39 & 40 Eliz. C. B. George v. Stanfield.

If the Action by 2 be brought *in the Tenuit*, a *Releaſe of the one* is a Bar to both. But *otherwiſe it* is *in the Tenet*; for there it bars but himſelf. 2 Inſt. 307.

40. If two bring an Action of Waſte, the *Releaſe of one* is a good Bar againſt the other; and ſo reſolved by the whole Court. Co. Litt. 355. b. cites 9 H. 5. 15.

41. Note, where *Hedge-boot* or Pale-boot are *granted to be taken reaſonably, and* where *certain* Loads or *Trees are granted annually for that Purpoſe*, here *it is not neceſſary to ſhew that the Fence is in Decay.* And note, that for *Fireboot* it is not neceſſary at the Time of the Cutting, to ſhew the Neceſſity. And ſo for *Reparation*; for it is Reaſon and good Husbandry to cut them in ſome convenient Time before Hand. And note the Difference, becauſe that, which is allowed certainly at ſome Years, may not be ſufficient. Noy 23. Jenkins v. Jenkins.

* [C. a] *Who may releaſe* a Waſte. Bar.

* This is (G) in Roll.

Br. Waſte, pl. 29. cites S. C. and that when the *Houſe is intitled to the Place waſted*, it cannot be releas'd without the *Conſent of the Covent*; by which the Defendant took other Iſſue.——See (L) pl. 1. 2.

1. If a Leſſee for Life of a Prior of a Hoſpital does Waſte, and the Prior releaſes it, yet the Succeſſor may bring Action; For the Predeceſſor by his Releaſe could not diſinherit the Houſe. 42 E. 3. 22.

Br. Waſte, pl. 29. cites S. C.——* Orig. is (Le gree)

2. But if Leſſee makes Agreement with the Predeceſſor, the Succeſſor ſhall not puniſh it. 42 E. 3. 22. (It ſeems then that it ought to be averr'd that * the Thing agreed for comes to the Uſe of the Houſe.

Br. Waſte, pl. 58. cites S. C. Per Hanke.

3. The Releaſe of an Abbot or Prior ſhall bar the Succeſſor of the Action. 2 H. 4. 3.

4. Waſte *by* 2 *againſt J. N.* He *pleaded Releaſe of the one*, and demanded Judgment. And the Opinion of the Court was, that *he ſhall be barr'd*; and this ſeems to be *intended that he ſhall be barr'd againſt both*; For the Damages are principal, and yet contra in Aſſiſe. Br. Waſte, pl. 73. cites 9 H. 5. 15.

[D. a] *Who may diſpenſe* with it.

1. If Tenant for Life be, Remainder or Reverſion in Tail, and he in Reverſion or Remainder grants to the Leſſee that he ſhall not be impeach'd of Waſte, and dies, and then it is committed, the Iſſue may have Action of Waſte for it notwithſtanding the Grant by his Anceſtor, becauſe he cannot prejudice his Iſſue. 38 E. 3. 23.

* [E. a] *What* ſhall be *a good Bar. Act of* the *Leſſee.*

* This is (H) in Roll.

1. IF Leſſee commits Waſte, and pending an Action of Waſte for it, repairs the Waſte, yet this is not any Bar of the Action. 38 Aſſ. 1.

Tho' what he diſburſed was more than the Waſte amounted to; per Cur. But *contra if he had repair'd the Waſte before the Writ purchaſed.* Note the Diverſity. Br. Waſte, pl. 105. cites S. C.——S. P. 2 Inſt. 306, 307.——S. P. per Cur. Jo. 145. Mich. 2 Car. B. R. in Caſe of Harvey v. Reynel.——S. P. as to repairing before the Action brought; per Moyle. Quod non negatur. Br. Waſte, pl. 14. cites 28 H. 6. 12.——S. P. 2 Le. 189. pl. 287. Mich. 32 Eliz. B. R. Wood v. Avery.——Sav. 96. pl. 177. S. C. accordingly.

2. *Rebuilding ſhall excuſe the Waſte.* Br. Waſte, pl. 29. cites 42 E. 3. 21, 22.

If a Man *pulls down a Houſe, and rebuilds one as good before Action of Waſte brought*, this is good, and Action does not lie. Br. Waſte, pl. 112. cites 5 E. 4. 100.— But in Debt on a Bond to maintain, ſuſtain, and repair, if he takes down and rebuilds before the Action brought, this is no Plea. 2 Le. 189. pl. 287. Mich. 32 Eliz. B. R. Wood v. Avery.——Sav. 96. pl. 177. S. C. accordingly.

[F. a] Barrs of Action of Waſte. *By Act in Law.*

1. IF Leaſe be made to B. for Life and 20 Years after, and B. does Waſte, and dies, it ſeems his Executor ſhall not be charged, becauſe it is a perſonal Action, which dies cum Perſona. Contra * 46 E. 3. 31.

* Br. Waſte, pl. 48. cites S. C. ſays it was admitted there, that of Waſte done in the Time of the Teſtator, the Executor ſhall not be charged.——Co. Litt. 53. b. (g) S. P.

2. If Leſſee for Life be, the Remainder in Special Tail to Baron and Feme, if the Leſſee commits Waſte, and after Baron becomes Tenant after Poſſibility, by Death of the Feme without Iſſue, he ſhall not puniſh this Waſte, becauſe now he having only for Life, cannot count to his Diſinheritance. 50 E. 3. 4.

Co Litt. 53. b. (e) S. P. —Tho' the Feme and Iſſue die pending the Writ of Waſte, the Action is determin'd. Br. Waſte, pl. 14. cites 28 H. 6. 12.——Waſte was brought *againſt Tenant for Life*, the *Remainder to Baron and Feme in Tail*, the *Remainder in Fee to the Tenant for Life*, and *ſaid that pending the Writ the Feme of the Plaintiff died without Iſſue, or that the Iſſue died without Iſſue pending the Writ*, there the Writ of Waſte is determin'd; for now the Plaintiff cannot be diſinherited; for now he is only Tenant in Tail after Poſſibility of Iſſue; and alſo now the Fee ſimple is in the Tenant. Br. Waſte, pl. 60. cites T. 2 H. 4. 22.——*And* ſuch a Caſe 19 H. 4. 5. The Opinion was, that it did not lie; for *now it is not to his Diſinheritance.* Ibid.——But Ibid. pl. 59. cites 37 H. 6. 37. that it was doubted.

3. If a Feme, Leſſee for Life, takes Baron, who commits Waſte, and after the Feme dies, the Action of Waſte is determin'd; for the Baron * cannot be charged in the Tenet nor Tenuit, becauſe he never had any Eſtate but in Right of his Feme, and the Feme [was] the Leſſee. † Co. 5. *Clifton* 75. b. Reſolved. M. 37 El. B. *Sacheverell againſt Bagnall*, adjudged, the which Intratur P. 36 El. Rot. 959. (It ſeems

Fol. 834.

Cro. E. 356. pl. 9. S. C. accordingly. † S. C. cited by Powell J.

And per Treby Ch. J. the Reaſon is becauſe it cannot be ſaid that the Baron *tenuit ex Dimiſſione*, according to the Words of the Statute. Lutw. 674. in Caſe of Baron v. Berkley.

ſeems that this is *Cliſton's Caſe*; For it is reported Co. 5. to be 36, 37 El.

Lord Coke ſays upon the Statute of Glouceſter, cap. 5. it has been receiv'd for a certain Rule,

4. If a Man brings Action of Waſte, and dies before any Recovery, his Heir ſhall not have Action for the ſame Waſte, becauſe the Damages do not belong to him. Contra 20 E. 1. Liber Parliamentorum 33. b. Adjudg'd in Parliament upon Debate, and there commanded to the Juſtices hencetorward to do accordingly in ſuch Caſes.

That if Waſte be committed, and he in the Reverſion dies, that the Action of Waſte fails, for that the Heir cannot recover Damages for the Waſte done in the Life of the Anceſtor, and the Waſte was not done to the Diſinheritance of the Heir; and yet the Law extends the Action of Waſte favourably, as much as with Convenience may be, leſt Waſte, which is hurtful to the Commonwealth, ſhould remain unpuniſh'd. 2 Inſt. 305.

* All the Editions are (Aunceſtors) but the Year-book is (Heirs.)

5. Waſte *againſt Tenant for Life* of the Leaſe of his Anceſtor, the *Tenant pleaded Releaſe of his Anceſtor of all his Right for him and his* * *Heirs to the Tenant for his Life, ſo that he nor his* * *Heirs any Right may challenge, claim, nor Demand during the Life of the Tenant*; and the beſt Opinion was, that it is no Plea; for yet the Tenant has but for Term of Life only, and if he aliens, he in Reverſion may enter, and by Releaſe nothing can paſs but that which is in Action, or is in Eſſe at the Time, and this Waſte was done after. But contra of Grant; for if the Leſſor grants that the Tenant ſhall not be impeach'd of Waſte, or may do Waſte, this is good. Note the Diverſity. Br. Waſte, pl. 30. cites 42 E. 3. 23, 24.

6. Where a Man *leaſes for Years, and brings Writ quas Tenet* of the Waſte &c. and the *Term expires pending the Writ*, yet the Writ quas Tenet is good. Quod Curia conceſſit. Br. Waſte, pl. 95. cites 14 H. 8. 10. 11.

7. If one makes a Leaſe *pur auter Vie*, and the Leſſee does Waſte, and then *Ceſty que Vie dies*, an Action of Waſte lies for Damages only, becauſe the other is determin'd by Act in Law. Co. Litt. 285. a.

8. When the *Reverſion is deveſted*, the Leſſor cannot have an Action of Waſte, becauſe the *Writ is* That the Leſſee did Waſte *ad Exhæredationem of the Leſſor*, and that Inheritance muſt continue at the Time of the Action brought. Co. Litt. 356 a.

9. A. ſeiſed of Land in Fee, *acknowledges a Statute*-Merchant, *and infeoffeth B. who lets the ſame for Life.* The *Land is extended upon the Statute.* B. brings an Action of Waſte againſt the *Leſſee.* He *may plead this Execution* &c. *before which Execution No Waſte done*; for the Poſſeſſion of the Land is lawfully taken from him by Courſe of Law, which he could not withſtand; and if he ſhould be puniſh'd for Waſte, he ſhould have no Remedy over. 2 Inſt. 303.

10. In Treſpaſs, Plaintiff is an Inheritrix and Defendant her Leſſee for Years, the Action is for *cutting down* Trees being excepted in the Leaſe; but on Evidence it appear'd that ſome of them were cut *in the Life of the Plaintiff's late Husband*; Per Holt Ch. J. The Plaintiff's Husband having Iſſue, was *intituled to be Tenant by the Curteſy*, and therefore, for what were cut down in his Time, he being Tenant for Life, the Action does not lie; but if he had had no Child the Action would *ſurvive* to the Wife. Cumb. 453. Trin. 9 W. 3. B. R. Park v. Fifield.

* [G. a]

* [G. a] By what means the *Action* may be *diſcharged*. This is (H) in Roll.
By the *Act of* the Party; to wit, *The Leſſor*.

1. IF Leſſee does Waſte by cutting of Trees, and Leſſor carries them away, (admitting the Carrying-away tortious; for there it is held that he may have Treſpaſs for them againſt the Leſſor) yet this is not any Matter in Bar of the Action; but he ſhall be put to his Treſpaſs. 44 E. 3. 44. b. For the Carrying them away by the Leſſor is no Excuſe of the Waſte, which the Leſſee was guilty of by the Abatement. Br. Waſte, pl 39. cites S. C.

2. If Leſſee for Years does Waſte, and after Leſſor enters upon him by Tort, he ſhall not have Action of Waſte againſt him during his own Seiſin, before Re-entry by the Leſſee. 8 H. 6. 10. Becauſe the Action ought to be in the Tenet. Br. Waſte, pl. 84. cites S. C. —— F. N. B. 60. (L) in the new Notes there (b) ſays the Action is ſuſpended, and cites S. C.

3. If Leſſee for Life upon Condition does Waſte, and Leſſor after enters for Condition broken, yet he may have Action of Waſte againſt Leſſee. 45 E. 3. 9. Demurrer. Br. Waſte, pl. 42. cites S. C. —— See pl. 4.

4. If Leſſee for Life does Waſte, and after aliens in Fee, and Leſſor enters for Forfeiture, yet he ſhall have Waſte againſt Leſſee; for peradventure if he had not entred he ſhould be diſinherited. 45 E. 3. 9. b. 14 H. 8. 14. 8 H. 6. 10. (It ſeems in thoſe Caſes he may have his Action in the Tenet, then it is clear that it lies.) Br. Waſt, pl. 42. cites S C. Per Finchden, that the Reverſioner ſhall not have Action of Waſte after his Entry of Waſte done before the Alienation. [In that Caſe the Action was brought in the Tenuit.]

5. The ſame Law is if Leſſor enters for Forfeiture, upon Alienation by Leſſee Pur auter Vie. (It ſeems more ſtrong.) 8 H. 6. 10. Br. Waſte, pl. 84. cites S. C.

6. [To ſay] that he ſurrender'd, is a good Bar of Action [accrued] before the Surrender. 46 E. 3. 31. (* as it ſeems will prove this) 19 H. 6. 66. Quære 14 H. 6. 14. Waſte *Quas tenet ad terminum Vitæ*; the *Defendant pleaded Surrender to the Plaintiff before the Writ purchas'd; to which the Plaintiff agreed, abſque hoc that he had any thing the Day of the Writ purchas'd, or after.* And per June Ch. J *This is no Plea; for he does not demand the Land, but is to diſpuniſh the Waſte.* Per Paſton, The Plea is to the Action; but per June, it is no Bar to the Action, viz. a Surrender. Quære if it be a Bar. Br. Waſte, pl. 103. cites 14 H. 6. 4. —— If the Leſſee does Waſte, and the *Leſſor accepts a Surrender*, the Waſte is determined and diſcharg'd. Br. Waſte, pl. 95. cites 14 H. 8. 10. 11. —— S. P. Co. Litt. 285. a. (1) —— F. N. B. 60. (L) in the new Notes there (b) S. P. But ſays Quære, and cites 21 E. 4. 31. 8 H. 5. 8. 14 H. 14. a. 19 H. 6. 66. —— S. P. If he does *not except the Waſte upon the Acceptance of the Surrender.* Br. Waſte, pl. 86. cites 19 H. 6. 66. Per Newton. —— Br. Waſte, pl. 138. S. P. cites 23 H. 8. ſays Quære if the Surrender be accepted, excepting the Waſte.
* Orig. is (Come ſemble voilt eſtre prover)

7. If Tenant in Dower leaſes for her Life to him in Reverſion within Age, who never took the Profits, but at full Age diſagrees to the Leaſe, he may have Action of Waſte for Waſte in the mean Time. 30 E. 3. 16. *So* if ſhe leaſes to the Heir within Age *and a Stranger rendring Rent* on *Condition* of Re-entry for Nonpayment of Rent. F. N. B. 55. (E) in the new Notes (a) cites 30 E. 3. 16. and 38 E. 3. 25. 29.

But if at the Time of, or during the Waſte done, the *Heir takes any of the Profits*, the Waſte is diſpunishable. F. N. B. 55. (E) in the new Notes (a)

8. If after Waſte done the Leſſor grants over the Reverſion in Fee, and retakes it, yet he ſhall not have Action for the ſaid Waſte. Co. Litt. 53. b.

9. So if after the Waſte done the Leſſor grants over the Reverſion, and retakes it to him and his Feme, and to his Heirs, yet he ſhall not have Action for the ſaid Waſte, becauſe the Eſtate, which was privy to the Waſte committed, is altered. Co. Litt. 53. b.

10. If a Man leaſes a Houſe, and grants further to Leſſee, that he may make his beſt Profit of it; this Grant ſhall not be any Bar in Action of Waſte for abating of the Houſe; for the Grant ſhall be intended that he ſhall make his beſt Profit according to the Law, without Tort and Diſinheritance to the Leſſor. Dubitatur. 17 E. 3. 7.

11. So if the Leaſe be of a Wood, with Grant to make his beſt Profit of it, he cannot cut and ſell. 17 E. 3. 7. b. Dubitatur.

Fol. 835.

S. C. cited Arg. Lat. 137. in Caſe of Daniel v. Upley.

Leſſee for Years of Mineral Lands, with *Liberty to dig*, and make his Profit of the *Mine*, digg'd for Mine, and *ſold the Gravel* coming off of it; this is no Waſte if the firſt Act of Digging be not Waſte; For the Sale is not Waſte, that being a *ſubſequent Act*. Adjudg'd. Godb. 28. pl. 37. 27 Eliz. C. B. Anon.

12. But if a Man leaſes Land, and grant further to the Leſſee that he ſhall make his beſt Profit of the Mines of Stones, Coal, and Iron open in the Land; this Grant ſhall be a good Bar in an Action of Waſte for digging of Coals, Stone, and Iron, and Selling; for the moſt Profit of them is to ſell, and he ſhall have little other Profit. 17 E. 3. 7. b.

Cro, J. 216. pl. 1. Hill. 6 Jac. B. R. S. C. accordingly.

13. If a Man leaſes Land to another Sine Impedimento vaſti, it ſhall be a good Bar in an Action of Waſte; for thoſe Words (Sine Impedimento Vaſti) amount to as much as without Impeachment of Waſte. P. 7 Ja. B. between *Sir Francis Leake and Eare* adjudged.

Cro. J. 216. pl. 1. Hill. 6 Jac. B. R. S. C. accordingly.

14. So if a Man leaſes the Manor of D. and all Lands and Tenements &c. Parcel of the ſaid Manor, to have the aforeſaid Manor, Lands, Woods &c. as Houſeboot and Hayboot, Sine Impedimento Vaſti for Years; this ſhall be a good Bar in Action of Waſte; for the Words (Sine Impedimento Vaſti) relate to all the Thing demiſed, and the expreſſing of Houſeboot &c. is Surplus, and void. P. 7 Jac. B. between *Sir Francis Leake and Eare* adjudged.

15. In Action of Waſte againſt Tenant in Dower, it is a good Bar that the Baron, who was the Anceſtor of the Plaintiff, alien'd to B. who aſſign'd to her her Dower, and ſo the Reverſion is in him, and not to the Plaintiff. 39 E. 3. 33.

16. The *Leſſor* cannot *give Trees during the Tenant's Leaſe*. But if he grants them to a Stranger, *and commands the Tenant to cut and deliver them*, who does it, this ſhall excuſe him in an Action of Waſte; and yet the Tenant was not bound by the Law to obey and execute this Command. Br. Done &c. pl. 13. cites 21 H. 6. 46.

If the Heir *granted away the Reverſion* and the *Tenant attorn'd*, the Action fail'd at the Common Law. 2 Inſt. 300.

17. In Waſte *againſt Tenant by the Curteſy* or in *Dower*, they may ſay, that the Plaintiff granted the Reverſion to W. N. to whom they attorn'd; Per Yaxley and Brian, quod alii conceſſerunt. Br. Releaſes, pl. 46. cites 9 H. 7. 25.

18. If

18. If *Tenant for Life* is, the *Remainder* over *in Tail*, and he in *Remainder releaſes to the Tenant all his Right*, this is a good Bar againſt the Releaſor in Writ of Waſte; and yet Fee nor Fee-Tail does not paſs. Br. Waſte, pl. 145. cites 13 H. 7. 10. Co. Litt. 345. b. S. P. But if *Tenant in Fee releaſes to his Tenant for Life all his Right*, yet he ſhall have an Action of Waſte.——So if *Leſſee for Life* does Waſte and *grants over* his Eſtate, and *Leſſor releaſes to the Grantee*; in an Action of Waſte againſt the *Leſſee*, he ſhall *plead the Releaſe*, and yet he has nothing in the Land. Co. Litt. 269. b.——*And ſo* in Waſte ſhall Tenant in Dower, or by the Curteſy in the like Caſe, and the Vouchee and the Tenant in a Præcipe after a Feoffment made, and ſo in a Contra Formam Collationis. Co Litt. 269. b.

19. Leſſee for Years in Bar of Waſte pleaded *Accord executed*; and Held a good Plea. Mo. 6. cites 6. E. 6. See (B a. 3) pl. 30.

20 If *Tenant in Tail makes a Leaſe for his own Life*, he ſhall have an Action of Waſte. Co. Litt. 345. b. F. N. B. 60. (H) S. P.

21. If Leſſee for Life or Years does Waſte, and then the Leſſor *releaſes all Actions Real*, he ſhall not have Action of Waſte in the Perſonalty only; And if he *releaſes all Actions perſonal*, he ſhall not have Action of Waſte in the Realty only. Co. Litt. 285. a.

22. An Eſtate reſerved without Impeachment of Waſte coming to a Leſſee, he would have it in the like Manner, but was reſtrain'd in Chancery. Toth. 147. cites Jan. 11 Jac. Marquis of Wincheſter v. Buſhon.

(G. a. 2) *Without Impeachment of Waſte.* How conſtrued.

1. 52 *H.* 3. *cap.* 23. *S.* 2. ENacts, That **Farmers, during their Terms, ſhall* † *not make Waſte, Sale, nor Exile of Houſe, Woods, and Men*, This Act provideth Remedy for Waſte done by Leſſee for Life or Leſſee for Years, and it is the firſt Statute that gave Remedy in thoſe Caſes; for the Rule of the Regiſter is, that there are five Manner of Writs of Waſtes, viz. two at the Common Law, as for Waſte done by Tenant in Dower, or by the Guardian; and three by Statute or Special Law, as againſt Tenant for Life, Tenant for Years, and Tenant by the Curteſy. 2 Inſt. 145

This Statute is *a Penal Law*, and *yet becauſe it is a Remedial Law, it has been interpreted by Equity.* Arg. 10 Mod. 281. in Caſe of Hammond v. Webb.

* Here *Firmarii* do comprehend all ſuch as hold by Leaſe for Life or Lives, or for Years, *by Deed or without* Deed, Large ſe habet hæc dictio Firmarius ad terminum Vitæ, & ad terminum annorum. 2 Inſt. 145. cites Fleta lib. 5. cap. 34.——It has been reſolved that it ſhould extend to Strangers. Arg. 10 Mod. 281. in Caſe of Hammond v. Webb.

Albeit the Regiſter ſays Sciend. that per Statutum de Marlebridge, cap. 23 data fuit quædam Prohibitio vaſti verſus tenentem annorum, which is true; yet the Statute *extends to Farmers for Life* alſo, *but* this Act extended *not to Tenant by the Curteſy*, for he is not a Farmer, but if a Leaſe be made for Life or Years, he is a Farmer, tho' no Rent be reſerved. 2 Inſt. 145.

† By theſe Words they are prohibited to ſuffer Waſte, ſee (K)——It has been reſolved that this Act extends to Waſte omittendo, tho' the Word is, faciant, which literally imports Active Waſte. Arg. 10 Mod. 281. in Caſe of Hammond v. Webb.

*Nor of any * Thing belonging to the Tenements that they have to Farm,* * *Houſes, Woods and Men*, were before particularly named, and theſe Words do *comprehend Lands and Meadows* belonging to the Farm. 2 Inſt. 146.

Alſo theſe general Words have a further Signification, and therefore if there had been a *Farmer for Life, or Years of a Manor*, and a *Tenancy had eſcheated*, this Tenancy ſo eſcheated did belong to the Tenements that he held in Farm, and therefore *this extended to it*, and the Leſſor ſhall have a Writ generally and ſuppoſe a Leaſe made of the Lands eſcheated by the Leſſor, and maintain it by the Special Matter. 2 Inſt. 146.

* *Unleſs*

This Grant *ought to be by Deed,*

Unleſs they have ſpecial Licence by Writing of Covenant, making Mention that they may do it,

for all Waſte tends to the Diſinheritance of the Leſſor, and therefore no Man can claim to be diſpuniſhable of Waſte without Deed. 2 Inſt. 146.

This Special Grant is intended to be Abſque Impetitione Vaſti, *without Impeachment of Waſte.* 2 Inſt. 146.

And this muſt be underſtood in

Which Thing if they do, and thereof be convict, they ſhall yield full Damage, and ſhall be puniſh'd by Amerciament grievouſly.

ſuch a Prohibition of Waſte upon this Statute, as lay againſt a Tenant in Dower at the Common Law, and ſingle Damages was given by this Statute againſt Leſſee for Life, and Leſſee for Years. 2 Inſt. 146.

The Statute of Glouc. cap. 5. gave treble Damages, and the Place waſted againſt Leſſee for Life, Leſſee for Years, and Tenant by the Curteſy &c. 2 Inſt. 146.

2. *Fine was levied to S. for Life*, the *Remainder to K. for Life, Remainder to the right Heirs of this ſame S.* there *S. may grant to K. to hold without Impeachment of Waſte*; and this ſhall bind the Heirs of S. and yet S. had nothing but for Life at the Time of the Gift in Poſſeſſion, but he had Fee in Remainder. Br. Waſte, pl. 98. cites 24 E. 3. 70.

S. C. cited 11 Rep. 83. b. in Lewis Bowles's Caſe. —— S. C. cited Roll Rep. 183. in Caſe of Bowles v. Berry S. C. ——— S. C. cited 8 Rep. 76. b. in the Ld. Stafford's Caſe. —— The *Privilege* given by the Words (without Impeachment of Waſte) *is annex'd to the Privity of Eſtate*, cites 3 E. 3. 44. per Shard and Stone, that if one who has a particular Eſtate with ſuch Privilege *changes his Eſtate*, he loſes his Advantage. 11 Rep. 83. b. in Lewis Bowles's Caſe.

3. If a Man *leaſes for 20 Years without Impeachment of Waſte*, and after, *within the Term, confirms his Eſtate for Term of Life*, he ſhall be impeach'd of Waſte within the Term; for now *he is in of another Eſtate*, and the greater Eſtate ſhall determine the leſs, which is the Term. Br. Waſte, pl. 71. cites 5 H. 5. 9. Per Aſcham.

S. C. cited 11 Rep. 83. b Paſch. 13 Jac. in Lewis Bowles's Caſe.

4. If a *Leaſe* is made *to A. for the Life of B. without Impeachment* of Waſte, the *Remainder to him for* Term *of his own Life*, now he is puniſhable of Waſte, for the firſt Eſtate is gone and drown'd; And *ſo* it is *of a Confirmation.* D. 10. b. pl. 37. Trin. 28 H. 8. in Caſe of the Abbot of Bury v. Bokenham

5. *By* Force of *the Clauſe Abſque Impetitione Vaſti* (that is without any Challenge or Impeachment of Waſte) the *Leſſee may cut* down the *Trees*, and convert them *to his own* Uſe. Co. Litt. 220. a.

It gives the Tenant only a bare Power, without an Intereſt; Per Holt. Ch. J. 1 Salk. 368. Poole's Caſe.

6. *But otherwiſe* it is *if the Words were without Impeachment by any Action of Waſte*; for then the Diſcharge extends but to the Action, and not to the Trees themſelves, and in that Caſe the Leſſor ſhall have them. Co. Litt. 220. a.

And. 151. pl. 199. Anon. but ſeems to be S. C. The Leaſe was to A. and B. for their Lives, abſque Impetitione Vaſti during the Lives of the ſaid Leſſees, naming them. A. died. Waſte was brought againſt B. All the Judges agreed that the Action did not lie, and that B. ſhall hold the Land without Impeachment of Waſte, and it ſhall go according to the Intereſt which ſurvives and enſue the Nature thereof; and ſo is the Intent of the Grant, and the Words by a reaſonable Conſtruction agree therewith.

7. A *Leaſe* was *made to A. and B. during their Lives, & alterius eorum diutius viventis, without Impeachment* of Waſte, *durante Vita ipſorum.* A. died; and the Queſtion was, whether B. the Survivor ſhould be puniſhable for Waſte; for ſome conceived the Limitation of the Eſtate to be more liberal or extenſive than the Liberty, the one being Durante Vita ipſorum, and the other Durante Vita alterius eorum diutius viventis. But it was agreed per tot. Cur. that *the Liberty runs with the Eſtate*, and ſhould endure as long. 3 Leon. 151. pl. 202. Hill. 29 Eliz. C. B. Rolt's Caſe.

8. If

8. If one is Tenant without Impeachment of Waſte, he *muſt plead it*, or elſe he can take no Advantage of it, tho' found by Verdict. Le. 66. pl. 86. Mich. 29 & 30 Eliz. C. B. Anon.

3 Le. 80. Paſch. 25 Eliz. C B. Pepys's Caſe, S. C.

and reported in the ſame Words.——Cro. E. 40. pl. 3. Trin. 27 Eliz. C B. Clare v. Pepys, S C. accordingly, by all the Juſtices, but Windham contra.——Ow. 91. Paſch. 25 Eliz. Kaire v. Druraft, S. P. accordingly, and ſeems to be S. C.

9. *Tenant for Life* without Impeachment of Waſte, cut down Trees. Reſolv'd that the ſaid Clauſe did *not give the Tenant for Life a greater Intereſt in the Trees than if ſhe had only a Demiſe of the Land, but* it *only ſerv'd to exempt her from being impeach'd in Action of Waſte*, or recovering Damages or the Place waſted. 4 Rep. 63. Paſch. 31 Eliz. B. R. Herlakenden's Caſe.

Ld. C. Nottingham, in the Caſe of Abraham v. Bubb, 2 Freem. Rep 54. Paſch. 1680. ſaid, That the Law formerly was held to be, that if there were Tenant for Life without Impeachment of Waſte,

10. It gives ſuch a Privilege, that tho' no Waſte is done, as that the *Houſe is blown down* by Tempeſt, yet *he ſhall have the Timber which was Parcel of the Houſe, and* alſo *Timber* Trees *blown down by the Wind*; for when they are ſever'd from the Inheritance, either by the Act of the Party, or of the Law, and become Chattels, the intire Property of them is in him who hath this Privilege by Virtue of theſe Words, without Impeachment of Waſte. 11 Rep. 83. b. 84. Reſolv'd. Lewis Bowles's Caſe.

that this did only create an Impunity to the Tenant for Life, altho' it was the expreſs Proviſion of the Party, and cited 4 Co. 63 But that afterwards in Lewis Bowles's Caſe, 11 Co. 80. the Opinion was, that theſe Words did *veſt a Right and Intereſt* in the Tenant for Life, and did give him Liberty *to ſell and take the Trees to his own Uſe*; for there is an expreſs Proviſion of the Party; but in the Caſe of *Tenant in Tail after Poſſibility* of Iſſue extinct, that is the Proviſion of the Law only; and tho' in ſome Caſes Fortior eſt diſpoſitio Legis quam Hominis, yet that ſhall not be to incumber Eſtates.

11. *Tenant for Life without Impeachment of Waſte makes Leaſe for Years*, or otherwiſe. Leſſee for Years commits Waſte. He in Remainder in Fee ſhall not have Action of Waſte; for this Leaſe was *deriv'd out of the Eſtate for Life privileg'd*; and if Waſte lies it ſhall be brought againſt the Tenant for Life who made the Leaſe, and he was diſpuniſhable. Reſolv'd. Jo. 51. pl. 2. Mich. 22 Jac. C. B. Bray v. Tracy.

Cro. J. 688. pl. 4. Trin. 21 Jac S. C. but not S. P.——Winch 79. 86. S. C. but S. P. does not appear.

12. This Privilege *continues no longer than the Eſtate to which* it is annex'd; So that if Tenant for Life with ſuch Privilege, grants his Eſtate, reſerving the Trees, it is not good; But if he grants for 3 Lives, by Virtue of a Power, reſerving the Trees; this is good, becauſe he has a Poſſibility of Reverter after the 3 Lives. But if Tenant in Tail after Poſſibility, grants his Eſtate, reſerving the Trees, it is void; but if he leaſe for Life, reſerving the Trees, it is good; Per Jones J. Lat. 270. in Caſe of Sacheverell v. Dale.

13. The *Intent* of ſuch Privilege *is only* in order *to cut down Timber and open new Mines*. Per Ld C. Cowper. 1 Salk. 161. Mich. 1 Geo. Vane v. Lord Bernard.

14. The Clauſe of Without Impeachment of Waſte, never was *extended* to allow the Deſtruction of the Thing itſelf, but *only to excuſe for Permiſſive Waſte*; and therefore ſuch Clauſe would not give Leave to fell and cut down *Trees ornamental, or ſheltering of an Houſe*, much leſs to deſtroy or demoliſh the Houſe. Ch. Prec. 454. Hill. 1716. in Lord Bernard's Caſe.

G. Equ. R. 127. S. C. & S. P.

(G. a. 3) Waſte. *Triable where.*

Action of *Waſte upon the Statute does not lie in Ancient Demeſne*, and *if it was brought at Common Law Ancient Demeſne is a good Plea*; for thoſe are not bound by the Statute. Br. Parliament, pl. 17. cites 8 H. 6. 34. 35.——Br. Waſte, pl. 81. cites S. C And Per Martin, Action of Waſte does not lie there upon the Statute, but by their Uſage; and therefore if the Uſage is ill the Action is ill.——2 Inſt. 306. ſays it does not lie there upon the Statute of Glouceſter, becauſe that Court fails of the Incidents to an Action of Waſte, viz. to award a Writ to the Sheriff to inquire of the Waſte &c.——S. P. *But* Waſte *lies there by Writ of Right, and ſhall have Proceſs at the Common Law*, viz. *Diſtreſs infinite.* Quære inde, unleſs *by Cuſtom* us'd Time out of Mind. Br. Waſte, pl. 141. cites 23 H. 6. 25.

1. IN Waſte the Defendant pleaded that the Place &c. is Parcel of the Manor of K. which is *Ancient Demeſne.* And the Opinion of the Court was, that it is a good Plea. Br. Waſte, pl. 81. cites 7 H. 6. 35.

2. A Man ſhall not have Writ of Waſte *in London*; but the contrary is us'd, but this is *by Cuſtom*, as Arbitrement. Br. Waſte, pl. 81. cites 7 H. 6. 35. and 8 H. 6. 35. Per Marten.

3. Of *Menace of Villeins in a foreign County Per quod receſſerunt*, Action of Waſte lies where the Manor is; Quod nota per Cur. But if he brings Action of Treſpaſs thereof, this Action ſhall be brought where the * Menace was. Note the Diverſity. Br. Waſte, pl. 9. cites 9 H. 6. 42.

* Orig. is (Manor)

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* [H. a] *Judgment by Statute.* In what Caſes the *Land* ſhall be *recovered.* At the Common Law.

* This is (I) in Roll. ——See (G. a. 2) pl. 1. the laſt Paragraph.

1. IF Tenant by the Curteſy does Waſte, and grants over his Eſtate; in Action of Waſte for it the Franktenement ſhall be recovered. 12 H. 4. 4.

2. The ſame Law is of Tenant in Dower. 12 H. 4. 14.

3. [So] if Lenee for Life does Waſte, and grants over his Eſtate, yet in a Writ of Waſte againſt him the Franktenement ſhall be recovered. 12 H. 4. 4.

4. So if Leſſee for Years does Waſte, and grants over his Eſtate, in Action againſt him the Land ſhall be recovered. 12 H. 4. 4.

5. If an Action of Waſte be brought againſt a Leſſee for Years, and it appears to the Court that the Term is expired pending the Writ, the Plaintiff ſhall recover Damages only, and not the Land. Mich. 9 Car. B. R. between *Newell and Donning*, adjudged in Writ of Error upon a Judgment in Bank, and the Judgment there ſo given affirm'd accordingly. Intratur Mich. 8 Car. Rot. 271.

6. Upon the Conſtruction of the Statute of Glouceſter, ſome Queſtion has been made, *Whether in this mixt Action the Place waſted is the Principal, or the Damages*; and in divers Reſpects the one is more principal than the other; for in reſpect of the Antiquity *againſt Tenant in Dower*, and the Tenant *by the Curteſy*, *the Damages are the principal*, and therefore they ſhall be ſometimes preferr'd, viz. The Plaintiff to have Execution of the Damages before the Place waſted. But in reſpect of the Quality, the Realty is ever preferr'd before the Perſonalty, and therefore in Waſte, if the Defendant confeſs the Action, the Plaintiff may have Judgment of the Land, and releaſe his Damages, which proves the Realty

ty to be the Principal; for omne majus dignum trahit ad ſe minus. 2 Inſt. 307.

[I. a] Judgment. *What Thing* ſhall be *recover'd.* [The Place waſted.]

* This is (K) in Roll. See (L. a)

1. IF Trees growing ſparſim in a Cloſe are cut, **in an Action of Waſte** all the Cloſe **ſhall be recover'd.** **M. 11 Jac. B. between** *Cage and Smith*, **per Curiam. Co. Litt. 54.** Brownl. 240. S. P. Anon.

2. **If Waſte be done** in diverſe Rooms **in a Houſe, the** Rooms * **ſhall be recover'd in Action of Waſte,** and not all the Houſe. **Co. Litt. 54.** * Fol. 836.

3. [But] **If Waſte be done in a Houſe** ſparſim throughout the Houſe, **all the Houſe ſhall be recover'd. Co. Litt. 54.** S. P. tho' all be not waſted. 2 Inſt. 303.

4. **If Waſte be done** in the Hall **of the Houſe, yet** all the Houſe ſhall not **be recover'd, tho' ſome ſay that the Houſe has its Denomination from the Hall. Co. Litt. 54.** In ancient time it was holden by ſome, that if the *Hall* were *waſted*, the whole Houſe ſhould be recover'd; for that, in thoſe Days, the Hall was the Place of greateſt Reſort and Uſe, inſomuch as the whole Houſe was call'd by the Name of the Hall, as Dale-Hale. &c. but the Purview of the Statute of Glouceſter is, that he ſhall loſe that Thing that he hath waſted. 2 Inſt 303, 304

Noy, Attorney-General in Mr. Atkins's Reading, held that the 15 E. 3. Tit. Waſte, 8. That in Waſte of the Hall all the Houſe ſhall be recover'd, was good Law, contrary to the Opinion of Co. Litt. 54. a. 15 H. 7. 11. And he cited the Caſe of **Lord Abergavenny v. Sir Rd. Southwell,** in Action of Waſte, for Waſte done in *Kitchen and Larder of a Caſtle*, and all the *Caſtle* was recover'd, becauſe a Caſtle is not dividable, and ſo adjudged. 11 Eliz. See D. 272. b. Marg. pl. 33.

5. **If a** Man brings **Action of** Waſte, becauſe he permitted the Pales of a Park, **which incompaſs the Park,** to decay; but it is not averr'd that there were any Deer in the Park, or that thereby the Deer were diſperſed, **and in this Action the Plaintiff recovers; he ſhall not recover all the Land which is compriſed within the Pale, but** only the Place where the Pale ſtood. **P. 11 Car. B. R. between** *Sir John Corbet and Sir James Stonehouſe*, **it was ſo held; and the Court ſeem'd to incline to it in Writ of Error upon ſuch Judgment in Bank, the Judgment being affirm'd in the King's-Bench to recover the Place waſted.** Cro. C. 381. pl. 9. and 340. pl. 9. S. C. but S. P. does not appear. —Jo. 354. pl. 1. S. C. but S. P. does not appear.

6. *Stat. of Glouceſter*, 6 *E.* 1. *cap.* 5. Enacts, That * *he which ſhall be attainted of Waſte, ſhall* † *leeſe the Thing that he hath waſted; and moreover ſhall* ‡ *recompence thrice ſo much as the Waſte ſhall be tax'd at;* * If one Jointenant does the Waſte, both ſhall be attainted of the Waſte &c. 2 Inſt. 303.——S. P. But treble Damages ſhall be recover'd againſt him that did the Waſte only. 2 Inſt. 302.

† In an Action of Waſte *againſt a Leſſee for Life, for Waſte* done *in* 3 *Acres*, the *Defendant claims Fee*; whereupon Iſſue is join'd. The Jury *find* againſt the Defendant That he hath but an *Eſtate for Life*; and inquired further of the Waſte, and found the *Waſte done in one Acre only.* The Plaintiff cannot have Judgment for the whole Land, in reſpect of the Forfeiture and treble Damages; for that Judgment is not according to this Act, that is to ſay of the Place waſted, and treble Damages in reſpect of the Place waſted; wherefore he had Judgment, according to the Statute, of one Acre and treble Damages. 2 Inſt. 305.

‡ Whereſoever the Common Law gave ſingle Damages againſt any, this Act does give treble, unleſs there be any Special Proviſion made by this Act. 2 Inſt. 306.

This Statute does not bind the King; per Coke Arg. Mo. 321. in Engleſield's Caſe.

And

And for Waſte made in the Time of Wardſhip, it ſhall be done as is contain'd in the great Charter.

If the *Guardian ſuffers a Stranger* to cut down Timber-Trees, or to proſtrate any of the Houſes, and according to his Name of Guardian doth not endeavour to keep and preſerve the Inheritance of the Ward in his Cuſtody and Keeping, nor to forbid and withſtand the wrong Doer, *this ſhall be taken in Law for his Conſent*; for in this Caſe Qui non prohibet, quod prohibere poteſt, aſſentire videtur. And if ſuch Waſte and Deſtruction be done without the Knowledge of the Guardian, or with ſuch Number as he could not withſtand, then ought the Guardian to cauſe an Aſſiſe to be brought againſt ſuch Wrong-Doers by the Heir, wherein he ſhall recover the Freehold, and Damages for ſuch Wrong and Diſheriſon. So note a Diverſity between the Intereſt of a Guardian created by Law; for there in an Aſſiſe the Heir ſhall recover Damages; but otherwiſe it is in Caſe of a Leaſe for Years, which is the Leſſor's own Act. 2 Inſt. 305.

And where it is contain'd in the great Charter, that he which did Waſte during the Cuſtody ſhall leeſe the Wardſhip, it is agreed that he ſhall recompence the Heir his Damages for the Waſte, if ſo be that the Wardſhip loſt do not amount to the Value of the Damages, before the Age of the Heir of the ſame Wardſhip.

See (L. a) The Committee of a Ward did Waſte, and after tender'd Marriage to the Heir, and he refuſed, and married elſewhere. The Waſte is found by Office. The Queſtion was, Whether the Committee may bring Forfeiture of *Marriage*. The Court upon Adviſement held, That the Committee by doing Waſte loſt only the Ward of the Land, and not of the Body, by the expreſs Words of this Statute. D. 25. b. pl. 163. Hill. 28 H. 8. Anon.

7. If 2 *Coparceners* leaſe Land for Life, and *after Waſte committed one dies*, the Aunt and Niece muſt join in Action; and tho' the *Niece* ſhall recover no Damages, yet ſhe ſhall recover the *Place waſted*; and it ſeems they ſhall hold the ſame in Coparcenary. F. N. B. 60. (R) cites M. 11 E. 3.

8. In Waſte at the Niſi Prius, Waſte was found *in four Oaks in divers Parts in a Wood*; and it was doubted if he ſhall recover the Wood or the Place waſted; and at laſt it was awarded, that he recover the Place waſted, and his treble Damages. Br. Waſte, pl. 24. cites 41 E. 3. 23.

If *Termor of a Wood does Waſte in one Corner of the Wood*, he ſhall not loſe all the Wood; per Fineux Ch. J. clearly; but only the Place waſted. Br. Waſte, pl. 96. cites 15 H. 7. 11.——*But if there are diverſe Plats* of Land *in the Wood* in diverſe Places, now if the *Termor does Waſte in the Wood* he ſhall loſe thoſe Plats, tho' he did not do Waſte in them; for thoſe are Parcel of the Wood; and this ſeems to be where he has done Waſte in the Wood ſparſim & circunquaque; and this was ſaid by Fineux for Law, in the Reading of Thecher. Ibid.

9. If *a Man does Waſte, and grants his Eſtate over*, yet upon Action brought againſt him, he ſhall loſe the Place waſted; and his *Grantee, who is not Party* to it, *ſhall loſe his Intereſt*. Quod nota. And therefore it is *a good Plea for the Grantee, that ſuch a Day he granted his Eſtate over, before which Grant No Waſte done*; and *in Action againſt the Grantee* it is a good Plea, *that ſuch a Day J. N. granted it to him, after which Grant No Waſte done*. Br. Waſte, pl. 33. cites 43 E. 3. 8.

Br. Parliament, pl. 14. cites S. C.—The Baron held a Houſe in the Right of his Feme for her Life, the Inheritance whereof was in an Infant in Ward of the Queen; and upon an Information in the Court of Wards that he had committed Waſte, and which was proved to the Value of 27 l. the Court awarded that he ſhould avoid the Poſſeſſion during the Life of the Feme, if ſhe ſhould live ſo long; and that he ſhould pay treble Damages, amounting to 113 l. Mo. 717. pl. 1003. Mich. 15 & 16 Eliz. Forſter's Caſe.——So for Waſte done in a Wood of the Ward's, the Defendant render'd treble Damages, and loſt the Place waſted. Mo. 718. in pl. 1003. cites Hill. 22 Eliz. Scrogg's Caſe.

10. If the *Guardian* in Chivalry *does Waſte* in Ward, *to the Damage of* 20 *s. he ſhall loſe the Ward to the Value of* 20 *l.* viz. he ſhall loſe *all the Ward*. Br. Waſte, pl. 68. cites 12 H. 4. 3. Per Hank.

S. P. 2 Inſt. 302.

11. Waſte *by two upon a Leaſe for Term of Life*, and *one was ſummon'd and ſever'd*, and the *other ſued forth*, and *aſſign'd the Waſte in diverſe Things, and in cutting of Willows*, and *found for the Plaintiff*, and *Damages tax'd*; and he had *Judgment to recover the Moiety of the Damages, and the Moiety*

Moiety of the Place waſted, and *as to the Willows the Court adviſed.* Br. Waſte, pl. 116. cites 12 E. 4. 1.

12. If a Man does Waſte *in Hedge-rows which ſurround a Paſture*, nothing ſhall be recover'd but the Place waſted, viz. the Circuit of the Root, and not the entire Paſture; Per Bromley Ch. J. Br. Waſte, pl. 136. cites 4 E. 6.

13. A. hath the *Wardſhip of Black-Acre and the Heir of B.* and *White-Acre and the Heir of C.* per Cauſe de Gard. A. doth *Waſte in Black-Acre.* He ſhall loſe only Black-Acre; for that Waſte is done only to the Diſheriſon of that Heir. And ſo it is if he does Waſte in White-Acre, he ſhall only loſe that Acre for the Waſte done there to the Diſheriſon of that Heir. 2 Inſt. 306.

14. *If the Tenant of one Houſe is Diſſeiſor of the next* Houſe, and *he pulls down both and builds them into one* new one, Diſſeiſee ſhall recover all the Houſe. D. 272. b. Marg. cites 34 Eliz. Allen v. Hayes.

S. C. cited Litt. Rep. 62. in Caſe of Hems v. Stroud.

15. When Waſte is brought *in the Tenuit*, Damages are only to be recover'd. 6 Rep. 44. Mich. 3 Jac. C. B. in Blake's Caſe.

16. If *Leſſee for Years or Life grants a Rent* out of the Land ſo leaſed, and afterwards commits Waſte, if the Lord recovers the Place waſted, yet the Land ſhall be charged. Brownl. 238. Anon.

(K. a) What *Eſtate* ſhall be recover'd.

1. WHERE a *Leaſe is made to one for Life, Remainder to another for Years*, and the firſt Leſſee loſes by Action of Waſte, Quære if the *Termor* cannot *enter after the Death of him who loſt.* Br. Waſte, pl. 44. cites 46 E. 3. 17.

2. If a Man grants a *new Leaſe to commence after the End of a former Leaſe*, and the firſt Leſſee does Waſte, Action lies againſt the firſt Leſſee notwithſtanding this future Intereſt, and the Term ſhall be ſaved. Co. Litt. 54. a. (t).

3. If *Leſſee for Life leaſes for Years, and after enters into the Land and does Waſte*, and the Leſſor recovers in an Action of Waſte, he ſhall avoid the Leaſe made before the Waſte done. Co. Litt. 233. b.

4. *But a precedent Rent* granted out of the Land ſhall not be avoided, but the Leſſor ſhall hold the Land charged during the Life of Tenant for Life; *But if* the Rent were *granted after the Waſte done*, the Leſſor ſhall avoid it. Co. Litt. 333. b. 334. a.

5. *Leaſe for Life to A. Remainder to a Feme ſole for Years*; they *intermarry*, and after Waſte is committed; as well the Eſtate for Years as the Eſtate for Life ſhall be recover'd. 2 Le. 7. Arg. in Cranmer's Caſe.

(L. a) Recover'd, What. Damages.

1. WASTE by a Prior againſt J. N. *Writ to enquire of the Waſte was awarded, and return'd ſerved; and Judgment was given that he ſhould recover the Place waſted, and treble Damages*, but *Ceſſet executio till till the Colluſion was tried*; quod nota; and this ſeems to be by Quale jus. And from hence it follows that this is a Recovery by Default as it ſeems. And it ſeems there by Belkn. that the *Plaintiff ſhall have the Damages tho' Colluſion be found*, but *not the Place waſted.* Br. Waſte, pl. 23. cites 40 E. 3. 37.

But 2 Inſt. 304. ſays, the Plaintiff ſhall not recover Damages for any

2. A *Man ſhall recover treble Damages in Writ of Waſte*, as well *for the Waſte done pending the Writ*, as for the Waſte done before. Br. Waſte, pl. 63. cites 7 H. 4. 16.

Waſte done banging the Writ, and therefore the Plaintiff may have a Writ of Eſtrepement in this Action, & ſic de ſimilibus. 2 Inſt. 304.

3. A Man ſhall recover *treble Damages* in Waſte *tho' the Action be not form'd upon the Statute.* Br. Damages, pl. 193. cites 12 H. 4. 3.

Br. Parliament, pl. 14. cites S. C.

4. In Action of Waſte by the Heir *againſt the Guardian*, which is brought *by the Common Law*, the Plaintiff ſhall recover treble Damages, tho' this be given by *Statute*; For when Action of Waſte is given with treble Damages, this *ſhall extend as well to thoſe who ſhall have the Action before as after.* Br. Waſte, pl. 68. cites 22 H. 4. 3. per Thirn.

Br. Parliament, pl. 14. cites S. C.

5. *And if Action of Waſte was now given generally againſt Tenant in Tail, after Poſſibility of Iſſue* &c. treble Damages ſhould be recover'd againſt him without more Words; for thoſe are adjoin'd to it by the former Statute, and when this is given in a new Caſe, all that is adjoin'd to it is given with it likewiſe. Br. Waſte, pl. 68. cites 22 H. 4. 3. per Thirn.

It was held per Cur. That becauſe thoſe treble Damages are

6. Waſte was found *to the Damage &c. and Coſts* 10 *Marks.* The Plaintiff recover'd the *treble Damages*, and 10 *Marks for Coſts*, which *were not treble.* Quod *mirum*, that he recover'd the Coſts where the Damages are treble. Br. Waſte, pl. 72. cites 5 H. 5. 12.

given by Statute, therefore the Plaintiff cannot have Coſts. Br. Waſte, pl. 10. cites 9 H. 6. 65. —— But Ibid pl. 125. cites 5 E. 4. 7. That all the Juſtices of B. R. held that the *Coſts ſhall be trebled*, and this *according as the Damages ſhall be trebled* [tax'd]; otherwiſe it is according as the Waſte ſhall be tax'd. —— See pl. 10.

7. It is agreed per Cur. That *upon this Iſſue of No ſuch Vill, if the Plaintiff has No ſuch Land in which he aſſigns a Part of the Waſte, yet* they ſhall give Damages; for by ſuch Iſſue the Waſte is not denied; per Cur. Br. Waſte, pl. 10. cites 9 H. 6. 65

If a Man *fells Trees, and after ſuffers the Germens to be deſtroy'd*, it is a double Waſte, and *treble Damages* ſhall be recover'd *for both*; yet he cannot recover Locum Vaſtatum.

8. Waſte per tot. Cur. where the *Leſſee cuts* 100 *Oaks, and after cuts the Stocks of the ſame Oaks, which grow again*, Waſte ſhall lie for both, and ſo it did; for he brought Writ of Waſte, and aſſign'd the Waſte in both; For the Stocks will grow to Oaks again, if they are well kept; and in this Caſe *he ſhall recover treble Damages twice, but* he *ſhall have only one Judgment of the Place waſted.* But note, that he brought but *one Writ of Waſte of both Waſtes*; For if he had firſt brought Waſte for the Cutting of the Oaks, and recover'd the Place waſted, and after the Tenant had cut the Stocks, Waſte does not lie; For by the firſt Recovery of the Place waſted, his Leaſe is determin'd in this Parcel, and therefore *Treſpaſs* lies *of the ſecond Cutting.* Br. Waſte, pl. 91. cites 22 H. 6. 13.

F. N. B. 59. (M) (e) (f) in the new Notes there, cites 22 H 6. 12.

9. If

9. If a Man *diſſeiſes the Tenant for Life, and does Waſte*, Action of *Waſte lies againſt the Tenant for Term of Life*; For *he may have his Remedy over againſt the Diſſeiſor*. Quære if he ſhall have this, viz. *treble Damages in Aſſiſe*, before that he be damnified by Action of Waſte, or after? It ſeems that *after the Action of Waſte brought, and Execution had*. Br. Waſte, pl. 138. cites 23 H. 8.

10. If the *Guardian commits Waſte*, and the *Heir*, being *within Age, brings* an Action of *Waſte*, the *Guardian* thereby *ſhall loſe the Wardſhip, and Damages for ſo much as is waſted, beſides the Value of the Wardſhip*, which is loſt. But *if* the *Heir at full Age brings* a Writ of *Waſte* againſt him who was Guardian, and recovers, then *he ſhall recover treble Damages* againſt the Guardian, becauſe the ſame is out of the Statute of Glouceſter, which ſays that the Guardian ſhall loſe the Wardſhip; For he cannot loſe the Wardſhip there, and therefore he is not in that Caſe as Tenant in Dower or by the Curteſy are, who were puniſhable in Waſte by the Common Law. And cites M. 12 H. 4. 3. in the Title of Waſte, the Opinion of Thirning. F. N. B. 60. (T)

S. P. Co. Litt. 54.—S. P. 2 Inſt. 305, 306.—Note one ſhall not recover Coſts on the Statute of Glouceſter. F. N. B. 60 (T) in the new Notes there (b) cites 30 E. 3. 27. b. Kelw. 261.

2 H. 4 17. b. 12 H 4. 4. 5 H. 5. 13. a. 9 H. 6. 66. b. 14 H. 6. 13. a. Contra 5 E. 4. 7. a. the Stat. 289.—See pl 6.

11. Leſſee for Years commits Waſte, and the *Years* do *expire*, yet ſhall the Leſſor have an Action of Waſte for the treble Damages, altho' he cannot recover the Place waſted, and tho' the Statute of Glouceſter be in the Conjunctive, perdra le choſe &c. & ouſter ceo ſace gree &c. For as there was at the Common Law 2 Forms of Actions of Waſte, viz. in the Tenet, as againſt Tenant by the Curteſy &c. and in the Tenuit againſt the Guardian after full Age; ſo upon this Act the like kind of Forms is fram'd by equal Conſtruction, viz. in the Tenet, to recover the Place waſted and treble Damages; and in the Tenuit to recover treble Damages only. 2 Inſt. 304.

But this is to be underſtood when the Term expires *by Effluxion of Time*, as in the Caſe of a Leaſe for Years, or when the Eſtate determines by the Act of God; as when *Ceſty que* * *Uſe dies*, or when the Eſtate is ended or *defeated by the Act and Wrong of the Tenant*, as when he makes a Feoffment in Fee, or commits any other Forfeiture, and the Leſſor enters, yet the Leſſor ſhall have his Action of Waſte. 2 Inſt. 304.

* It ſeems that this ſhould be (Vie.)——And Co. Litt 285. a. ſays, If Ceſty que Vie dies, Waſte ſhall lie only for the Damages.——And if pending a Writ Ceſty que Vie had died, the Writ ſhall not abate, but the Plaintiff ſhall recover Damages only; becauſe if Ceſty que Vie had died before any Action brought, the Leſſor might have an Action of Waſte for the Damages. Ibid.

(M. a) Recovery of Damages. *By and againſt whom.*

1. A Man ſeiſed *leaſed for Life, and had Iſſue two Daughters, and died*, the *Tenant did Waſte*, the *one Daughter had Iſſue and died*, and the *Tenant did Waſte again*, and the *Iſſue and the Aunt brought Writ of Waſte, and counted upon their Caſe*. The *Defendant pleaded No Waſte* done, and all *found as above*. And it was adjudged That they recover the Place waſted, and treble Damages in their own Time, and the Aunt alone the treble Damages in the Time of her Siſter to herſelf. Quod nota. Br. Waſte, pl. 41. cites 45 E. 3. 3.

Br. Damages, pl. 31. cites S. C.—S. P. 2 Inſt. 305. And Lord Coke ſays, this is a leading Caſe, and worthy great Obſervation.

——If 2 *Coparceners* leaſe Land for Life, and Waſte is committed, and after *one dies*, the Aunt and the Niece ſhall join in Action of Waſte for the Waſte done before; and yet *the Niece ſhall not recover any Damages* for the ſame, but the Place waſted. F. N. B. 60. (R) cites M. 11 E. 3. and in the new Notes there (f) cites 11 E. 2. Waſte, 115. 45 E. 3. 3. b. 11 H. 4. 16. b. 48 E. 3. 14. b. 35 H. 6. 23 b. Kelw. 105. a. Nat. Br. 101. 22 H. 6. 12. 49 E. 3. 2.

2. If

Mo. 321. in Englefield's Caſe, S. C. out of Statham, cited by Cook, Arg. who ſaid that Book is not to be taken for Law; neither is it adjudged there, but is only a Collateral Opinion, which ought not to receive Credit againſt Reaſon and the Rules of Law.

2. If there be *Tenant for Life without Impeachment of Waſte*, and a *Stranger cuts Trees*, the Tenant for Life ſhall not have the Damages, becauſe the Property is the Leſſor's. Lat. 269. in Caſe of Sacheverel v. Dale, Arg. cites 27 H. 6. Statham Waſte, pl. 47.

3. Two *Joint-tenants* for Years or Life, and *one of them does Waſte*. This is the Waſte of them both as to the Place waſted; but treble Damages ſhall be recover'd againſt him only that did the Waſte. 2 Inſt. 302.

See (B. a. 2) (N. a) *Writ of Inquiry.* Awarded in what Caſes. And how the Inquiry ought to be.

1. IN *Waſte at the Grand Diſtreſs, the Parol was without Day by Protection*, and the *Plaintiff brought Reſummons*, and the *Defendant made Default*; the Proceſs ſhall be Pone, and not Writ of Inquiry of of Waſte. Br. Reſummons, pl. 42. cites 27 E. 3. 78. and Fitzh. Waſte, 13.

2. In Waſte where *at the Grand Diſtreſs the Sheriff returns Iſſues, and the one of the Plaintiffs upon Demand makes Default, and the other appears, he ſhall be ſever'd* by Award, and Writ ſhall iſſue to inquire of the Waſte; and ſo it did. Br. Waſte, pl. 57. cites 2 H. 2. 4.

Br. Waſte, pl. 6. cites S. C. For the *Statute is*, That *if he does not come at the Grand Diſtreſs*, then

3. In Waſte, if the *Defendant appears at the Grand Diſtreſs, and has Day over*, and *after makes Default*, the Plaintiff ſhall never have Writ to inquire of the Waſte; but ſhall have the Proceſs of the Common Law, viz. *Diſtreſs infinite.* Quod nota. Br. Waſte, pl. 119. cites 7 H. 4. 15.

Writ ſhall iſſue to inquire of Waſte; which is intended at the ſame Day.

In Waſte the *Sheriff return'd Nihil at the Summons, and* the like *at the Diſtreſs*, and yet the *Writ of Inquiry of Waſte was awarded*, tho' no Writ be ſerved; and yet it was agreed, that the Tenant may be ſummon'd in the Land in which the Waſte is ſuppoſed, and ſo in Quare Impedit, and Writ of Ward. Br. Waſte, pl. 90. cites 21 H. 6. 61.

4. *The Summons, Attachment, and Diſtreſs* in Writ of Waſte were *return'd Nihil*, and *yet Writ iſſued to inquire of Waſte*; and good per Thirn, Hank. & Culpeper. For the Statute is, That if he does not come at the Diſtreſs, the Sheriff be commanded &c. And yet per Skrene, *in Writ Quas tenet* he may be *ſummon'd in Terra petita. Contra in* this Action *Quas tenuit.* Br. Waſte, pl. 68. cites 12 H. 4. 3.

In Waſte *againſt two*, if the *one comes at the Diſtreſs, and the other not*, he ſhall not have Writ of

5. If the *Sheriff* has *done his Office ill in one Vill, and well in another, all ſhall be inquir'd De novo*; inaſmuch as all the Inquiſition ſhall be by one and the ſame Inqueſt, all at one Time. Br. Waſte, pl. 68. cites 12 H. 4. 3. Per Thirn.

6. Waſte *againſt two Barons and their Femes. At the Grand Diſtreſs the one Baron and Feme appear'd*, and *the other made Default.* Skrene *pray'd Writ* to the Sheriff, *to inquire* of Waſte *againſt thoſe who made Default, and counted againſt the others.* Hank. ſaid, You ſhall not have Writ to the Sheriff, but count againſt thoſe who appear, and take Proceſs at Common Law againſt the others. Thirn ſaid, The Waſte of one is the Waſte

of all, and a Man ſhall not recover by Moieties in Waſte as in Præcipe quod reddat againſt two; For in Waſte *the Land ſhall not be loſt by Default, but by Action tried.* Per Hank. Thoſe who appear ought to plead, and if it be found that No Waſte is done, this ſhall diſcharge all. But per Thirn, if Waſte be found, it is hard that the others ſhall be attainted who are Strangers to the Iſſue; and after they were forced to anſwer. Br. Waſte, pl. 69. cites 12 H. 4. 5.

of Inquiry of Waſte againſt the other; for the one may be found the one way, and the other another way. Br. Proceſs, pl. 45. cites 14 H. 4. 37.

7. Day was given againſt the Jury *to try if B. was a Vill by it ſelf or not*, and at the Day they read the Record; becauſe they ſhall not be ſworn unleſs ſix of them had the View of every Place where the Waſte is aſſign'd, and after *one was examined if he had the View who ſaid, Yes*; by which he was ſworn upon the Principal, and there the Jury was *charged to inquire of the Damages of each Parcel by itſelf, and not of a Sum in Groſs for the Whole*; For if they find that B. is a Vill by it ſelf, then they ſhall inquire of Damages. And Waſte was *aſſign'd in two Acres in digging of* 200 *Load of Slate-Stone, and* 100 *Load of Coals*, and there it is agreed, per Cur. that *upon this Iſſue, of No ſuch Vill, if the Plaintiff has no ſuch Land, in which he aſſigns a Part of the Waſte*, yet they ſhall give Damages; for by ſuch Iſſue the Waſte is not denied; and alſo when they ſay, that they have view'd every Parcel, they ſhall not ſay after, No Waſte done, or that there is No ſuch Parcel as one of the Parcels is. And they found Damages of 300 Oaks, and were compell'd to ſhew the Price of each Oak by it ſelf; and becauſe thoſe treble Damages are given by the Statute, therefore the Plaintiff cannot have Coſts; Per Cur. Br. Waſte, pl. 10. cites 9 H. 6. 65.

8. In Waſte, if the *Defendant demurs upon the Declaration which is adjudg'd againſt him*, as he did where Reverſion was deviſed by Name of Tenement, and paſſed without Attornment, there *Writ ſhall not iſſue to inquire of Waſte*; For by the Demurrer he is convicted of the Waſte, *but* Writ ſhall iſſue to inquire *of the Damages*; quod nota. Br. Waſte, pl. 16. cites 34 H. 6 7.

9. Waſte *ex Hæreditate as Couſin and Heir*, the *Tenant made Default after Default*, by which *Writ was awarded to enquire of the Waſte, upon which he aſſign'd the Waſte certain, as he ought in Lieu of Declaration*, viz. *Cutting ſo many Oaks* &c. *ad Valentiam* &c. Permitting a Hall &c. & ſic de ſingulis, and *did not ſhew How Couſin*; and yet good, becauſe *it is no Declaration but Aſſignment of Waſte to inſtruct the Jury*; but *contra upon Declaration*; where the Defendant appears, there he ought to ſhew the Coſinage. Br. Waſte, pl. 17. cites 34 H. 6. 44.

10. If a Man *pleads Releaſe* in Waſte which is found againſt him, the *Waſte ſhall not be inquired*; For by the Pleading of the Releaſe, it is confeſs'd; Per Moile. Br. Waſte, pl. 18. cites 35 H. 6. 44.

11. In Waſte upon a *Nihil dicit enter'd*, a Writ was awarded to the Sheriff to go in proper Perſon to the Place waſted and *inquire of the Damages*; And the Court held the Writ good; and that he need not inquire of the Waſte; For that is not denied &c. D. 204. pl. 1. Mich. 3 & 4 Eliz. Darrel v. Wybarne.

S. P. and ſo if Judgment be given by *Non ſum informatus, or upon Demurrer*, the Waſte ſhall not be inquired but the Damages. D. 204 Marg. cites it as adjudg'd Hill. 33 Eliz. C. B. Anon.

Judgment in Waſte was had by Confeſſion by Nihil dicit. It was aſſign'd for Error, that the Judgment being by Confeſſion, the Waſte ought not to be inquired; but becauſe diverſe Precedents were ſo, it was awarded no Error, and the Judgment was affirm'd. Cro. E. 290. pl. 10. Hill. 34 & 35 Eliz. B. R. Warneford v. Haddock.

If the Plaintiff in Waſte recovers by *Nil dicit*, and a Writ of Inquiry iſſues, the Jury may *inquire of the Damages but not of the Place waſted*; For the Nil dicit is a Confeſſion, and the Precedents are accordingly. And Hobart asked, if the Defendant ſhall be bound by the Nihil dicit, as to the Place waſted, For what Reaſon he ſhould not be bound as to the Damages? Win. 5. Paſch. 19 Jac. Topping, [alias, Tipping] v. King. —— Hutt. 44. Tippin v. King S. C. Reſolved that the Jury ought not now to inquire

inquire of the Waſte, and ſays that it was ſo adjudg'd between **Ewer and Moyle**, upon *Demurrer* in Waſte, there the Waſte is confeſs'd, and the Writ ſhall be to inquire only of the Damages; So if the Plaintiff will releaſe his Damages, he ſhall have a Writ upon Judgment of the Place waſted. —— Yelv. 140. Mich. 6 Jac. Ewer and Moyle S. C. but S. P. does not appear. —— Lane 83. Hill. 8 Jac. S. C. but S. P. does not appear.

D. 204. a. Marg. cites it as adjudg'd Hill. 33 Eliz. C. B. that where Judgment is given upon Nihil dicit, or by Non ſum informatus, or upon Demurrer in Waſte, the Sheriff is not bound to return Quod acceſſit ad Locum Vaſtatum.

12. But the Reporter adds a Quære, if in this Caſe the Sheriff Ex Rigore Juris, ought to *go in proper Perſon* to the Place waſted; and ſays, it ſeems he need not; For this Form is only in the Writ De Vaſto inquirendo, where the Defendant made Default at the Diſtreſs, as in the Statute of Weſtminſter 2. cap. 15. D. 204. a. pl 1. in Caſe of Darrel v. Wybarne.

After Judgment in Waſte it was aſſign'd for Error, that in the Action the *Defendant appear'd upon the Diſtreſs, and after Declaration made no Anſwer*, but *Judgment* was given againſt him *by Nihil dicit*, and upon the Writ awarded to enquire of the Waſte and Damages, the *Sheriff went not to the Place* waſted, *but inquired of it at another Place*, and this was aſſign'd for Error. Sed non allocatur; for when Judgment in Waſte is given upon a Demurrer or Nihil dicit, the *Waſte is confeſs'd*; and the Writ ſhall be only to enquire of Damages, and altho' the Writ do command the Sheriff to go to the Place, yet this *is but* of *Form* and Nugation; but *otherwiſe* it is *where Judgment is given by Default before Appearance*, ſo is 3 Eliz. Dy 204. Cro. E. 290. pl. 10. Hill. 34 & 35 Eliz. in B. R. Warnford v. Haddock.—— Ow. 12. Wardford's Caſe, S. C. and S. P. and diverſe Precedents were produced to ſhew that this was the Courſe; wherefore Judgment was affirm'd.—— S. C. cited Poph. 24. in the Caſe of Crocker and York v. Dormer, Paſch 35 Eliz. as the Caſe of Haydock v. Warnford, and that tho' the Writ was that the Sheriff ſhould go to the Place waſted, and he did not, yet he need not go, for by the Nihil dicit the Waſt is acknowledg'd; But where a Writ is awarded to inquire of the Waſte upon Default made at the Grand Diſtreſs, there by the Statute of Weſtm. 2. cap. 24. the Sheriff ought to go in Perſon to the Place waſted, and inquire of the Waſte done, and therefore in that Caſe it is needful to have the Clauſe in it, that the Sheriff ſhall go to the Place waſted, and there enquire of it; For by the View the Waſte may be the better known to them, but where the Waſte is acknowledg'd, as here, that Clauſe need not, and albeit it be comprehended in the Writ; yet the Sheriff is not thereby bound to go the Place waſted and to enquire there, but he may do it at any Place within his Bailywick where he will, and therefore it is no Error in this Point.

13. In Waſte there was a Judgment by Default, and upon a Writ of Enquiry, it was *found in two Houſes and three Gardens generally, as the Plaintiff had declared, and entire Damages given*; Upon a Writ of Error it was aſſign'd, that the Jury ought to have found the Damages ſeveral, that it might appear to the Court how much the Waſte is of each Particularly; for if any were under 12 d. the Court would not adjudge it Waſte. Sed non allocatur; For when the Sheriff and the Jury have the View of the Place waſted, and given Damages for the Waſte, it ſhall *not be intended Petit Damages in any*. Cro. C. 414. pl. 1. Mich. 11 Car. B. R. King v. Fitch.

See (B. a. 2) (O. a) *Return* of the Writ of Inquiry. *Good or not.*

Waſte *by the Heir at full Age againſt the Guardian in Chivalry Quas tenuit in Cuſtod'* and the *Waſte was aſſign'd in two Vills*, and the *Sheriff return'd the Writ of Inquiry* of Waſte, *Quod Virtute brevis Pred' in Villa infra contenta cepit inquiſitionem*, and becauſe the Writ is Quod accedat ad locum Vaſtatum, he may cauſe the Jury to *ſee the Waſte in each Vill, and make the Inquiſition in the one Vill only or in another Vill* 20 *Miles from thence*; Per Thirn and Hank. Br. Waſte, pl. 68. cites 12 H. 4. 3.

1. BEcauſe the *Sheriff did not take the Inqueſt in Loco Vaſtato*, Shard held *he ſhould be amerced and a new Inqueſt taken*; But Thorp held that it was good enough, becauſe the *Return was Acceſſi ad Loca &c. Vaſtata* &c. and then the Inqueſt may *take the Inquiſition at H.* which *is not any of the Places* or Vill *waſted*. Br. Waſte, pl. 129. cites Fitzh. Retorn de Vicount, 82. 16 E. 3.

In

In the Return of the Writ to inquire of the *Waſte* which *was aſſign'd in three Vills*, He return'd *Inquiſitio capta apud A. one of the Vills*, and it did not appear if he came to the three Vills, and therefore ill; For *it ought to be* Quod *Virtute brevis* &c. *acceſſit ad Loca Vaſtata*, viz. *the three Vills, & apud A. one of them, fecit Inquiſitionem* &c. Br. Waſte, pl. 17. cites 34 H. 6. 44. ——Br. Return de Brief, pl. 16. cites S. C.——br. Waſte, pl. 129. cites S. C. that the Sheriff *may return, That he came to A. B. and C. and made Inquiſion at D.* and well.

2. The Sheriff *ought to return what Day and Year he made the Inquiſition, and that he came to the Place waſted.* Br. Waſte, pl. 129. cites 40 E. 3. 20. Br. Retorn de Briefs, pl. 17. cites S. C.

3. In Waſte, the *the Sheriff ought not to return Quod Mandavit ballivo* &c. in Writ of Enquiry of Waſte, but ſhall be amerced, and the ſame in Re-diſſeiſin; For in this Action, and in Re-diſſeiſin, he is Officer and Judge, which Power cannot be committed to the Bailiff of the Franchiſe. Br. Waſte, pl. 129. cites 11 H. 4. 82. S. P. 2 Inſt. 390. —— He ought to ſerve it himſelf, and not by Bailiff. Br. Proceſs, pl. 162. cites 2 H. 4. 1.

4. The Sheriff *ought not to return Quod fecit Vaſtum in Domibus & Boſcis, but ſhall ſhew certainly How* and *every Thing by it ſelf*, and the *Damages and Value of every Thing by it ſelf*, and if *otherwiſe*, then *New Writ of Inquiry ſhall be awarded.* Br. Waſte, pl. 129. cites 34 H. 6. 44. and 11 H. 4. 3. accordingly. Br. Waſte, pl. 17. cites S. C. and ſays, that the Waſte ought to be return'd as certain as it is aſſign'd, viz. Permittend. &c. & Succidend &c. Quod nota.——Br. Retorn de Briefs, pl. 16. cites S. C.

5. If the Waſte be *aſſign'd in S.* and the Sheriff *returns upon Writ of Inquiry* of Waſte, *That he came to S and there inquired of the Waſte*, this is no good Return; for he may do ſo, and yet not come to the Place waſted; for he *ought to return, That he came to the Place waſted, and there inquired* &c. Br. Waſte, pl. 3. cites 27 H. 8. 13. Br. Return de Briefs, pl. 2. cites S. C. — See (N. a) pl. 12. the Note.

(P. a) *Joinder in Waſte.* Who may or muſt join, and what ſhall be recover'd; And How.

1. IF *three* are Tenants in Common *Pro indiviſo*, and *one commits Waſte*, the *other two ought to join* in Action of Waſte againſt the 3d. F. N. B. 60. (S) cites Mich. 3 E. 2. Waſte. *A. was Tenant in Common with B. and C. of the 3d Part of a Reverſion*, and *A. brought* an Action of *Waſte alone, without naming his Companions*; The Court held that the Action did not lie by him alone; and it would be very inconvenient to deliver a 3d Part in Execution. Cro. E. 357. pl. 16. Mich. 36 & 37 Eliz. C. B. Hill v. Hart.

2. In Waſte againſt two, it was *found* by Writ of Inquiry *that the one did Waſte, and the other not*; whereupon Herle awarded *Sicut alias*. Theloal's Dig. of Writs, lib. 16. cap. 5. S. 37. cites Mich. 6 E. 3. Waſte, 20. But in ſuch Caſe Award was, that the Plaintiff ſhould recover againſt both. Ibid. cites H. 33 E. 3. Waſte 6.

3. A Man *leaſed for Life*, and *had two Daughters*, and *died*, the *Tenant did Waſte*, the *one Daughter had Iſſue and died*, the *Tenant did Waſte again* and the *Aunt and the Niece brought Waſte upon their Caſe*, and the Tenant pleaded No Waſte done, and it was found as above, by which the Plain- If the *Aunt and the Niece join* in an Action of Waſte *for*

Waſte done in the Life of the other Siſter, the Aunt ſhall recover the Damages only; becauſe the ſame belongs not by Law to the Niece; And ſome hold the Damages in the Caſe to be the Principal. Co. Litt. 198. a.

Plaintiffs recover'd the Place waſted and treble Damages in their own Time, and the other treble Damages in the Time of her Siſter to herſelf Br. Joinder in Action, pl. 12. cites 45 E. 3. 3.

4. Waſte *againſt two Priors, where the Ward was granted to both, and they did Waſte*; and it was not denied but that one Writ of Waſte lies againſt both without ſeveral Writs. And per Belknap clearly, If a *Co-chanon of an Abbot* does Waſte, the Abbot ſhall be charged; for this is the Waſte of the Abbot himſelf. Br. Waſte, pl. 55. cites 49 E. 3. 25.

5. If the Tenant enjoys by the *Leaſe of one Coparcener*, the Action lies well; but it is a good *Plea, that the Leaſe was made by the Baron and Feme, and the other Coparcener who is alive not named*, Judgment of the Writ; abſque hoc that it was made by the Baron and Feme only. Quod nota. Br. Waſte, pl. 94. cites 22 H. 6. 24.

Br. Joinder in Action, pl. 76. cites S. C.——F. N. B. 59. (F) S. P.——Co. Litt. 53. b. (d) S P.

6. Where *Reverſion is granted to two, and the Heirs of the one*, they ſhall join in Action of Waſte after Attornment ad Exhæredationem of him who has the Fee. Br. Waſte, pl. 94. cites 22 H. 6. 24. Per Newton.

Br. Joinder in Action, pl. 76. cites S. C. That the Survivor and the *Tenant by the Curteſy may join in Action of Waſte ad Exhæredationem of the Baron and Feme, and of the Heir of the Tenant by the Curteſy.*

7. If *two Barons and their Femes leaſe for Years*, and the *one Baron and Feme have Iſſue*, and the *Feme dies*, and the Baron is Tenant by the Curteſy, the *Baron and Feme who ſurvive, and the Tenant by the Curteſy*, ſhall join in Action of Waſte; for there is *Privity between them.* Br. Waſte, pl. 94. cites 22 H. 6. 24. Per Newton.

8. *But* if the *Baron and Feme ſeiſed in Jure Uxoris leaſe*, and the *Baron has Iſſue by her*, and *ſhe dies*, there the *Heir and the Tenant by the Curteſy ſhall not join* in Action of Waſte; for there *is no Privity.* Br. Waſte, pl. 94. cites 22 H. 6. 24.

Co. Litt. 42. a. (b) 53. b. (d)

9. If *Tenant for Life and he in Reverſion join in a Leaſe for Life*, and the *Leſſee does Waſte*, they ſhall join in Action of Waſte, and the Tenant for Life ſhall recover the Place waſted, and he in Reverſion ſhall recover the Damages. And the Reaſon ſeems to be inaſmuch as the one parts with the Soil by the Leaſe, and the Diſinheritance is to the other who has the Reverſion. Br. Joinder in Action, pl. 1. cites 27 H. 8. 13.

10. *So* where *Tenant by the Curteſy and the Heir* join in an Action of Waſte, the *Tenant ſhall have Locum Vaſtatum, and the Heir* ſhall have *the Damages.* 1 Le. 48. pl. 62. Mich. 28 & 29 Eliz. C. B. in Caſe of Lewknor v. Ford, cites 27 H. 8. 13.

Cro. E. 290. pl. 10. Warneford v. Haddock, S. C. accordingly; for B. *having counted upon the whole Matter, it is as if he had made ſeveral Counts*, and he may well join them in one Action.

11. *A. and B. Coparceners of* a Houſe. *A. lets her Part to L.* and then *B. lets her Part to M.* Afterwards *both Leaſes come to the Hands of N.* and then *A. bargains and ſells her Reverſion to B.—N. does Waſte*, by permitting the Houſe to fall. *B. brings Waſte*, and has Judgment. In Error it was aſſign'd, that it being on 2 ſeveral Demiſes there ſhould have been 2 *Actions.* Per Gawdy J. There is a *Diverſity* when the *Right* is *ſeveral* and when the *Poſſeſſion* is *ſeveral*; for tho' the Poſſeſſion be ſeveral, yet if the Right be intire, one Action only will lie. And to this Popham Ch. J. agreed; For tho' at the firſt A. and B. were intitled to ſeveral Actions, yet by Matter ex poſt Facto the Actions may be united. Ow. 11. Mich. 33 & 34 Eliz. B. R. Wardford's Caſe.

And that Paſch. 35 Eliz. the Caſe was moved again; for that it appears by the Count, that the

the Defendant held one Part of the Demiſe of the Plaintiff, and the other of the Demiſe of a Stranger, which had granted his Reverſion to the Plaintiff, ſo he had the Reverſion by ſeveral Titles, he cannot maintain this Action; and altho' he hath declared ſpecially how he held it, Ex Dimiſſione & Aſſignatione, this will not aid him; but if he had made ſeveral Leaſes, he might have had one Action of Waſte, as 44 E. 3. is. But all the Juſtices held the contrary; for inaſmuch as he hath ſhewn the Truth of his Caſe in his Declaration, and he hath the Reverſion in one Hand, he ſhall maintain this Action.—S. C. cited Poph. 24, 25. to have been agreed, That the Action was well brought upon the ſeveral Demiſes, becauſe neither the Intereſt of the Term nor of the Inheritance was ſever'd nor divided to ſeveral Perſons at the Time of doing the Waſte, but the 2 Terms were in N. and the Inheritance of them immediately in B. And by Popham, The Thing waſted is one and the ſame, viz. a Houſe.

12. Another Error aſſign'd was, becauſe A. the other Coparcener was not join'd with B. in the Action. But reſolved that it was good enough; and the Juſtices made this *Diverſity*, viz. *when both the Parties have an equal Eſtate* and Inheritance, *and when one of them hath but a particular Eſtate, as* in the 27 H. 8. 13. *Leſſee for Life and he in the Remainder* ſhall join in an Action of Waſte, where they had equal Eſtate of Inheritance; as 2 Coparceners, or 2 *Tenants in Common*, and *one makes a Leaſe*, and the Leſſee commits Waſte, there the Writ of Waſte ſhall be brought by the Leſſor only; For it is not like a Perſonal Injury done upon an Inheritance; for an Action of Waſte is now in the Nature of the Realty, altho' that at the Common Law (before the Statute of Glouceſter) there was but a Prohibition, yet the Statute gives the Place waſted and Damages, and therefore it is mixt; wherefore both of them ſhall not join; and the Writ ſays, To his Diſinheritance that made the Leaſe; and cites 22 H. 6. 24. by the Court, and agreeing with this Reſolution. Ow. 11. Mich. 33 & 34 Eliz. in B. R. Wardford's Caſe.

(Q. a) *Voluntary or Permiſſive Waſte.* What. And of What.

1. OF *Timber uncover'd*, voluntary Waſte may be, but not negligent. See ſupra (E) pl. 12. cites 43 E. 3. 3. b.

2. *Voluntary Waſte* is not to be intended of permiſſive Waſte; for by this Word Voluntary is intended an Act to be done, or Conſent to an Act; and in *permiſſive Waſte* is no Act done, nor any Conſent to an Act to be done which is done. Dal. 34. pl. 25. 3 Eliz. Anon.

3. A. leaſed a *Houſe* which was *ruinous at the Time of the Demiſe*. The Leſſee obliged himſelf not to do or ſuffer any voluntary Waſte &c. *The Houſe falls*, and A. brought Debt, and adjudged that it lies; for it is Waſte, tho' the Leſſee may excuſe himſelf upon the Special Matter. D. 36. Marg. pl. 35. cites Trin. 29 Eliz. B. R. Rot. 838. Glover v. Pipe.

Ow. 92. S. C. and the Difference is between an Action of Waſte and Debt on an Obligation.

(R. a) Equity. *Injunction* granted in what Caſes.

1. THE Plaintiff's Bill was, For that he being a *Copyholder leaſed to the Defendant for Years*, and the *Defendant hath digg'd Gravel, and ſold the ſame* away, whereby the Copyhold is prejudiced. The *Defendant juſtified, for that the Copyholders are not puniſhable in Waſte*; which

Cauſe this Court allows not of; For tho' *the Copyholders* of the Manor *are not puniſhable, yet the Leſſees of the Copyholders* of the Manor *are* puniſhable; therefore a Subpœna is awarded, to ſhew Cauſe why an Injunction ſhall not be granted for ſtaying his digging of Gravel, and felling Woods upon the Copyhold-Lands. Cary's Rep. 89, 90. 19 Eliz. Dalton v. Gill and Pindor.

2. The Bill was to be relieved againſt a *Judgment indirectly gotten* by R. C. in the Name of T. C. his Brother, by Default in an Action of Waſte; and becauſe it ſo appear'd, an Injunction is granted. Cary's Rep. 108. cites 21 & 22 Eliz. Galley v. Cavendiſh.

S. P. per Ld. C. Nottingham. 2 Freem. Rep. 54. Paſch. 1680. in Caſe of Abraham v. Bubb. —

3. Egerton Ld. Keeper ſaid, He had ſeen a Precedent in the Time of R. 2. that if there be *Tenant for Life*, the Remainder *for Life*, the Remainder *in Fee*, and the Tenant for Life commits Waſte, ſo as he is diſpuniſhable by the Common Law; yet upon Complaint, he in the Remainder in Fee may have an Injunction againſt him not to do Waſte. Mo. 554. pl. 748. Paſch. 41 Eliz. Anon.

S. P. But otherwiſe of a Tenant for Life, with an expreſs Clauſe of *Without Impeachment of Waſte*. Vern. 23. pl. 17. Mich. 1681. Tracy v. Tracy.

Ibid. 209. Tit. Paſture, Ld Howard v. Kidler,

4. It was order'd that no *ancient Paſture or Meadow Ground* ſhould be *plow'd*. Toth. 114. Paſch. 4 Jac. Haſtings v. Cowper.

a Decree to ſtay the plowing up ancient Paſture. Paſch. 19 Jac.

S. P. in Caſe of Tenants for Life. Chan. Rep. 106. 12 Car. 1. Cole v. Peyſon — S. P. held accordingly, *tho'* it was *inſiſted that the Nature of the Ground was for Tillage, and had been formerly plow'd.*

5. A Bill *to reſtrain Plowing ancient Meadow and Paſture granted to be us'd only as Meadow and Paſture, and not otherwiſe*, being rich Land, and had not been plow'd in the Memory of Man. Upon ſearching Precedents, the Court, aſſiſted with Judges, declar'd there were diverſe Precedents in Lord **Eleſmere**'s Time, and ſince, of ſuch Reſtrictions, wherein it did not appear that the Paſture was either ſo ancient or rich as in the preſent Caſe; and that whereas Plowing Meadow is Waſte, he conceiv'd that Plowing *Ancient Paſture is of equal Value with Meadow*, as no leſs Prejudice either to the Landlord or the Commonwealth, and conſequently fit to be reſtrain'd; and the Judges being of the ſame Opinion, decreed the Defendant not to plow. Chan. Rep. 13. 1 Car. 1. Atkins v. Temple.

Ibid. 116. 13 Car. 1. Fermier v. Maund.——S. P. And the Defendants *inſiſted that the Land was very full of Buſhes and Furze, and that the Plowing and Burn-baiting was an Improvement*; but the *Plaintiff inſiſted that the Land was Sheep-ſtrete or Sheeps ſlight, and the Surface* of the Soil *ſo thin, that if plough'd up two Years together*, the *ſame will yield no Profit in many Years after*. The Court, on reading an Order of 20 Feb. 25 Car. 2. and a Certificate of Referrees, decreed a perpetual Injunction againſt the Plowing up or Burn-baiting the Land above 2 Years. 2 Chan. Rep. 94. 25 Car. 2. Trégonwell v. Lawrence.

6. A Reſtraint from Plowing of Land worth 5 s. an Acre, being *ancient Warren*, tho' diſpuniſhable in Chancery. Toth. 210. cites about 6 Car. Sill v. Mole.

7. On a Bill againſt *Tenants for Life*, to reſtrain them from cutting Timber *Trees*, the Defendants demurr'd, for that they are *not particularly excepted in the Leaſe*; and pray the Judgment of the Court if they do not paſs in the Grant as Part of the Freehold. But they having only an Eſtate for their Lives, and having cut Timber Trees, and cleav'd them out for Fewel, the Court granted an Injunction. Chan. Rep. 106. 12 Car. 1. Cole v. Peyſon.

8. Feme, *Tenant in Tail and her Husband, contracted with J. S. for cutting down Timber*. The *Feme died*, whereby the *Husband was Tenant by the Curteſy*. They had Iſſue a Daughter (the Heir) an *Infant*, who *by her Guardian exhibited a Bill* in the Exchequer, to ſtop her Father's cutting the

the Trees. And an Injunction was granted to ſtay Waſte. Hard. 96. pl. 2. Paſch. 1657. Roberts v. Roberts.

9. An *Injunction* was granted *againſt felling Trees*, which the *Defendant mov'd* to diſſolve, inſiſting *that he had* ſworn in his Anſwer that he had an *Eſtate of Inheritance*, and for 14 Years had cut down and ſold Timber without Interruption, *and produc'd the Settlement* made on his Marriage; whereby it appear'd that he had an Eſtate in the Premiſſes *without Impeachment of Waſte*. The Court diſſolv'd the Injunction. Chan. Rep. 242. 15 Car. 2. Minſhal v. Minſhal.

10. A. ſurrender'd Copyhold Lands to the Uſe of B. on Condition that C. ſhould enjoy the ſame *for Life*. B. brought a Bill to ſtay Waſte. Decreed there could be *no Relief for what Waſte was paſt*, it appearing that C. had paid 100 l. of his own Money, to diſcharge a Mortgage on the Premiſſes, but an Injunction againſt him to ſtay all *future Waſte*. Fin. Rep. 220. Trin. 27 Car. 2. Corniſh v. New.

11. A. devis'd to C. all her *Houſhold Goods after the Death of B.* who was her Executor, and was to have the Uſe of them only for his Life. Decreed there can be no Relief for Waſte done to the Goods; but Injunction was granted to ſtop future Waſte. Fin. Rep. 220. Trin. 27 Car. 2. Corniſh v. New.

12. A perpetual Injunction was granted againſt a *Jointreſs*, to reſtrain her and her Agents from *plowing the Paſture* and Meadow Lands of her Jointure. Fin. Rep. 190. Hill 27 Car. 2. Baſſet v. Baſſet.

13. *Tenant in Tail after Poſſibility*, ſhall be reſtrain'd in Equity from doing Waſte by Injunction &c. becauſe the Court will never ſee a Man diſinherited; Per Chanc. Finch. And he took a *Diverſity* where a Man is *not puniſhable for Waſte*, and where he hath *Right to do Waſte*; and cited Uvedale's Caſe, 24 Car. 1. rul'd by the Lord Roll, to warrant that Diſtinction. 2 Show. 69. pl. 53. Trin. 31 Car. 2. Abrahal v. Bubb.

2 Freem. Rep 53. pl. 61. S. C. one A. on his Marriage with M. ſettled Lands to the Uſe of himſelf and M. and the Heirs of their 2 Bodies A. died without Iſſue. M. married B. the Defendant being then Tenant in Tail after Poſſibility. M. and B. fell'd ſome Trees that grew near to and in a *Grove, which was an Ornament to the Manſion-Houſe*; and intending to fell the reſt, the Plaintiff being the Remainder-man brought his Bill for an Injunction. Ld. C. Nottingham diſcover'd his Inclination ſtrongly for granting an Injunction; but at length the Caſe was referr'd, and if they could not agree, then to be ſet down again ——— A Woman, *Tenant in Tail, after Poſſibility of Iſſue* extinct, was reſtrain'd from committing Waſte in pulling down *Houſes*, or in cutting down *Trees, which ſtood in Defence of the Houſe, and Fruit-Trees in the Gardens*; but for ſome Turrets of Trees, which ſtood a Land's Length or two from the Court, would grant no Injunction, becauſe ſhe had by Law Power to commit Waſte; and yet notwithſtanding ſhe was reſtrain'd in the Particulars aforeſaid, becauſe that ſeems to be malicious. 2 Freem. 278, 279. pl. 349. Hill. 1704. Anon.

14. A *Leaſe* was made *by a Biſhop for 21 Years, without Impeachment* of Waſte, of Lands that had many Trees upon it. *The Tenant cut down none of the Trees till about half a Year before the Expiration of his Term, and then goes to felling down the Trees.* But the Court granted an Injunction; for tho' he might have fell'd Trees every Year from the Beginning of his Term, and then they would have been growing up again gradually, yet it is unreaſonable that he ſhould let them grow till towards the End of his Term, and then ſweep them all away; for *tho' he had a Power to commit Waſte*, yet *this Court will model the Exerciſe of that Power*; Per Lord C. Nottingham 2 Freem. Rep. 55. pl. 61. Paſch. 1680. in Caſe of Abraham v. Bubb, cites it as the Biſhop of Wincheſter's Caſe.

15. *Tenant for Life*; Remainder *to the firſt Son for Life, without Impeachment of Waſte*, with *Remainders over*; the *firſt Son, by the Leave of the Leſſee of Tenant for Life*, comes upon the Land, and *fells the Trees*. Altho'

tho' he could not in that Caſe be puniſh'd by an Action of Waſte, yet he was injoin'd by this Court; Per Lord C. Nottingham 2 Freem. Rep. 55. pl. 61. Paſch. 1680. in Caſe of Abraham v. Bubb, cites it as the Lady Evelin's Caſe.

16. Leſſee for Years *covenants not to plow Paſture Land, and if he does, to pay 20 s. per Acre per Ann.* Per Cur. The Parties have ſet a Price, and denied to grant Injunction, or relieve the other Party for the Penalty. 2 Vern. Rep. 119. pl. 118. Hill. 1690. Woodward v. Gyles.

17. If *A.* is *Tenant for Life*, Remainder *to B. for Life*, Remainder *to the firſt and other Sons of B. in Tail Male*, Remainder *to B. in Tail* &c. and *B. (before the Birth of any Son) brings a Bill againſt A. to ſtay Waſte; and A. demurs* to this Bill, *becauſe* the Plaintiff had no Right to the Trees, and *none that had the Inheritance was Party*, yet the Demurrer will be over-ruled, becauſe Waſte is to the Damage of the Publick, and B. is to take Care of the Inheritance for his Children, if he has any, and has a particular Intereſt himſelf, in Caſe he comes to the Eſtate. Abr. Equ. Caſes 400. Trin. 1700. Dayrell v. Champneſs.

A *Jointreſs* reſtrain'd from Plowing up of Ancient Paſture Ground. Toth. 241. —— Ibid. cites 6 Car. Packer v. Lady Newell.

18. On a Motion for an Injunction to ſtay a *Jointreſs Tenant in Tail after Poſſibility* &c. from committing Waſte, it was urged, that ſhe being a Jointreſs within the 11 H. 7. ought in Equity to be reſtrain'd from *cutting Timber*, that being Part of the Inheritance, which by the Statute ſhe is reſtrain'd from aliening; and the Court granted an Injunction againſt wilful Waſte in the Site of the Houſe, and pulling down Houſes. Abr. Equ. Caſes, 400. Hill. 1701. Cook v. Whaley.

Barnard. Chan. Rep. 275. in Caſe of Wallis v. Hodſon, cites it as held ſo in 2 Vern. 711.

19. A Bill may be brought on the Behalf of an Infant in *Ventre ſa mere*, and an Injunction had to ſtay Waſte. Arg. 2 Vern. 711. pl. 632. Hill. 1715 in Caſe of Muſgrave v. Parry.

Decreed not only the Injunction to continue, but that the Caſtle ſhould be repair'd and put into as good Condition as it was in before the Waſte done. 2 Vern. 738. pl. 647. Hill. 1716. Vane v. Ld. Barnard.—Chanc. Prec. 454. Ld. Bernard's Caſe S. C. accordingly—G. Equ. R. 127 S. C. and in the ſame Words of Chanc. Prec. only that it adds, that the Defendant Tenant for Life, was Tenant by the Curteſy, which ſeems not agreeable to the State of the Caſe in 2 Vern. and 1 Salk. —— S. C. cited in Caſes in Equity in Ld. Talbot's Time, 12 Arg. in Caſe of Ld. Glenorchy v. Boſville. —— 2 Chanc. Caſes 32. Trin. 32 Car. 2. Anon. Ld. Chancellor Nottingham declared, he would ſtop pulling down Houſes or defacing a Seat by Tenant in Tail after Poſſibility &c. or by Tenant for Life, who was diſpuniſhable of Waſte by expreſs Grant or by Truſt.——S. P. per eundem. 2 Freem. Rep. 54. Paſch. 1680. in Caſe of Abraham v. Bubb. [which ſeems to be S. C.] For this Court will moderate the Exciſe of that Power, and reſtrain extravagant humerous Waſte, it being Pro Bono Publico to reſtrain it; and he ſaid, he never knew an Injunction denied to ſtay the pulling down of Houſes by Tenant for Life without Impeachment of Waſte, unleſs it were to Serjeant Peck, in my Ld. Oxford's Caſe; and he believed he ſhould never ſee this Court deny it again.

20. A. in Conſideration of Marriage and a Portion of 10,000 l. ſettled Raby-Caſtle &c. to the Uſe of himſelf for Life *without Impeachment of Waſte*, Remainder to his Son for Life &c. Cowper Chancellor granted Injunction to prevent A. pulling down the Caſtle, becauſe it was an Abuſe of the Power and Derogatory to the Grant, the Intent of that *Privilege* being *only in Order to* cut down Timber and open new Mines. 1 Salk. 161. pl. 14. Mich. 1 Geo. Vane v. Barnard.

Tenant for Life without Impeachment of Waſte was order'd not to do Waſte *upon Woods and *Houſes.* Toth. 147. cites 5 Jac. King v. Blundevile. ——*Toth. 156 cites 37 Eliz. Morgan v. Penry S. P.—— S. C. cited Chanc. Rep. 10. Paſch. 27 Eliz. in the Earl of Oxford's Caſe.

See further 1. P. Wms 527. 3. Atk. 215. 1. Ves. 264. 5 24. 546. 8. Bro. Cha. 162.

21. An Injunction *to ſtay Waſte muſt be* had *upon a Bill filed* to that Purpoſe. P. R. C. 212.

22. Tho'

22. Tho' a Bill is exhibited, yet an *Affidavit of Waſte* committed or threatned, *is ordinarily neceſſary* to induce the Court to grant the Injunction. P. R. C. 213.

But ſometimes on filing the Bill *without* Affidavit, *and even before Subpœna ſerved*, the Court will grant it. Ibid. 213.——*As* in the Caſe of *Hoſpital Lands* (lately decreed by this Court) The Court, partly from the Defendant's own Confeſſion, partly becauſe the Complainant ſeemed not to deſign to renew to the preſent Tenant, (the Defendant) when his Leaſe was out, the *Court, being pretty well ſatisfied there was Danger that Waſte would be done*, granted it without Affidavit. Ibid. 213.

23. An Injunction was pray'd *to reſtrain Tenant for Years from doing Waſte in a Warren*, upon *Affidavit of ſeveral great Numbers of Conies deſtroy'd at unſeaſonable Times*. It was alſo alleg'd, that he cut Timber-Trees &c. (and ſo I ſuppoſe they would have an Injunction for all together.) The Court ſaid an Injunction might as well be granted to keep a Man in quiet Poſſeſſion of his Houſe. But it being urged, that it was a very conſiderable Warren, and that the *Leſſees Term was near an End*, it was granted. P. R. C. 213, 214.

24. It was ſaid, that for ſtaying Waſte an Injunction is to be granted *againſt thoſe only who claim* or hold, either *immediately or mediately under him that prays it*. P. R. C. 214.

25. And tho' this Court will *ſtay a meer Leſſee* from doing Waſte, yet not (or *not ſo eaſily*) *a Mortgagee or his Leſſee*. In Cur. P. R. C. 214.

26. A very long *Leaſe was made by a Biſhop* of London *in E. 6. Time*, and of which there were about 18 Years to come. The Leaſe was made *without Impeachment of Waſte*, and the Aſſignee articled with Brickmakers that they might *dig and carry the Soil* of ſo many Acres, and of ſuch Depth a Year, but to level thoſe Acres before they dug up others. The now Biſhop of London having the Inheritance in Right of his Biſhoprick brought his Bill to injoin the digging. And Ld. Chancellor Parker ſaid, that before the Statute of Glouceſter Waſte did not lie againſt Leſſee for Years, and the being *without Impeachment of Waſte* ſeems *originally only intended to mean that the Party ſhould not be puniſhable by that Statute, and not to give a Property* in the Trees or Materials of a Houſe pull'd down by Leſſee for Years Sans Waſte. But he ſaid, that the Reſolutions having eſtabliſh'd the Law to be otherwiſe he would not ſhake it, much leſs carry it further, and that he took this to be within the Reaſon of Ld. Barnard's Caſe; And decreed accordingly; But directed that the Defendant might carry off the Brick (Earth) he had dug, but order'd an Injunction to ſtop further digging. Wms.'s Rep. 527. Hill. 1718. Biſhop of London v. Webb.

27. Where there is an *Arrear of a Charge* upon a real Eſtate, an Injunction ſhall go to prevent *cutting of Timber* upon the Premiſſes chargeable. M S. Tab. tit. Injunction cites 27 March 1723. Ld Blaney v. Mahon.

28. *Tenant in Tail may commit Waſt in Houſes as well as in all the other Parts of the Eſtate, notwithſtanding any Reſtraint to the Contrary*; And no Inſtance can be ſhewn where a Tenant in Tail has been reſtrain'd from committing Waſte by Injunction of this Court. And Ld. Chancellor ſaid, it was refuſed in Mr. **Saville**'s Caſe of Yorkſhire, who being an Infant, and Tenant in Tail in Poſſeſſion, in a very bad State of Health, and not likely to live to full Age, cut down by his Guardian a great Quantity of Timber juſt before his Death to a very great Value; the Remainder-man applied here for an Injunction to reſtrain him, but could not prevail. Caſes in Equ. in Ld. Talbot's Time, 16. Mich. 1733. Glenorchy v. Boſville.

29. A Bill may be brought *by a Patron againſt a Parſon*, for an Injunction *to reſtrain* committing *Waſte upon the Glebe*. Barnard. Chan. Rep. 399. Hill. 1740. Bradly v. Stratchy.

(S. a) *Relief* in Equity.

Toth. 263. cites S. C.

1. *Damages given* to the Plaintiff for Waſte committed by the Defendant upon the Plaintiff's Woods as much as he was damnified. Toth. 114. cites 32 Eliz. Brown v. Lady Bridges.

2. Waſte *done by one* which held by Covenant, therefore *not puniſhable by Law*, yet *holpen here*. Toth. 285. cites Songhurſt v. Dixy, 221.

3. A *Leaſe* is made *for Life*, the *Remainder* over *in Fee*, the firſt Leſſee makes Waſte, and becauſe he in the Fee hath no Remedy by the Common Law, and Waſt is a Wrong prohibited, he ſhall be holpen in Chancery. Cary's Rep. 27. cites Crompton 48. 6.

And where he *waſted the Houſes*, it was decreed that he ſhould *repair two Parts*.

4. Nota, per Egerton Chancellor, where *Tenant for Life* is the *Remainder for Life*, tho' there lie no Action of Waſte in Chancery, yet he ſhall be prohibited to do Waſte by the Chancellor, for Wrong to the Inhabitants, and Hurt to the Commonwealth. Cary's Rep. 36. cites Hill. 1 Jac.

Toth. 123 cites 23 & 24 Eliz. Chapman v. Biſcow.

Mod. 94 pl. 4. paſch. 24 Car. 2. B. R. Cole v. Forth S. C. but the Point of the order, in Chancery does not appear. Chancery.

5. Converting a *Brewhouſe into Tenements* of a greater Value is Waſte notwithſtanding the Melioration, by Reaſon of the Alteration of the Nature of the Thing and the Evidence, and ſo reſolved on a Trial before Hale Ch. J. and the Jury gave the Verdict accordingly, and 100 Marks ſingle Damages, which being trebled amounted to 200 l. which the Chancery compell'd Cole to take. Lev. 311. Hill. 22 & 23 Car. 2. Cole v. Green.

——— 2 Saund. 252. S. C. by the Name of Green v. Cole, but no Mention of the Order of

6. *Leſſee for 500 Years of Land of about 200 l. a Year, built ſeveral Houſes*, and thereby improved the Rents from 200 l. a Year to 1400 l. a Year, and quietly enjoy'd the ſame for 20 Years and more, and then an Action of Waſte was brought for pulling down a Brick-Wall, and cutting down Fruit-Trees, and digging Gravel for laying the Foundations of the Houſes built on the ſaid Ground. He brought a Bill ſetting forth, That ſuch Building could not be accounted any Waſte, but rather a Melioration and Improvement of the Land. The Defendant pleaded the Statute, by which Proviſion is made for bringing Actions of Waſte. But the Court over-ruled the Plea, and order'd the Defendant to anſwer, and to ſpeed the Cauſe. Fin. Rep. 135. Mich. 26 Car. 2. Wild v. Sir Edward Stradling.

7. Under-Tenant of a Jointreſs commits Waſte *ſparſim*, ſo as at Law the Eſtate was forfeited, but inſiſted he had improved the Eſtate from 40 l. to 60 l. per Ann. and offer'd to take a Leaſe of it at that Rent for 50 Years, and to anſwer the Value of the Timber on a Quantum Damnificatus. Quære. 2 Vern. R. 263. pl. 247. Paſch. 1692. Ligo v. Smith & Leigh.

At the End of this Caſe is a Quære, and in the Margin is ſaid Quære whether the Court will relieve as to the Waſte.

8. A. made a Settlement voluntarily to himſelf for Life, and then to his Nephew. Afterwards he committed Waſte *Sparſim*, and the Nephew recover'd, ſo as A. could not go out of his Houſe. 2 Vern. R. 263. in the Caſe of Ligo v. Smith & Leigh, cited as the Caſe of Sir Percival Hart.

9. A

9. A *Bill* was brought againſt the Executors of a Jointreſs, *to have a Satisfaction out of Aſſets for permiſſive Waſte* upon the Jointure of the Teſtatrix &c. But by Cowper C. The Bill muſt be diſmiſs'd; For here is *no Covenant that the Jointreſs ſhall keep the Jointure in good Repair*, and in the common Caſe, without ſome particular Circumſtances, there is *no Remedy* in Law or Equity *for permiſſive Waſte after the Death of the particular Tenant*. MS. Rep. 1 Geo. 1. in Canc. Turner v. Buck.

10. A *Cuſtomary Tenant of Lands, in which was a Copper-Mine which never had been open'd, open'd the ſame, and dug* out, *and ſold great Quantities* of Oar, and died, and his Heir continued digging and diſpoſing of great Quantities out of the ſaid Mine. The Lord of the Manor brought a Bill in Equity againſt the Executor and Heir, praying an Account of the ſaid Oar; and alleg'd, that theſe Cuſtomary Tenants were as Copyhold Tenants, and that the Freehold was in the Plaintiff as Lord of the Manor and Owner of the Soil; and that the manner of paſſing the Premiſſes was by Surrender into the Hands of the Lord, to the Uſe of the Surrenderee. It was inſiſted for the Defendants, That *it did not appear that the Admittance in this Caſe was to hold Ad voluntatem Domini ſecundum Conſuetudinem* &c. without which Words it was inſiſted that there could be no Copyhold, as had been adjudged in Lord Ch. J. Holt's Time. And it was decreed by Ld. C. Cowper for the Defendant. Wms.'s Rep. 406. pl. 112. Hill. 1717. The Biſhop of Wincheſter v. Knight.

11. A. *Tenant for Life*, Remainder *to Truſtees to preſerve* &c. Remainder *to C. the Plaintiff in Tail*, Remainder over, with *Power for A. with Conſent of Truſtees to ſell Timber, and the Money* ariſing *to be inveſted in Lands* &c. *to ſame Uſes* &c. *A. ſell'd* Timber to the Value of 3000 *l. without Conſent of Truſtees, who never intermeddled*, and A. had *ſuffer'd ſome of the Houſes to go out of Repair*. C. by Bill pray'd an Account and Injunction. The Maſter of the Rolls ſaid, That the *Timber* may be conſider'd under 2 Denominations, (to wit) ſuch as was *thriving, and* not fit to be fell'd; and ſuch as was *unthriving*, and what a prudent Man and a good Husband would fell &c. And order'd the Maſter to take an Account &c. and the Value of the former which was Waſte, and therefore belongs to the Plaintiff, who is next in Remainder of the Inheritance, is to go to the Plaintiff, and the Value of the other is to be laid out according to the Settlement &c. But as to Repairs, the Court never interpoſes in Caſe of *permiſſive Waſte* either to prohibit or give Satisfaction, as it does in Caſe of *wilful Waſte*; and where the Court having Juriſdiction of the Principal, (viz.) the Prohibiting, it does in Conſequence give Relief for Waſte done, either by way of Account as for Timber fell'd, or by obliging the Party to rebuild &c. as in Caſe of Houſes &c. and mention'd **Lord Barnard's Caſe**, as to Raby-Caſtle, 2 Vern. But *as to the Repairs* it was objected, That the *Plaintiff here had no Remedy at Law, by reaſon of the Eſtate for Life to the Truſtees* Mean *between Plaintiff's Remainder in Tail and Defendant's Eſtate for Life*, and that therefore Equity ought to interpoſe &c. and that this was a Point of Conſequence. Sed non allocatur. MS. Rep. Mich. Vac. 1733. Lord Caſtlemain v. Lord Craven.

(A) Watch and Ward.

In False Imprisonment the Defendant justified That he was Constable of B. and that he appointed the Plaintiff to watch there, and because he refused he put him in the Stocks. And upon this it was demurr'd, 1st, because the Defendant did not shew that

1. 13 *Ed.* 1. *cap.* 4. *the* ENacts, That *in great wall'd Towns, Gates shall* *Stat. of Winchester,* *be shut from Sun-set to Sun-rise, and no Person shall lodge in the Suburbs from* 9 *of the Clock until Day, unless his Host will answer for him; and the Bailiffs of Towns, every Week or* 15*th Day, shall make Enquiry of all Persons lodged in the Suburbs, or Out-Parts of the Town; and shall call to Account those who have lodged or received Strangers, or suspicious Persons; and a Watch shall be kept yearly, from the Feast of Ascension to St. Michael, in manner following, viz. in every City* 6 *Men shall keep at every Gate; every Borough shall have* 12, *and every Town* 6 *or* 4 *Watchmen, according to the Number of the Inhabitants, who shall watch from Sun-set to Sun-rise; and every Stranger passing by them shall be arrested till Morning; and if it do not appear to be a suspicious Person, he shall be discharged; otherwise he shall be deliver'd to the Sheriff, who shall keep him till he is duly acquitted: And where any Person will not obey the Arrest, he shall be follow'd with Hue and Cry by all the Town, and the Towns near; and so Hue and Cry shall be made from Town to Town, until he be taken and deliver'd to the Sheriff as aforesaid.*

was an Inhabitant there; and he cannot appoint a Stranger to watch, neither by this Statute nor the Statute of 5 H. 4. cap. 3. 2dly, It was moved That the Constable cannot imprison one for refusing to watch, but must complain to a Justice of Peace, and he may inflict Punishment upon the Refusers. 3dly, That he ought to shew it was the Plaintiff's Turn to watch. The Court held, That for the first Cause clearly, the Plea is not good; but for the 2d, Wray held, That the Constable might imprison one for refusing to watch. Gawdy contra. And for the first Cause it was adjudged for the Plaintiff. Cro. E. 204. pl. 37. Mich. 32 & 33 Eliz. in B. R. Stretton v. Brown.

Serjeant Hawkins says, 2 Hawk. Pl. C. 80. cap. 13. S. 4. That it has been resolved, That a Stranger, who is not an Inhabitant of a Town, cannot be compell'd by Virtue of the Statute of Winchester, to keep Watch in it; but says it seems to be agreed, That every Inhabitant is bound to keep it in his Turn, or to find another sufficient Person to keep it for him: From whence it follows, that he is indictable for a Refusal; but it is not agreed that he may be committed by the Constable till he consent to do his Duty.

S. was indicted for that he, *on the* 19*th of June &c. and before, being an Inhabitant,* was *summon'd to watch with B. a Constable,* but made Default. Exceptions were taken, first, because it does *not say that he continued to be so.* 2dly, *That Notice was given him to watch within the Parish.* 3dly, because it was that he *did not watch with B. a Constable*; whereas he should have said That he did not watch at all; for possibly he might watch the same Night with another Constable. It was answer'd, That this Indictment is founded at Common Law, and not upon the Statute of Winton. And as to the 2d, there may be an extra Parochial Place where the Constable is to watch. But nothing was said as to the 3d Exception. The Court bid them demur to the Indictment; for they would not quash it. 5 Mod. 393. Pasch. 10 W. 3. B. R. The King v. Stainford.

Water-

Water-Courſes.

(A) The *Original.* *And in what Caſes* they may be *diverted.*

1. A Water-Courſe does not *begin* by Preſcription, nor yet by Aſſent, but begins *Ex jure Naturæ*, having taken this Courſe naturally, and cannot be averted; per Whitlock J. 3 Bulſt. 340. in Caſe of Sury v. Piggott.

2. If one had *ancient Ponds*, which were *repleniſh'd by Chanels out of a River*, he cannot change the Channels, if any Prejudice accrue by it to to another; Per Cur. Het. 32. Mich. 3 Car. C. B. Duncomb v. Randall.

3. Suppoſe a Man has a Water-Courſe running *thro' his Ground*, and *his Neighbour diverts it*, this is no Treſpaſs; but if by diverting it he turns it on his Neighbour's Houſe &c. it will be a Treſpaſs; per Cur. 8 Mod. 274. Trin. 10 Geo. in Caſe of Reynolds v. Clerke.

(B) Action. *What Action lies* of a Water-Courſe, or for ſtopping or diverting *it.*

1. IF a Man *ſtops a Water-Courſe in his own Soil to the Nuſance of his* [the Plaintiff's] *Franktenement*, he to whom the Nuſance is done ſhall not have *Treſpaſs Vi & Armis* of the Act done in his [the Defendant's] own Franktenement. Quod nota. Br. Treſpaſs, pl. 78. cites 3 H. 4. 5.

2. In Caſe by one who had Franktenement in a Mill, againſt one that had Franktenement in a Meadow, the Plaintiff declared That the Defendant diverted *multum Curſus Aquæ per Levationem Weræ* &c. *ex tranſverſo Curſus Aquæ illius & foſſato in prato prædicto facto, per quod multum Aquæ quæ ad Molendinum illud currere conſuevit, e contra recurrit & antiquum Curſum ſuum divertit*; ſo that the Mill which was uſed to grind 2 Quarters of Corn in a Day, can hardly now grind one. The Queſtion was Whether Aſſiſe of Nuſance lay or not, ſuppoſing that the Defendant diverted *Curſum Aquæ*, where only a Part of the Water was turn'd. D. 248. b. pl. 80. Paſch. 8 Eliz. Anon.

S. C. cited Arg. 3 Mod. 49.——Bendl. 223. pl. 255. Lorndon v. Pain, Trin. 15 Eliz. The Defendant pleaded an ill Plea; whereupon the Plaintiff demurr'd, and pray'd Judgment; but becauſe it appear'd by the Count that the Plaintiff was ſeiſed of the ſaid Mill in Fee, ſo that he ought to have Aſſiſe of Nuſance, and not an Action of the Caſe, the Court would not give Judgment for the Plaintiff.

In Aſſiſe of Nuſance pro Diverſione majoris partis Curſus Aquæ, the Plaintiff recover'd by Judgment coram Harper & Weſton. Ibid. cites Mich. 12 & 13 Eliz. Wyke v. Serle, but ſays that Error was brought thereof in B. R.——S. C. cited 4 Rep. 89. a. and ſays the Judgment was affirm'd.

Yelv. 243. B. R. S. C. accordingly. —Godb. 157. pl. 213.

3. *Ejectment* lies not of a Water-Courſe; but it muſt be of ſo many Acres of Land cover'd with Water. Brownl. 143. Mich. 6 Jac. Challenor v. Thomas.

Anon. ſeems to be S. C. and ſays it was adjudg'd that Ejectment lies de Aquæ Curſu.——S. C. cited Poph. 167. by the Name of Challoner v. Moore, as adjudg'd Mich. 6 Jac. that it does not lie of a Watering Courſe.

Brownl. 143. S. P. in S. C.

4. Where a Water-Courſe is *diverted*, if the *Land under the Water* or River *does not belong to the Plaintiff*, but the River only belongs to him, then upon Diſturbance his *Remedy is Action on the Caſe only*; & non aliter. Quod nota. Yelv. 143. in Caſe of Challoner v. Thomas.

(C) *Declaration and Pleadings.* Good or not.

Bendl. 215, 216. pl. 249. S. C. and the Pleadings, and ſays the Plaintiff had his Judgment; and that himſelf was of Counſel with the Defendant.

1. IN Caſe for diverting a Courſe of Water, which run *from ſuch a Place* in a Conduit *to the Plaintiff's Houſe, neither the Writ nor Court ſuppoſed the Plaintiff* to be *Owner* of the ſaid Houſe *at the Time of the Diverſion, but only at* the Time of *the Action commenced*, viz. Quod cum Querens ſeiſitus exiſtat &c. and did not ſay Extitit &c. and ſo the Plaintiff not being damnified, he could not have Judgment. D. 319. b. 320. a. pl. 17. Mich. 14 & 15 Eliz. Moor v. Brown.——And at the End of the Caſe in Dyer it is ſaid, That upon Search of the Roll it appears that Judgment was given, and the Plaintiff confeſs'd Satisfaction of the Damages, and the Defendant afterwards brought Writ of Error.

2. In Caſe the Plaintiff declared, that the Defendant *exaltavit ſtagnum, by which the Plaintiff's Meadow was flooded*; the Defendant pleaded Not Guilty, and the *Jury found*, that *erexit ſtagnum*; and if erectio & exaltatio are all one, then they find the Defendant Guilty; if not, then they find him Not Guilty. Judgment was given for the Plaintiff. Upon Error brought all the Juſtices held, that erigere is de novo facere, but exaltare is in majorem altitudinem attollere, but at length the Judgment was affirmed; For the Ch. J. had turned all his Companions, when he came to be of Opinion that it *was all one*. And ſo the Caſe paſſed againſt the Plaintiff in Error. Godb. 59. pl. 70. Mich. 28 & 29 Eliz. B. R. Giles's Caſe.

3. In Caſe the Plaintiff declared, that he was ſeiſed of certain Mills, and preſcribed that *Magna pars Aquæ cujusdam Rivuli ran from H. to the ſaid Mills*, and that Defendant broke down a Bank, and diverted it &c. It was aſſigned for Error, that it was uncertain how much of the Water ſhall be comprehended in thoſe Words (Magna pars Aquæ) and if the Truth be that the ſame River before its coming to the Mills divides itſelf into Branches whereof one only runs to the Mills, the better Form was to preſcribe to have Aquæ curſum to the ſaid Mills; For every one of the Branches is Aquæ Curſus; Quod fuit Conceſſum as to this Point; But reſolved, that though the Count might have been better, yet in Subſtance it was good enough, it not being poſſible to ſhew how much of the Water run to the Mills, and the Quantity is not material, in as much as the Defendant by breaking the Bank diverted the Water which ſhould run to the ſaid Mills. 4 Rep. 88. b. 89. a. Paſch. 43 Eliz. B. R. Cottell v. Lutterell, alias, Lutterell's Caſe.

4. Caſe &c. for that he was ſeiſed of two Acres of Meadow in D. and J. Q. the *Leſſor of the Defendant* was ſeiſed in Fee of a Water-Mill in D. whereunto the Water run out of the River S. by the ſaid two Acres,

Acres, and that the ſaid J. Q. *erected ripas ſtagni Molendini* prædict' *ſo high that the Water overflowed* the ſaid Meadow &c. It was moved in Arreſt of Judgment, 1ſt. That here was *no Place laid where the Stagnum molendini was*, ſed non allocatur; For it ſhall be intended in the Vill where the Mill is. 2dly, That the *Requeſt to abate it was made to the Leſſee* who had no Authority to abate it, it being erected in time of the Leſſor; ſed non allocatur; For *the Continuance is a Nuſance* by him, and Action lies againſt him. Adjudged for the Plaintiff. Cro. J. 555. pl. 18. Mich. 17 Jac. B. R. Brent v. Haddon.

5. B. having an antient Water-courſe to a Mill, and the *ancient Banks being hollow, a Dam was made by Direction of certain Juſtices* a Rood from the River-Bank *in the Ground of C.* and ſo the River was held in. *J. S. cut up the Dam*, whereupon *B. brought* an *Action for ſubverting Ripam cujuſdam Rivi.* Upon a Trial before Hobart Ch. J. after Evidence he cauſed it to be ſtayed, the Declaration being inſufficient, (as it was afterwards held by the Court to be) and ordered the Plaintiff to take a new Writ, as his Caſe was, *de quadam Ripa, Anglice a Dam, includente Ripam prædictam*; [whereas] it was before laid to the Bank time out of Mind. Hob. 193. pl. 244. Biccot v. Ward.

6. In Caſe for *breaking down an ancient Dam upon the River D. by which a great Part of the Water* of the ſaid River *from its ancient and uſual Courſe to the Mill of the Plaintiff upon the ſaid River was diverted*, by which &c. ad Damnum &c. It was objected, that it is *not ſhewn that the Mill was ancient, nor that the Defendant* time whereof &c. *had repaired* the Dam, but only called it an ancient Dam; *nor that the Water at the time whereof* &c. run this Way, but only that Defendant had diverted it from its ancient and uſual Courſe. Upon theſe Exceptions the Caſe depended long. North Ch. J. held the Declaration ſufficient, to which Levins inclin'd, but Hæſitanter. Windham and Charleton e contra. North being made Lord Keeper, Pemberton Ch. J. held it good, to which Windham now agreed, and Levins hæſitanter. And Charleton totis Viribus contra. And ſo it hung till another Term, and then adjudged for the Plaintiff; and that Judgment ſaid to be affirmed in Error. 3 Lev. 133. Trin. 35 Car. 2. C. B. Nulmes v. Hoblethwaite.

Skin. 65. pl. 10. Mich 34 Car. 2 B. R. Palms v. Hebleth-waite S. C. adjornatur. ——Ibid. 175. pl. 5. Paſch. 32 Car. 2 B. R. S. C. Curia adviſare vult. ——Comb. 9. Hill. 1 & 2. Jac. 2. B. R. Kebleth-waite v. Palmes S. C. argued but no Judgment. ——— Carth. 84. Mich. 1 W. & M. in B. R S. C. and Judgment affirmed. ———3 Mod. 48 Heblethwaite v. Palmes. Mich. 36 Car. 2 B R. S.C. The Court held, that the Word (Solet) implies Antiquity, and will amount to a Preſcription; & ſolitus curſus Aquæ running to a Mill, makes the Mill to be ancient; for if it be newly erected there cannot be ſolitus curſus Aquæ towards that Mill, for which Reaſons the Judgment in the original Action was affirmed in Hill. 1 W. But the Ch J. was of Opinion, that if the Cauſe had been tried upon ſuch a Declaration, that the Plaintiff ought to prove his Preſcription, or elſe he muſt be nonſuit.

7. Caſe for diverting of a Water-Courſe *in per and trans Meſſuag'*. After Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That he doth *not ſay for what Uſe*, whether Family, Cattle, or Field; and if it was not uſeful when it run, it cannot be actionable to divert it. 2 Show. 507. pl. 470. Hill. 2 & 3 Jac. 2. B. R. Glynne v. Nicholls.

Comb. 43. S. C. That in Treſpaſs for diverting a Water-Courſe by a Stranger the Defendant demurred to the Declaration, and took an Exception thereto that no Title is made in the Declaration to the Water-Courſe, nor for what Uſe it was. But adjudged pro Quer.——Per Holt Ch. J. ſuppoſe a Water-Courſe runs to my Ground, and I have no Uſe for it, and one upon another Ground *diverts* it before it comes to mine will an Action lie? Muſt not you *ſay ſome Uſe for it*? Show. 64 in Caſe of Palmer v. Keblethwaite.

8. In *Caſe* the Plaintiff declared, that the 1ſt. of May 1 W. & M. he was *poſſeſſed of a Houſe from which* a Courſe of *Water per & trans* the Garden of the Defendant *Currere debuit & debet* &c. the Court gave Judgment for the Plaintiff niſi; but an Exception being taken becauſe he does *not ſay* that the Water ever *ran from the Houſe, or* that he *was poſſeſſed* of it, *but only* that *debuit*, the Court ordered it to be put into the

the Paper again; & adviſare vult; and afterwards this being a poſſeſſory Action it was ruled to be well enough. Skin. 316. Paſch. 4 W. & M. in B. R. Jackſon v. Savage.

Skin. 389 pl. 25. S. C. accordingly, and as to the firſt Objection of the want of a Terminus a quo it is not neceſſary in this Caſe, he having ſhewn, that the Stream was uſed to run to the Well, and he having diverted it when it was at the Well, this is a Tort, and it is not material from whence it comes; to which it was ſaid at the Bar, that the Terminus was neceſſary, otherwiſe the *Jury could not know* that *there was ſuch a Current, if* it be *not ſhewn*; but per Cur. this ought to have been in Proof, but it is not material after a Verdict. And as to the 2d. it was held, that *conſuevit & debuit* is ſufficient; and as to the 3d. That *no Act of Diverſion is alleged*, for it is not ſufficient to ſay that he had diverted the Current, but he ought to *ſhew ſuch an Act which was the Cauſe of the Diverſion*, which the Court might adjudge a ſufficient Cauſe; ſed non allocatur; and after it was adjudged for the Plaintiff, and that the Count was good after a Verdict though it might have been in a better manner; for it was not alleged, that the Water had uſed to run from the Well to his Houſe ſo certainly as it might have been; but all theſe Things ſhall be *intended to be proved upon Evidence*, and ſo aided by the Verdict. Skin. 389. pl. 25. Mich. 5 W. & M. in B. R. Prickman v. Tripp.

9. In Caſe the Plaintiff declared, that he was poſſeſſed of an ancient Meſſuage in Com. S. and that a certain *Water-courſe at D. currere debuit & adhuc debet in quendam fontem, and as often as the Well overflowed run into the Plaintiff's Houſe for his neceſſary Uſe*, and *that the Defendant dug the Ground ſo near the Well* and plac'd a Ciſtern there, ſo *that the Water was diverted* and did not overflow from ſuch a Day whereby the Plaintiff loſt his neceſſary Water. After Verdict for the Plaintiff it was moved, 1ſt. That there was *no Terminus a quo*. 2dly, That it is *not averred that it uſed to overflow*. 3dly, *Neither is there a ſufficient Diverſion alleged*; But reſolved that it is not neceſſary to allege a Terminus a quo, and that the other Informalities are cur'd by Verdict; and Judgment for the Plaintiff. Comb. 231. Mich. 5 W. & M. in B. R. Prickman v. Trip.

10. In Caſe for diverting a Water-Courſe which the Plaintiff had to a Mill, he *counted that the Defendant intending to deprive him of the Profit of the ſaid Mill did divert the Water ab antiquo curſu ſuo* per quod he could not molare ſo faſt &c. After Verdict it was moved, That he did *not ſay, that he diverted the Water from the Mill, but from its ancient Courſe, per quod &c.* and that Molare was inſenſible; But the Plaintiff had his Judgment; and they held, that the Word (Molare) being inſenſible no Damages could be given for it, and that the Declaration had been good if that Part had been left out. 5 Mod. 206. Paſch. 8 W. 3. B. R. Richards v. Hill.

For more of Water-Courſes in General, See **Indictment, Mills, Nuſance,** and other proper Titles.

Waver.

(A) *How* it may be.

1. FOur [were made] *Jointenants* by a Deed delivered to 3 in the Abſence of the 4th. afterwards the 4th. comes and would waive *en pais* but non potuit without Record; and in the Argument of the Caſe it is put, that the

the Law is the ſame of a Remainder, but it is ſo without doubt of a *Remainder in Tail*, becauſe of the Prejudice to the Iſſue. Arg. Mo. 363. cites 13 R. 2. Fitzh. Jointenants, pl. 9.

2. If Eſtate be *granted by Fine to two, or to one for Life, and to the other in Remainder in Fee*, there this cannot be waived but by Refuſal thereof in Court of Record. Br. Waiver de Choſes, pl. 41. cites 8 H. 4. 19.

3. Where *Land is deviſed* to W. N. this is veſted in him by the Deviſe. So where *Leaſe is made to one for Life, the Remainder to W. N.* this is veſted in him by the Livery, and thoſe *cannot be waived but by Diſclaimer in Court of Record*, but a *Gift offered* to a Man may be refuſed by Parol, but if it be taken it cannot be waived after without Diſclaimer in the Court of Record. Br. Waiver de Choſes, pl. 41. cites 8 H. 4. 19.

4. Waiver of *Jointure* is good enough *en Pais*, becauſe the Jointure is not created but by *Uſe*, which may be waived *by Parol* en Pais by all the Juſtices. Mo. 254. pl. 401. Mich. 29 & 30 Eliz. B. R. Butler v. Baker. 3 Rep. 26. S. C.

(B) *By whom* Waiver of a Thing may be. *Of what.*

1. IN Cui in Vita the Tenant ſaid that he was in by Deſcent as Heir of his Father, and prayed his Age, and the Demandant ſaid, that the Land is deviſable by Teſtament, and that the *Father deviſed it to the Son in Tail*, the *Remainder over in Fee* &c. Quære; For it ſeems that he ſhall not have his Age; For *he cannot waive the Deviſe and take to the Deſcent in Fee* by reaſon of the Advantage of him in Remainder. But it ſeems, that if the Deviſe had been to him by his Father in Fee, he might waive the Deviſe and take to the Deſcent; Note the Difference. Br. Waiver de Choſes, pl. 1. cites 3 H. 6. 46.

2. A *Man was bound to Baron and Feme*, and *he made the Feme his Executrix and died*, and *ſhe brought Debt* upon Obligation *as Executrix* of the Baron, and well per Cokain J. for ſhe may waive it by the Coverture *and refuſe the Survivorſhip*. Contra per Weſton Serjeant. Br. Waiver de Choſes, pl. 13. cites 4 H. 6. 5.

So if a Bond be made to a Baron and Feme, and the Baron dies, and the Feme takes out Adminiſtration and ſues as Adminiſtratrix, but dies before Judgment, yet this is a ſufficient Election and Waiver. Noy. 149. Norton v. Glover.

3. *Infant or Feme-Covert may at full Age or Diſcoverture wave Leaſe or Gift made to them* during the Coverture or Nonage. Br. Waiver de Choſes pl. 49. cites Doct. & Stud.

4. If a Man *takes a Leaſe for Years rendering more Rent than the Land is worth*, and dies, *his Executors ſhall not waive* the Leaſe *if they have Aſſets, but if they have not* Aſſets *they may waive it by ſpecial pleading*. Br. Waiver de Choſes, pl. 49. cites Doct. & Stud.

Executor cannot waive a *Term* come to him, per Roll J. Sti. 52. Mich. 23 Car. B. R. Vandicoot's Caſe ——— Ibid 61. per Roll J. accordingly, but per Bacon J. contra if the Executor finds the Rent to be more than the Land is worth, in the Caſe of Kale v. Jocelyn. ——— Executor cannot waive a Term if he has Aſſets, but if he has *not Aſſets* he may; Per Roll J. Sti. 119. in Caſe of Corniſh v. Cowſie. ——— Held that he cannot waive it unleſs it had been ſpecially alleged that the Rent was greater than the Value of the Land; and then peradventure by Special Pleading he ſhould be diſcharged. Cro. J. 549. pl. 10. Mich. 17 Jac. B. R. Mawle v. Cacyffyr.

5. Where *Leaſe or Remainder* is limited *to a Parſon, Biſhop*, Abbot &c. they cannot waive it. *Contra of their Succeſſor, if they do not take the Profits.* Br. Waiver de Choſes, pl. 49. cites Doct. & Stud.

6. Upon Waiver of *Privilege by one of the King's Servants*, who was after taken in Execution by Conuſee of a Statute, Ld. Chancellor ſaid, the Privilege is the King's Privilege and not the Servant's. And the Conuſee was order'd into Cuſtody of the Warden of the Fleet. 2 Chanc. Caſes 69. Mich. 23 Car. 2. Sir Ph. Howard's Caſe.

(C) Plea. *What* ſhall be ſaid a Waiver *in Pleadings.*

Br. Aſſiſe, pl. 310. cites S. C.

1. IN *Aſſiſe by two Parceners againſt the third*, he *pleaded Partition in Bar againſt the one, and to the Aſſiſe againſt the other*; and per Cur. by his pleading to the Aſſiſe againſt the one he has waived his Bar. Br. Waiver de Choſes, pl. 17. cites 30 Aſſ. 7.

2. An *Infant* who *ſued by Prochein Amy*, would have diſallow'd his Suit and was not ſuffer'd, becauſe he was an Infant, if the Defendant *joins Iſſue and after makes Default*, yet the Iſſue thereby is not waived. Br. Waiver de Choſes, pl. 37. cites 34 Aſſ. 5. Contra 38 E. 3. 38 H. 6. 33. and 16 Aſſ. 13.

Br. Executors, pl. 46. cites S. C. — Br. Repleader, pl. 9. cites S. C. — Br. Enqueſt, pl. 12. cites S. C.

3. In *Debt againſt two Executors*, if the *one pleads in Bar to the Iſſue and* after comes *the other*, and pleads *to the Writ*, and the Plaintiff replies to it, he has waived the Advantage of the firſt Plea. Br. Waiver de Choſes, pl. 8. cites 7 H. 4. 12.

Br. Demurrer, pl. 1. cites S. C.

4. Where a Man *pleads a good Plea or Replication, and* alſo *demurs upon the Plea or Declaration of the other*, there the Plea or Replication ſhall ſtand, and the Demurrer is void, and waiv'd, per Priſot. Br. Waiver de Choſes, pl. 4. cites 33 H. 6. 10.

5. If a Man makes *Default after Plea pleaded, and Iſſue join'd or Demurrer* in Law, there by this, the Plea the Iſſue or Demurrer is waived, and *Judgment ſhall be by Reaſon of the Default.* Br. Waiver de Choſes, pl. 32. cites 38 H. 6. 33.

Br. Brief, pl. 368. cites S. C.

6. In *Ceſſavit of two Acres*, the *Tenant to one Acre ſaid*, That *he held it* of him *by Fealty and 2 d. and the other by Fealty and 1 d. which were open and ſufficient to his Diſtreſs Abſque hoc, that he held both the Acres Modo & Forma*, viz. by one entire Tenure, in this Caſe the Pleading of *Open to his Diſtreſs does not waive the Plea to the Writ*; Per Cur. Br. Waiver de Choſes, pl. 33. cites 10 E. 4. 2.

7. Where the *Feme claims Dower by Poſſeſſion in Law in her Baron*, it ſuffices to conclude; *and ſo ſee Dowable by the Law*, and need not conclude, *And ſo ſeiſie que Dower la poet*; For this Concluſion will waive the Special Matter. Br. Waiver de Choſes, pl. 26. cites 21 E. 4. 60.

8. When one pleads *in Abatement, and alſo in Bar* of the Action, the Plea in Bar waives the Plea in Abatement of the Writ, unleſs it be where the Life is in Jeopardy in Caſe of Felony, and that is *in Favorem Vitæ*. Cro. E. 495. pl. 14. Mich. 38 & 39 Eliz. B. R. Kirton v. Williams.

9. If

9. If one is ſued by the Addition of *Baronet* who is not ſo, yet if he *appears by that Name*, and Judgment is given againſt him, Execution may be had againſt him by the ſame Name. Roll Rep. 450. pl. 12. Hill. 14 Jac. adjudg'd in B. R. and ſays, that Paſch. 16 Jac. the Judgment was affirm'd in the Exchequer-Chamber per tot. Cur. Markham v. Forteſcue.

Affirm'd in Error; for per Haughton J. when he appears and pleads he has loſt the Advantage of the ſaid Miſnoſmer. 2 Roll Rep. 50. S. C.

10. Where Matter is pleadable in Abatement, the Benefit of it is loſt *by pleading to Iſſue.* See Carth. 60, 61. in Caſe of Boſon v. Sandford.

And the *finding of the Jury will not abate the Writ*, it not being in Iſſue, and ſo is Ex abundanti and void. Kelw. 21. in Caſe of the Archbiſhop of Canterbury v. Sir Hugh Conway.

(D) *Of Pleadings. In what Caſes* a Man may waive the Plea or Iſſue, and plead another or the General Iſſue after Plea enter'd.

1. IN *Mortdanceſtor* the Tenant vouch'd, and the *Vouchee was ſummon'd*, and yet the Tenant *waived the Voucher, and pleaded the General Iſſue* to the Points of the Writ. Br. Waiver de Choſes, pl. 44. cites 31 E 1. Fitzh. Mortdanceſter 48.

So if a Man *counterpleads a Voucher* he may at another Day *waive the Counterplea and grant the Voucher*, Br. Waiver de Choſes, pl. 38. cites 4 E. 3. 56. and Fitzh. Counterplea de Voucher, 66.

2. *Tenant by Receipt* may *waive his Receipt at a Day after.* Br. Waiver de Choſes, pl. 30. cites M. 17 E. 2.

3. *After one has pleaded to the Writ he may* waive this, and *plead to the Action*, notwithſtanding the Demandant has replied to the Writ. Theloal's Dig. lib. 16. cap. 8. S. 1. cites Trin. 8 E. 3. 417.

4. *Aſſiſe againſt Baron and Feme*, by Name of John Stile and Alice Stile, *and did not ſay his Wife*; and the *Feme pleaded in Bar*, and the *Man ſaid that the ſaid Alice is his Feme, not named Feme*, Judgment of the Writ. Upon which they were *adjourn'd into Bank*; at which Day the *Plaintiff waived his Plea to the Writ, to have the Plaintiff barr'd upon the Plea in Bar of the Feme.* The Plaintiff ſaid that he ſhall not waive it, inaſmuch as it goes in Abatement of the Writ. Et non allocatur; For the Waiving goes in Advantage of the Plaintiff, to have his Writ to ſtand; and alſo the Plaintiff ſhall not diſable his own Writ. And ſo ſee that the *Defendant may waive his Exception at the Day of Adjournment.* Br. Waiver de Choſes, pl. 29. cites 23 Aſſ. 4.

Br. Aſſiſe, pl 250. cites S. C. —— Theloal's Dig. lib. 16. cap. 8. pl. 2. cites S. C.

5. In * *Aſſiſe* and Action of † *Waſte*, if the Defendant pleads a Bar, he may come after and *waive the Bar, and plead the General Iſſue*; per Thorpe Ch. J. Br. Waiver de Choſes, pl. 28. cites 38 E. 3. 24.

* S P. Tho' the Bar is enter'd. Br. Waiver de Choſes, pl. 48. cites 34 H. 6 29. —— Ibid. pl. 5. cites S. C. per Cur. —— † Br. Waiver de Choſes, pl 47. cites S. C. A Man may waive his Bar, and plead the General Iſſue, but not plead to the Writ after Bar. Br. Aſſiſe, pl. 107. cites 1 Aſſ. 17.

6. In *Coſinage* the *Tenant pleaded Eſtoppel by Fine* levied *of the ſame Anceſtor, Judgment if he ſhall ſay that he died ſeiſed*; and the *Demandant confeſs'd, and avoided the Eſtoppel*; and therefore the *Tenant would have waived*

waived the Eſtoppel, and pleaded in Bar. And the Opinion of the Court was, that he could not. *But in* Aſſiſe of *Mortdanceſtor he may.* Note the Diverſity. Br. Waiver de Choſes, pl. 6. cites 40 E. 3. 19.

7. In Aſſiſe the *Tenant pleaded Feoffment of the Anceſtor of the Plaintiff, whoſe Heir* &c. *by Deed with Warranty.* The *Plaintiff denied the Deed.* The *Tenant retook the Deed, and ſaid that he is in by Feoffment, without Tort done.* And he was compell'd by the Court to redeliver the Deed to the Court, or otherwiſe he had been awarded to Priſon, and the Aſſiſe taken upon the Traverſe of the Deed. Quære. Br. Waiver de Choſes, pl. 19. cites 41 Aſſ. 20.

Br. Aſſiſe, pl. 41. cites 50 E. 3. 9. —Theloal's Dig. lib. 16. cap. 8. S. 3. cites S. C. accordingly; but ſays, that otherwiſe it is where it is *triable by Judgment of the Court &c.*——So it was held, that after the Tenant had pleaded to the Writ a Recovery had againſt him by a Stranger pending the Writ, and a Demurrer was thereupon; If he ſees the Opinion of the Court againſt him, he may plead the ſame Plea to the Action. Ibid. cites 5 H. 7. 40.

8. If a Man *pleads Plea to the Writ in Aſſiſe in proper Perſon, or by Attorney, upon which they are at Iſſue, and adjourn'd for the Trial,* in this Caſe he cannot waive it, and plead in Bar. *But* where a Man pleads to the Aſſiſe *by Bailiff*, there he may come after in proper Perſon, or by Attorney, and plead in Bar Matter of which Certificate of Aſſiſe lies. Br. Waiver de Choſes, pl. 7. cites 50 E. 3. 19.

9. If the Parties demur in Law, yet always *before the Judgment he may waive the Demurrer, and join Iſſue* ex Aſſenſu Partium. Br. Waiver de Choſes, pl. 43. cites 11 R. 2. Fitzh. Iſſue, 146.

10. If an *Infant pleads by Guardian*, he may afterwards waive the Plea, and plead in proper Perſon. *But* if *a Man of full Age pleads by Attorney*, he ſhall not waive it; for he himſelf made the Attorney. But in the other Caſe the Court admits the Guardian, whoſe Act ſhall not prejudice the Infant. Note the Difference, and ſee the Book. Br. Waiver de Choſes, pl. 35. cites 3 H. 6. 16.

11. In Quare Impedit the Defendant *pleaded that the Plaintiff was made a Knight after the laſt Continuance*, Judgment of the Writ. And thereupon they were *at Iſſue*; and after the *Plaintiff* came, and *would have waived the Averment, and demurr'd* in Law, and *could not without acknowledging the Exception*, and then his Writ ſhall abate. Quod nota, and take Heed; for it is peremptory. Br. Waiver de Choſes, pl. 9. cites 7 H. 6. 15.

12. In *Præcipe quod reddat*, if the *Tenant prays Aid* of a Stranger, which is granted, yet he *may waive the Aid, and plead alone, before the Prayee appears* and offers to join, but not after; but he may confeſs after. Br. Waiver de Choſes, pl. 40. cites 4 E. 4. 28.

But on an Information upon a Penal Statute, if the Defendant makes Bar, and traverſes the Plea, there the King cannot waive ſuch Iſſue tender'd, and traverſe the former Matter of the Plea, as he may upon Traverſe of Office &c. where the King is ſole Party, and intitled by Matter of Record. Br. Prerogative, pl. 116. cites 34 H. 8. Per Whorwood, Attorney-General.

13. Note for Law, that the *King after the Demurrer taken for him, and enter'd, may* waive the Demurrer in Law, and *join an Iſſue.* Br. Waiver de Choſes, pl. 24. cites L. 5 E. 4. 122.

For more of Waver in General, ſee **Deviſe, Diſagreement, Jointreſs,** and other Proper Titles.

(A) Weights

(A) Weights and Measures.

1. IN Debt upon an Obligation the Queſtion was, How a *Mile in Law* ſhall be *conſtrued for Carriages*, whether by Paces, reckoning five Foot to a Pace, or otherwiſe. Gawdy and Wray conceived that the Pleading the Diſtance by Paces is well enough; for if 1000 Paces make a Mile, ſo many 1000 Paces is tantamount to ſo many Miles. But the Doubt was, How the Miles ſhould be conſtrued; for Wray ſaid, That in the **Caſe of Cambridge** it was holden, that a Mile ſhall be taken the moſt near way, and ſhall not be taken as a Bird ſhall fly. Cro. E. 212. pl. 3. Hill. 33 Eliz. B. R. Minge v. Earle. Cro. E. 267. pl. 2. Hill. 34 Eliz. B. R. **Wing v. Earle**, S. C. Gawdy held, That a Mile ſhall be conſtrued according to the Engliſh Form, and not according to the Geometrical Computation. And by Fenner J. If the Queſtion had been upon the Statute, the Miles ſhall be conſtrued according to the uſual Ways for Carriages; but upon the Condition of its being within 4 Miles, if it be within 4 Miles any Way, the Condition is broken; wherefore it was adjudged for the Plaintiff.

2. If one *ſells Land, and is obliged that it contains* 20 *Acres*, this ſhall be according to the Law, and not according to the Cuſtom of the Country; per Gawdy J. Cro. E. 267. pl. 2. Hill. 34 Eliz. B. R. in Caſe of Wing v. Earl. Upon a Queſtion of an Aſſurance of Land, Popham ſaid it had been reſolved by all the Juſtices, That if one be *obliged to aſſure* 20 *Acres of Land*, the Acres ſhall be accounted according to the Eſtimation of the Country where the Land lies, and not according to the Meaſure limited in the Statute. Cro. E. 665. pl. 15. Paſch. 41 Eliz. C. B. Some v. Taylor.

3. In a *Common Recovery*, the which is had by Agreement and Conſent of the Parties, of Acres of Land, they ſhall be accounted according to the accuſtomable and *uſual Meaſure of the Country*; and not according to the Statute of 33 [34] E. 1. De Terris Menſurandis. 6 Rep. 67. a. cites it as adjudged in the Beginning of the Reign of Q. Eliz. in Bruyn's Caſe.

4. If one brings an *Ejectment* or a *Præcipe of* 100 *Acres*, it ſhall be according to the Statute Meaſure; but if he bargains and *ſells* 100 Acres of Land, that ſhall not be according to the Statute Meaſure, but after the uſual Account in the Country. Cro. E. 476. in pl. 4. cites it as adjudg'd ſo in Andrew's Caſe. D. 47. b. pl. 9 Marg. cites S. C.

5. M. granted to T. 100 *Acres of Land in Bl. Acre, and* 60 *in Wh. Acre and* 20 *of Meadow in ſuch a Meadow in G. and H.* in which the Acres are known by Eſtimations or Limits, there he ſhall take the Acres as they are known in the ſame Places, be they more or leſs than the Statute; for *they paſs as they are there known*, and *not according to the Meaſure by the Statute.* Poph. 55. pl. 4. Trin. 36 Eliz. B. R. Morgan v. Tedcaſtle. But if I have a great *Cloſe containing* 20 *Acres* of Land *by Eſtimation, which is not* 18, and *I grant* 20 *Acres* of the ſame Cloſe to another, there he ſhall have them according to the Meaſure by the Statute, becauſe *the Acres of ſuch a Cloſe are not known by Parcels or by Meets and Bounds*; And ſo it differs from the firſt Caſe. And upon the Caſe then put to Anderſon, Brian and Fenner, they were of the ſame Opinion; Quod nota. Ibid.

6. Where a certain Number of Acres are to be *deliver'd in Execution*, the Meaſure of them muſt be according to the common Meaſure of the

Country, and not according to the Statute Measure. So of Grain sold by the *Bushel*. Roll Rep. 420. pl. 8. Mich. 14 Jac. B. R. Loyd v. Bethell.

7. If *Recovery* be of 20 Acres of Land *Execution* shall be by Metes and Bounds by Admeasurement according to the Statute 47 E. 3. 11. but if *Fine* be *levied of* 20 *Acres* of Land in D. Execution shall not be by Admeasurement. But if a Quantity of Land be in D. which contains 30 Acres, but has been reputed for 20 Acres, the Conusee shall have all; for this is a *Conveyance by Consent*. Arg. But per Montague Ch. J. a Fine differs from common Recovery, for Fine is grounded upon the Writ of Covenant, which is Amicabilis Conventio, but every Writ of Entry supposes a Title. 2 Roll. Rep. 67. Hill. 16 Jac. B. R. in the Case of Treswallen v. Penhules.

8. *The* 33 [34] *of E.* 1. is not a Statute but an Ordinance only; Arg. and admitted by the Court. Cro. J. 604. pl. 30. Mich. 18 Jac. B. R. in Stowe's Case.

Ld Raym. Rep. 638. Hill. 12 W. 3. in the Case of the King v. Everard S. P. and S. C. cited, but the Court over-ruled the Exception, and held that it was a Statute.

9. *Indictment against a Clerk of a Market* set forth that he keeps and *uses divers false Weights and Measures* in Deceit and Oppression of the Subjects, contra formam Stat. Upon not Guilty pleaded, the *Evidence* was, that *he seal'd the Weights, and there being a Leet, he deliver'd the Leet-Jury a heavier Weight than that which he seal'd with*; and so they found the Weights too light, *whereby the Defendant gain'd a Fine, and the Profit of sealing them again.* It was said in this Case, that the same Weight being used in the open Street differs from its being used in a House, and that the Consequence of the Defendant's being found guilty would be the Loss of his Place, and Fine and Imprisonment. And afterwards he was acquitted. Sid. 421. pl. 10. Trin. 19 Car. 2. B. R. the King v. Ayres.

10. On an *Indictment for using false Weights not agreeable to the Standard of London*, Exception was taken because it should be *Not according to the Standard of the Exchequer*, it being in Brandford in the County of Middlesex; but per Cur. were it for false Weights it were sufficient, and they would not quash it without pleading; and it being against the Clerk of the Market for producing Weights ad triandum, not according to the Standard of London, not saying he did try any, yet the Court would not quash it. 2 Keb. 412. pl. 39. Mich. 20 Car. 2. B. R. the King v. Bloom and Hudson.

11. In an *Information* upon the Statute of 22 Car. 2. cap. 8. *for selling by a Bushel not agreeable to the Statute*, Exception was taken that it did *not say, whether it was above or under* 8 Gallons; Sed non allocatur; For be it either way it is an Offence, and being after Verdict, it is well enough. 3 Keb. 468. pl. 57. Pasch. 27 Car. 2. B. R. the King v. Kersey.

12. Another *Exception was, that* there being a particular Proceeding [appointed by the Act] to be before Justices [of Peace] below, *no Information lies* here; but Judgment was given for the Plaintiff Nisi, there being no Negative Words. 3 Keb. 468. the King v. Kersey.

But see 3 Keb. 518. pl. 82. Trin. 27 Car. 2. B. R. the King v. Careswell. —— Ibid. 565. pl. 88. Mich. 27 Car. 2. B. R. the King v. Slaughter S. P. but it was answer'd, that it being contra Formam Statuti *selling by Measure not agreeable to the Standard of Winchester*, is general and well enough; which the Court agreed. And ibid. 620. pl. 93. Hill. 27 & 28 Car. 2 B. R. in S. C. the Court said that 14 E. 3. cap. 12. of the Standard is all one with Winchester Measure, and the latter Act of 22 & 23 Car. 2. cap. 12. being prohibitory, an Information here is good upon that, it being for selling *against the Standard of Exchequer Communiter vocat. Winchester Measure*, and it is not like to where there is but one particular Statute which directs the Way of Information [Prosecution] which can be only in that Way.

13. If

13. If I covenant to convey to another *an Acre* of Land *in Cornwall*, the common Acceptation of the Word (Acre) there *amounts to as much as* 100 *of other Counties*; ſo a *Perch in Staffordſhire is as much as* 20 Perches *in ſome other Places*, and therefore muſt be govern'd by the common and known Acceptation of the People. Per Cur. 4 Mod. 186. Paſch. 5 W. & M. in B. R. in Caſe of Barkſdale v. Morgan.

S. P. admitted Arg. 8 Mod. 277. Trin. 10 Geo. in Caſe of Waddy v. Newton, becauſe the publick Uſage of the Country gives it a Sanction and cites Crompt. Juriſd. of Courts 222. to prove that the Meaſure in thoſe Counties is different from all other Places in England.

14. A. Tenant in Tail covenanted to levy a Fine and ſuffer a Recovery of Lands, and accordingly *levied a Fine* thereof *by the Name of* 140 *Acres* in S. and declared the Uſe thereof to himſelf and his Heirs. The Land being more than 140 Acres, the Defendant being *Heir in Tail, claim'd all above thoſe* 140 *Acres*. The Court obſerved, that it was admitted by the Counſel for the Defendant, that if this Fine had been levied and Recovery ſuffer'd, *in Purſuance of a former Agreement* or Covenant *for a valuable Conſideration*; and if it had appear'd to be the *Intent of the Parties to Paſs the whole* Eſtate *by the Name of* 140 *Acres*, in ſuch Caſe the whole would paſs. And ſaid, that here the Jury hath found that the whole Eſtate entail'd was computed in the County to be 140 Acres, and it will be difficult to apprehend a Difference between a Covenant for a valuable Conſideration and a voluntary Covenant; for it cannot reaſonably be ſaid, that the ſame Words ſhall paſs all the Lands in one Caſe, and ſhall not paſs the whole in the other Caſe, eſpecially when the Tenant had it in his Power of paſſing it as he pleaſed. 8 Mod. 275. Trin. 10 Geo. 1725. Waddy v. Newton.

15. In an Indictment for making light Bread, it is not enough to *ſhew* that it had not due Weight, without ſhewing *what is due Weight*. 2 Salk. 687 Mich. 10 W. 3. B. R. the King v. Flint.

16. The *keeping of falſe* Weights and Meaſures is *indictable in the Sheriff's Torn, whether* it appear that they were *actually made Uſe of or not*. 2 Hawk. Pl. C. 67. cap. 10. S. 59.

For more of Weights and Meaſures in general, ſee **Fine** (X. 4) and other Proper Titles.

Windfalls.

(A) Who ſhall have them.

1. IT was in a Manner admitted, that the *Leſſee may have* the *Windfalls*. Br. Waſte, pl. 39. cites 44 E. 3. 44.

S. P. and S. C. cited by Rhodes J. who ſaid, he did not regard the Opinion of Statham to the contrary. But Anderſon Ch J. held that the Leſſor ſhould have the Windfalls. Godb. 118. in Caſe of Lewknor v. Ford.

2. It

2. It is admitted, that if Trees fall by the Wind they belong *to* the *Tenant for Life, and not to him in Reverſion.* Br. Waſte, pl. 82. cites 7 H. 6. 38.

3. Where *Leſſee for Years is by his Leaſe to have* Windfalls, yet he *muſt employ them* to the Benefit and Profit of his Farm, and cannot *ſell* or ſpend them elſewhere; per 2 Juſtices. Le. 49. in Caſe of Lewknor v. Ford.

4. Windfalls do not appertain to the Office of a *Keeper* without Preſcription, and the *Guardian in Chivalry* ſhould not have them; for they are Parcel of the Inheritance, as 'tis in **Herlackenden's Caſe**, 4 Rep. Per Croke J. Arg. Ley's Rep. 74. Paſch. 1 Car. in Caſe of the Biſhop of Chicheſter v. Freeland.

For more of Windfalls in General, ſee **Waereſme, Trees,** and other Proper Titles.

(A) Woods.

In Information upon this Statute, for not fencing of Coppices, 1ſt Exception was, that it is *not alleged that the Defendant had lawful Intereſt in them*, as the Words of the Statute are.

1. 35 *H.* 8. cap. 17. ENacts, That *Underwoods fell'd at 14 Years Growth, or under, ſhall during 4 Years next after the 20th of April after their Felling, be preſerved from Deſtruction of Cattle, on Pain that the Owner thereof ſhall forfeit for every Rood of Land unfenced, for every Month 3 s. 4 d. And Underwoods above 14 Years Growth, and under 24, being ſo fell'd, ſhall during 6 Years next after the 20th of April after ſuch Felling be preſerved as aforeſaid, upon the like Pain.*

2dly, becauſe it is ſhewn that certain Coppices were cut, but *ſhews not what Coppices they were*. 3dly, becauſe it is recited that he *ſhall forfeit for every Rood* 3 s. 4 d. where it ſhould be for every *Rood of Land*. But it was ſaid the Parliament-Roll is Rood of Land, and ſo was the laſt Impreſſions; but for the 2 firſt Exceptions the Party was diſcharg'd. Cro. Eliz. 117. pl. 21. Mich. 30 & 31 Eliz. in B. R. Edwards v. Ebſworth.

Information upon this Statute for *grubbing up Wood* in Buckinghamſhire, *contra Formam Statuti*

None ſhall convert into Paſture or Tillage any ſuch Underwood or Coppice, containing two Acres or above, which now be Wood or Underwood, and put or reſerved to the Uſe or Increaſe of Wood or Underwood, and being two Furlongs diſtant from the Houſe of the Owner thereof, or from the Houſe whereunto ſuch Wood doth appertain, on Pain to forfeit 40 s. for every Acre ſo converted.

After a Verdict for the Plaintiff it was moved in Arreſt of Judgment, 1. That it is *not mention'd* in the Information, *that the Wood was growing at the Time of the Act made*; for ſo the Words of the Statute run, and ſo it ought to be ſet forth, as upon the 5th Eliz. concerning Apprentices, which has been often adjudged. To which it was anſwer'd, That the Proviſo in the Statute is general, and not tied up to Wood growing at the Time of the Act; and contra Formam Statuti ſupplies it, if the Law were ſo, as, in * Dyer 312. The Court conceived the Exception fatal, and that it could not be ſupplied by the Words contra Formam Statuti; for they do but make the Concluſion upon the Caſe before ſet forth, and are themſelves no Part of the Caſe, but diſcloſe the Reſult of the Premiſſes, and will not of themſelves make a Caſe without ſufficient Premiſſes, which ought to ſet forth the Law, as it is upon the Statute. Et adjornatur. But afterwards Judgment was arreſted upon this Exception. Hard. 105. pl. 1. Trin. 1657. Morby v. Urlin.

* D. 312. pl. 86.

Half

Half of the Forfeitures to be to the King, the other half to him that will ſue for the ſame by Bill, Plaint, Action of Debt or Information, in any of the King's Courts of Record, in which no Protection, Wager of Law, or Eſſoign, ſhall be allow'd.

Exception to an Information upon this Statute was, becauſe by the Statute of 21 Jac. 1. the Information ought to be brought and tried in the proper County. But it was anſwer'd, that this is a Miſtake; for that Law takes place only in ſuch Caſes where Juſtices of Peace, or of Aſſiſe, have Power by Law to hear and determine; but by this Act of Parliament, upon which the preſent Information is grounded, they have no Power at all; for the *Proſecution is tied up to Courts of Record*, and thus that Law has always been conſtrued. Hard. 105. pl. 1. Trin. 1657. Morby v. Urlin.

2. 13 *Eliz. cap.* 25. *Adds* 2 *Years more than the* 4 *Years limited by* 35 *H.* 8. *cap.* 17. *for preſerving the Spring from Deſtruction by Cattle.*

For more of Woods in General, ſee **Foreſts, Trees, Waſte,** and other Proper Titles.

Words. See tit. Parols.

* Wreck.

* Wreck, or Shipwreck, is an Engliſh Word; in French, Naufrage; in ancient French Varech; in Latin Naufragium, legally Wreccum maris, Wreck of the Sea; in legal Underſtanding is applied to † *ſuch Goods as after Shipwreck at Sea are by the Sea caſt upon the Land*, and therefore the Juriſdiction thereof pertains not to the Lord Admiral, but to the Common Law. 2 Inſt. 167.

† S. P. the firſt Reſolution in Sir E. Conſtable's Caſe, 5 Rep. 106. a Patch 43 Eliz. B R.

(A) *Goods caſt over-board or wreck'd. How* they ought to be *order'd*, and *to whom* they *belong*.

1. IF any *Ship, or other Veſſel*, ſailing to and fro, and coaſting the Seas, whether *in the way of Merchandizing, or upon a Fiſhing Deſign*, happen by ſome Misfortune, through the Violence of the Weather, to run againſt the Rocks, and there to be ſhatter'd and broken, be it in what Coaſts, Country, or Dominion ſoever, and the Mariners, Merchant or Merchants, or *any one* of them, *eſcape and come ſafe to Land*, in this Caſe the Lord of that Place or Country where ſuch Misfortune hath happen'd, ought not to hinder or oppoſe the Saving of as much of the Ship or Lading as may poſſibly be ſaved by thoſe who have eſcaped as aforeſaid, or thoſe to whom the ſaid Ship and her Lading belong. But on the contrary, *the Lord of that Place* or Country *ought* by his own Intereſt, and by thoſe under his Power and Juriſdiction, *to be aiding* and aſſiſting to *the ſaid diſtreſs'd Mariners* and Merchants, *in ſaving their Ship-broken Goods*, and that *without taking any thereof from them*; nevertheleſs there ought to be a Conſideration for the Salvers, according to Equity and a good Conſcience, and as Juſtice ſhall appoint, notwithſtanding what Promiſe in that Caſe has been made to the Salvers by ſuch diſtreſs'd Merchants and Mariners, as is declared in the fourth Law. And in caſe any one ſhall do contrary hereunto, or take any Part of the ſaid Goods from the ſaid poor, diſtreſs'd, ruin'd, and Ship-broken Perſons, *againſt their Wills, or without their Conſent*, the ſame ſhall be excommunicated by the Church, and ſhall receive the Puniſhment of Thieves, unleſs ſpeedy Reſtitution be made; and there is no Cuſtom or Statute whatever that

that can protect him againſt the ſaid Puniſhment. Miege's Laws of Oleron 11. S. 28.

2. When a Ship or other Veſſel, *entring into an Harbour, happens* by Misfortune *to be broken* and periſh, *and the Maſter, Mariners, and Merchants on board her to be drown'd, and the Goods* thereof be driven aſhore, or *floated on the Sea, without being ſought after by thoſe to whom they belong, not knowing any thing of the Diſaſter*; in this doleful Caſe the Lord of that Place ought to ſend Perſons to ſave the ſaid Goods, and ſuch as ſhall be recover'd he ſhall ſecure, and put into ſafe Cuſtody; which being done, he ought to take care (as much as in him lies) to give Notice thereof to the Friends or next of Kin of the Parties ſo drown'd; and to ſatisfy the Salvers according to their Pains, not out of his own Purſe, but out of the Goods ſaved; and the Remainder ſhall be left wholly to the ſaid Lord's Cuſtody for the Space of one Year, and if in that Time they to whom the ſaid Goods did appertain do not appear and claim the ſame, the *Year being fully expired, the* ſaid *Lord ſhall publickly ſell* and diſpoſe of the ſaid Goods (unleſs he pleaſe to ſtay a longer Time) to ſuch as ſhall bid moſt; *and the Moneys* proceeding of the Sale thereof ſhall be *converted to pious and charitable Uſes*, as in relieving the Poor, in providing Marriages for poor Maids, and doing therewith ſuch other Works of Piety and Charity as is agreeable to Reaſon and a good Conſcience. And if the ſaid Lord ſhould aſſume the ſaid Goods, either in Whole or in Part, unto himſelf, he ſhall by ſo doing incur the Curſe or Malediction of our Mother the Holy Church, with the aforeſaid Penalties, without ever obtaining Remiſſion, unleſs he make Satisfaction. Miege's Law of Oleron, 10. S. 29.

3. If a Ship happen to be loſt, either by ſtriking on ſome Rock or running a-ground, and the *Mariners* thinking to ſave their Lives, *ſwim to the Shore*, and come thither *half drown'd*, in Expectation of Help; and whereas it ſometimes happens, that in many Places they meet with *People* more inhumane, barbarous, and cruel than Mad Dogs, who to get their Moneys, their Cloaths, and other Goods, *do murder* and deſtroy *the poor diſtreſs'd Mariners*; in this Caſe the Lord of the Country ought to execute Juſtice on ſuch Malefactors, and to puniſh them in their Bodies and Goods. They ſhall be plunged into the Sea, until they be half dead, then being drawn forth out of the Sea, they ſhall be ſtoned, or knock'd down, as they would do to a Wolf or a mad Dog. Miege's Laws of Oleron, 11. S. 30.

4. When a *Ship* being *under Sail, or riding at Anchor* in any Road, *is overtaken by ſo violent a Storm* that it is thought expedient, for the lightning of the Ship, to caſt Part of the Lading overboard; and *that Part of the Goods are thrown overboard*, in order to preſerve the Ship, the Men thereof, and the reſt of the Lading; it is to be underſtood, that *the ſaid Goods*, ſo caſt overboard, do *become his that can firſt poſſeſs himſelf thereof*, and carry them away, *provided the Merchants*, Maſter, or Mariners, (which muſt be firſt known and underſtood) *did caſt the ſaid Goods overboard, without any Hope or Likelyhood of ever recovering them again, and ſo give them over* as utterly loſt and forſaken, *without ever making any Purſuit after them*; in which Caſe only the firſt Occupant becomes the lawful Proprietor thereof. Miege's Law of Oleron, 11. S. 31.

5. When a Ship or other Veſſel has *caſt overboard ſeveral Goods* and Merchandize, it is to be ſuppoſed the ſaid Goods were lock'd up, and made faſt in Cheſts; and if they be Books, that they are ſo well ſecured and ſo well condition'd, that they may not be damnified by Salt-water; in ſuch Caſes it is apparent, that they who did caſt ſuch Goods overboard do ſtill retain an Intention, Hope, and Deſire of recovering the ſame. And therefore whoever ſhall happen to find ſuch Things ſhall be bound to make *Reſtitution* thereof, to him that ſhall make a *legal Purſuit*

after

after them; or at leaſt to employ them in charitable Uſes, according to a good Conſcience. Miege's Laws of Oleron, 11. S. 32.

6. The *Cuſtom of the Country* is to be obſerved *in* all *Things found by the Sea-ſide, which have been formerly in the Poſſeſſion of ſome body* or other; ſuch *as Wines, Oils, and other Merchandize*, altho' they have been caſt overboard, and left by the Merchants, and ſo ought to appertain to him that firſt finds the ſame. But *if* there be a Preſumption that *theſe Goods belong'd to ſome Ship that periſh'd*, then neither the Lord nor the Finder ought to take any thing thereof, ſo as to convert it to their own Uſe; but they ought to do therewith as aforeſaid, that is to do Good to poor People; otherwiſe they ſhall incur the Judgments of God. Miege's Laws of Oleron, 12. S. 41.

7. If a Veſſel by Streſs of Weather be *forced to cut her Cables* by the End, ſo as to leave behind her both her Cables and Anchors, and make to Sea as pleaſe the Wind and Weather; in ſuch Caſe the ſaid Cables and Anchors ought not to be as loſt to the ſaid Veſſel, if there were *any Buoy* at them; and ſuch as fiſh for them are bound to reſtore them, if they know to whom; but withal they ought to be paid for their Pains, according to Juſtice and Equity. And in caſe they don't know who to reſtore them to, the Lord of the Place ſhall take his Share, and the Salvers theirs; for it has been ordain'd, That *every Maſter* of a Ship cauſe to be ingraven, or *ſet upon the Buoys thereof*, his *own Name, or the Name of his Ship, or of the Port or Haven whereof ſhe is*; which muſt needs prevent great Inconveniencies, and be of great Advantage to many; inſomuch that he who left his Anchor in the Morning, may poſſibly recover it again by Night; and ſuch as ſhall detain it from him ſhall be counted no better than Thieves and Pirates. Miege's Laws of Oleron, 12. S. 43.

8. When a Ship or other Veſſel has the Misfortune to be wreck'd, and periſh, in that Caſe the *broken Pieces of the Ship, as well as the Lading* thereof, *ought to be* reſerved and *kept in Safety for them to whom it belonged before the Shipwreck*, any Cuſtom to the contrary notwithſtanding. And all Partakers, Abettors, or Contrivers in the ſaid Wreck, if they be Biſhops, Prelates, or Clerks, they ought to be depoſed and deprived of their Benefices reſpectively; and if they be Laymen, they are to incur the Penalties aforeſaid. Miege's Laws of Oleron, 12, 13. S. 44.

But this is *to be underſtood of a Ship* or Veſſel *that hath not practiſed Robbing upon the Sea*, and whoſe Mariners are not Pirates, Sea-Rovers, or Enemies to our Holy Catholick Faith; for in this Caſe one may make a Prey of ſuch People, and deſpoil them of their Goods, without any Puniſhment for ſo doing. Miege's Laws of Oleron, 13. S. 45.

9. *Weſtm.* 1. 3 *E.* 1. *cap.* 4. *Concerning Wrecks of the Sea, it is agreed, That where a* * *Man, a Dog, or a Cat, eſcape quick out of the Ship, that ſuch Ship nor Barge, nor any Thing within them, ſhall be adjudged Wreck*;

Many have doubted what the *Common Law* was before the making of this Statute; and ſome have holden that the Common Law was, That the Goods wreck'd upon the Sea were forfeited to the King, and that they be forfeited alſo ſince the Statute, unleſs they be ſaved by following this Statute. To this I anſwer with Macrobius, Multa ignoramus, quæ nobis non laterent, ſi veterum lectio nobis eſſet familiaris; For Bracton, who wrote before this Statute, proves that *this Act is but a Declaration of the Common Law.* 2 Inſt. 166. cites Bract. li. 3. fo. 120 Brit. fo. 7. 26. 85. Flet. li. 1. cap. 41. and 2 Inſt. 167. cites Mirr. cap. 1. S. 13, and cap. 3. S. de Wrecks.

* Albeit the Mirror wrote after this Statute, yet he wrote of the Ancient Laws before the ſame, and is more large than the Words of the Act; for therein is named only of a *Man, a Dog, and a Cat*, that eſcapes alive; and this Author ſpeaks generally of any *Beaſt, Hawk, or other living Thing*; ſo as he purſues not this Act, but treats of the Common Law. 2 Inſt. 167.—5 Rep. 107. b. S. P. in Sir H. Conſtable's Caſe.—And this Statute being but declaratory of the Common Law, theſe 3 *Inſtances are put but for Examples*; for beſides theſe two kind of Beaſts, all other Beaſts, *Fowls, Birds, Hawks, and other living Things are underſtood*, whereby the Ownerſhip or Property of the Goods may be known. And Bracton yet goes farther, Si *certa ſigna appoſita* fuerint *mercibus*, & aliis rebus &c. 2 Inſt. 167, 168.

Altho' this Statute ſpeaks only of a Wreck, yet it *extends to* **Flotſam, Jetſam, and Lagan.* 2 Inſt. 167.

* Flotſam

* Flotſam is when a Ship is ſunk, or otherwiſe periſh'd, and the Goods float upon the Sea. Jetſam is when the Ship is in Danger of ſinking, and for diſburthening the Ship the Goods are caſt into the Sea, and notwithſtanding this the Ship afterwards periſhes. Lagan (or rather Ligan) is when the Goods are ſo caſt into the Sea, and the Ship afterwards periſhes, and the Goods are ſo ponderous that they ſink to the Bottom, but the Mariners, with Intent to get them again, faſtens to them a Buoy or Cork, or other ſuch Thing as will not ſink, ſo that by ſuch Means they may find them again, and it is call'd Ligan a Ligando; and none of thoſe Goods which are call'd Jetſam, Flotſam, or Lagan, are call'd Wreck ſo long as they remain in or upon the Sea; but if any of them are drove to the Land by the Sea, then they ſhall be ſaid Wreck; ſo that Flotſam, Jetſam, and Lagan paſs by the Grant of Wreck. 5 Rep. 106. a. b Paſch. 43 Eliz. B R. Sir H. Conſtable's Caſe.

The *Cauſe wherefore* originally *Wreck was given to the Crown*, ſtood upon 2 main Maxims of the Common Law, 1ſt. That the Property of all Goods whatſoever muſt be in ſome Perſon. 2dly, That ſuch Goods as no Subject can claim any Property in, do belong to the King by his Prerogative, as Treaſure Trove, Strays, Wreck of the Sea, and others; becauſe of ancient Time, when the Art of Navigation was not ſo perfect, nor Trade of Merchandize grown to ſuch Perfection as now it is, it was a Matter of great Difficulty to be proved in whom the Property of Goods wreck'd at Sea was. Others have yielded another Reaſon, That the King by old Cuſtom of the Realm, as Lord of the narrow Sea, is bound to ſcour the Sea of the Pirates, and petty Robbers of the Sea; and ſo it is read of that noble King Edgar, that he would twice in the Year ſcour the Sea of ſuch Pirates &c. and becauſe that could not be done without great Charge, the Law gave unto him ſuch Goods, as be wreck'd upon the Sea, towards the Charge. 2 Inſt. 167.

If a *Ship be ready to periſh*, and *all the Men* therein, for Safe guard of their Lives, *leave the Ship*; and after the forſaken *Ship periſhes*, if any *of the Men* be ſaved, and *come to Land*, the Goods are not loſt. 2 Inſt. 167.

If a *Ship* on the Sea is *purſued with Enemies, and the Men* for Safe-guard of their Lives *forſake the Ship*, and the *Enemies take the Ship*, and ſpoil her of her Goods and Tackle, *and turn her into Sea*; by the Weather *ſhe is caſt on Land, where her Men arrived*; it was reſolved by all the Judges of England, That the Ship was no Wreck nor loſt. 2 Inſt. 167. cites 5 R. 2. Fiſhlake's Caſe.

Yet if the Goods be *bona peritura*, the *Sheriff may ſell* ſuch Goods within the Year leaſt they ſhould periſh, and nothing be made of them; and therefore *for Neceſſity* (which is excepted out of Law) the Sale in that Caſe is good within the Year. 2 Inſt. 168.

But the Goods ſhall be ſaved and kept by View of the Sheriff, Coroner, or the King's Bailiff, and delivered into the Hands of ſuch as are of the Town, where the Goods were found;

Where Goods are taken as Wreck, he who was *the Owner ought to make Proof of the Property within the Year and Day after the taking*, and otherwiſe he ſhall not re-have them; per Nottingham. Br Wreck, pl. 2. cites 35 H. 6. 27.

*So that if any ſue for thoſe Goods, and after prove that they were his, or periſhed in his keeping * within a Year and a Day, they ſhall be reſtored to them without Delay, † and if not they ſhall remain to the King, and be ſeiſed by the Sheriff's Coroners, and Bailiffs, and ſhall be delivered to them of the Town which ſhall anſwer before the Juſtices of the Wreck belonging to the King.*

Yet if the *Owner dies within the Year*, his *Executors* or Adminiſtrators *may make Proof*, for that this Act is but a Declaration of the Common Law. 2 Inſt. 168.

* This Year and Day ſhall be *accounted from the Seiſure* made as Wreck, for that is the Thing whereof the Owner may take the beſt Notice. 2 Inſt. 168.——5 Rep. 107. b. S. P. in Sir H. Conſtable's Caſe; For though the Property is in Law veſted in the Lord before Seiſure, yet till the Lord does ſeiſe and takes it into his actual Poſſeſſion it is not notorious who the Perſon is that claims the Wreck, nor to whom the Owner muſt reſort to make his Claim, and to ſhew his Proofs.

But if the *King's Goods* be *wreck'd* and caſt upon Ground where a Subject has Wreck of the Sea, who ſeiſes the ſame, the King *may make his Proofs at any time* when he will, and is not confined to a Year and a Day, as the Subject is. 2 Inſt. 168.——S. P. for Nullum Tempus occurrit Regi. Br. Wreck, pl. 2. cites 35 H. 6. 27.

Now if the Goods or *Merchandizes* ſo caſt upon the Land be not ſeiſed, as is aforeſaid, but *taken away by certain Wrong-doers not known*, the Party may have a *Commiſſion of Oyer and Terminer to enquire* of them that did the Treſpaſs, and to hear and determine the ſame, and to make Reſtitution to the Party. 2 Inſt. 168. ——S. P. and a Writ to the Sheriff to return the Probos & legales Homines. F. N. B. 112. (C)——5 Rep. 107. b. 108. a. in Sir H. Conſtable's Caſe. If the Wreck belongs to the King the Party may have ſuch a Commiſſion, for no Proof is allowable by Law but the Verdict of 12 Men; and if the Wreck belong to another than to the King, then if the Owner cannot ſatisfy him who claims them as Wreck by his Mark or Cocket, or the Book of Cuſtoms, or the Teſtimony of honeſt Men, then the Owner may have ſuch Commiſſion, or he may bring his Action at Common Law and prove it by Verdict of a Jury, and if the Commiſſion be awarded, or the Action be commenced within the Year and Day, though the Verdict be given for him after the Year, it is ſufficient.

† That is, it ſhall *not be tried in the Admiral Court, but before the King's Juſtices* at the Common Law, becauſe the Wreck is ever caſt upon the Land. 2 Inſt. 168.

And

And where Wreck belongeth to another than to the King, he ſhall have it in like manner.

Wreck may *belong to the Subject* either *by Grant* from the King, *or by Preſcription.* 2 Inſt. 168.

Of ancient time Wreck of the Sea and other Caſualties, as Treaſure-trove in the Land, Strays and the like, were Primi inventoris quaſi totius Populi, ſed Poſtea ad Regem tranſlata fuerunt quia non modo totius Populi, ſed Reipublicæ etiam caput eſt; But if Treaſure be found in the Sea the Finder ſhall have it at this Day. 2 Inſt. 168.

And he that otherwiſe doth, and thereof be attainted, ſhall be awarded to Priſon and make Fine at the King's Will, and ſhall yield Damages alſo.

Which is to be underſtood, that the King's Juſtices before whom the Party is attainted, ſhall ſet the Fine; Et non Dominus Rex per ſe in Camera ſua, nec aliter coram ſe, niſi per Juſticiarios ſuos, & hæc eſt voluntas Regis, viz. per Juſticiarios & legem ſuam, unum eſt dicere. 2 Inſt. 168.

And if a Bailiff do it, and it be diſallowed by the Lord, and the Lord will not pretend any Title thereunto, the Bailiff ſhall anſwer, if he have whereof; and if he have not whereof, the Lord ſhall deliver his Bailiff's Body to the King.

10. In an Information for landing Goods *without paying* or agreeing for *the Cuſtom*; the Defendant pleaded that the Goods were Wreck and caſt upon the Land of C. who had Wreck of Sea appurtenant to his Manor adjoining to the Sea, and that C. ſeiſed them and ſold them to the Defendant and ſo juſtified. Quære if the Juſtification be good? Mo. 224. pl. 365. Mich. 28 & 29 Eliz. in the Exchequer, Saunders's Caſe.

At Common Law all Wreck was wholly the King's, ſo that they could not then be chargeable with Cuſtom

and by Statute W. 1. cap. 4. where Wreck belongs to another than the King, he ſhall have it in like Manner, that is, as the King has his. Vaugh. 164. Shepherd v. Goſnold

The Words of the Statute of 12 Car. 2 cap. 4. of Tunnage and Poundage granted to the King, are *of all Merchandizes &c. to be imported &c. into the Kingdom of England &c. by way of Merchandize* of ſuch a Value &c. Per Vaugh. Ch. J. in delivering the Opinion of the Court, by theſe Words Wreck imported, and not imported as Merchandize, is not to pay the King's Subſidy; and Judgment accordingly. Vaugh 160, 168, 170. Hill. 23 & 24 Car. 2. C. B. Sheppard v. Goſnold & al'——— Molloy 276. (8th. Edit.) lib. 2. cap. 5. S. 9 ſays, that in the like Caſe in all Circumſtances Hill. 6 W. 3. C. B. between Power and Sir Wm. Portman, the Judges, and more particularly Treby Ch. J. ſeemed to be of Opinion that Goods wreck'd or Flotſam ſhould pay Cuſtom.——— Ld. Raym. Rep. 388. Mich. 10 W. 3. Anon. ſays, that Mention being made that this Point had been argued 3 or 4 times in C. B in the Caſe of Sir Wm. Courtney v. Bower, he ſaid that he would not have ſuffered more than one Argument if it had been in B. R. and that pro forma tantum; And that always ſince the Caſe of Shephard v. Goſnold, Vaugh. 159. it had never been a Doubt, but that Wreck ſhould not pay Cuſtom.——— Ld. Raym Rep. 501. S. C. of **Courtney v. Bower** having been adjudged in C. B. by 3 J. that no Cuſtoms ought to be paid contra to the Opinion of Treby Ch. J. a Writ of Error was brought in B R. and Judgment affirmed without other Reaſon given by the Court than the Authority of that Caſe in Vaugh.

11. Goods *caſt into the Sea* to unburthen a Ship in a Storm, and *never intended for Merchandiſe*, are Wreck when caſt on the Shore *without any Shipwreck*. Per Vaughan Ch. J. Vaugh. 168. Hill. 23 & 24 Car. 2. C. B. in Caſe of Shepherd v. Goſnold & al'.

12. *Derelict Goods*, viz. deſerted by the Owners and caſt into the Sea, which happens upon various Occaſions, as coming from infected Towns and Places, and for many other Reſpects, will be Wreck, if caſt on Shore afterwards, though never purpoſed for Merchandiſe; but *Goods caſt overboard to lighten a Ship* are not by Bracton, nor from him in **Sir H. Conſtable's Caſe** eſteemed derelict Goods; which is a Queſtion not throughly examined; Si autem ea mente, ut nolit eſſe Dominus, aliud erit per Bract. By Vaughan Ch. J. Vaugh. 168. in Caſe of Shepherd v. Goſnold & al'.

In Trover for an Anchor &c. a ſpecial Verdict found that the Plaintiff was poſſeſſed of this Anchor &c. and that the Manor of M. adjoins to the Sea, and that *the Cuſtom of the Manor* is, *that if any Ship* or Boat *ſailing or floating on the Sea ſtrike upon the Soil of the ſaid Manor ſo*

But where an Action was brought upon a like Cuſtom, the

Defendant ſet forth, that the Lds. of the Manor have uſed in Caſe of wreck of any Ship caſt upon the Manor there

that it periſhes, though it be not Wreck, yet the beſt Anchor and Cable belong to the Lord, and that *the Ship* to which this Anchor &c. belonged *ſtruck upon the Soil of the Manor & adtunc & ibidem periit, but that the Men in it were ſaved*, and that the Defendant ſeiſed the Anchor and Cable to the Uſe of the Lord; adjudged that this Cuſtom is void, [it being] *without any Conſideration*. The Reporter ſays, Note, no Cuſtom of Salvage is found. 3 Lev. 85. Hill. 34 Car. 2. C. B. Geere v. Burkenſham.

inter Fluxum & Refluxum Maris *to take Care of the ſick and wounded, and of Burial of the Dead, and to preſerve the Goods caſt there, for the Uſe of the Proprietors, and in Conſideration thereof to have the beſt Anchor and Cable* of the Ship ſo caſt there, and that Ship being wreck'd and caſt upon the Manor, the Defendant as Servant of the Lord took the Anchor and Cable in the Declaration mentioned; Tho' it was objected, that this is no more than common Charity obliges the Lord to do, yet Powel and Rooksby, the only Juſtices then in Court, were of Opinion that ſuch Cuſtom is not unreaſonable, it being for Encouragement and Safety of Navigation; ſed adjornatur. But afterwards it was adjudged for the Defendant. 3 Lev. 307. Trin. 3 W. & M. in C. B. Simpſon v. Bithwood.

Ld. Raym. 474. Trin. 11 W. 3. S. P. accordingly in S. C.

14. Wreck may be *claimed by Preſcription*, and may belong to the Lord High Admiral by Preſcription, for it is an ancient Office Time whereof &c. per Holt Ch. J. And ſaid he made no doubt but Wreck *belonged to the Admiral about the Cinque Ports* and ſuch Places where he was moſt converſant in ancient Time. 12 Mod. 260. Hill. 11 W. 3. in Caſe of Wiggan v. Branthwaite.

15. If a Man, either by Grant or Preſcription, has right to a Wreck *thrown upon another Man's Land*, of neceſſary Conſequence he has a *Right to a Way* over the ſame Land to take it. And the very *Poſſeſſion* of the Wreck is in him that has ſuch Right *before any Seiſure*. Originally all Wrecks were in the Crown, and the King has a Right to a Way over any Man's Ground for his Wreck, and the ſame Privilege goes to Grantee thereof; per Cur. 6 Mod. 149. Paſch. 3 Ann. B. R. Anon.

16. It ſeems that the *taking* of Wreck *before Seiſure* can *not* be *Felony*, becauſe no one has Property of the Goods at the time of the taking. Hawk. Pl. C. 93. cap. 33. S. 24. ſays it ſeems agreed.

(B) Pleadings.

If a Man has Wreck by Preſcription, or by the King's Grant &c. and Goods are wreck'd upon his Lands, and another takes them away, he who has the Wreck ſhall have Action of Treſpaſs Quare Vi & Armis, and this without any Seiſure thereof before. F. N. B. 91. (D) and in the new Notes there (d) it is ſaid, that it is ſo in the King's Caſe, and cites 14 E. 2. Treſpaſs 326.

1. TReſpaſs *of taking Goods Vi & Armis*, the *Defendant juſtified in Jure Uxoris, that he is ſeiſed* in Jure Uxoris *of the Manor of D. and that the Anceſtors of the Feme, and all thoſe whoſe Eſtate they have in the Manor, have had Wreck de mere there Time out of Mind, and a Ship was wreck'd, and came into the ſame Manor with the Goods &c. and the Plaintiff as Lord of the Hundred there would have carried them away, and the Defendant would not ſuffer him*, Judgment &c. and Iſſue joined upon the Preſcription, and it was admitted that a Man *may preſcribe* in Wreck, and ſhall have it by Preſcription *without Charter of the King*; per Hank. the one or the other ſhall not have Wreck; For they have not ſhewn Charter of Grant or Allowance in Eyre; Skrene ſaid, peradventure the Eyre has not been there. Per Thirn, Men have had ſeveral Points of Franchiſe in England without Allowance in Eyre. Per Hank. Wreck *cannot be Parcel of a Hundred*; Horton ſaid, We do not claim it as Parcel, but that the Lords of the Hundred have had Wreck there Time out of Mind by Preſcription, and after Iſſue was joined upon the Preſcription. Br. Wreck, pl. 1. cites 1 H. 4. 16.

2. In

2. In Treſpaſs the Defendant *juſtified for Wreck* by Preſcription, the Plaintiff ſaid, that De ſon tort demeſne abſque hoc that it was Wreck, and it was admitted for a good Plea *without making Title*; quod nota. Br. De ſon Tort, pl. 38. cites 9 E. 4. 22.

3. Treſpaſs of Goods taken, ſcilicet 2 Butts of Wine, the Defendant ſaid, that he is Lord of the Manor of D. and that *he and all thoſe whoſe Eſtate &c. have had Wreck within the ſame Manor Time out of Mind, and the ſame Butts were in a Ship on the High Seas*, which *Ship was drowned, and by the re-flowing of the Water the Butts were caſt upon his Manor, and he took them as Wreck* &c. and the Defendant was compelled to give *Colour*, and ſo he did. Br. Preſcription pl. 32. cites 9 E. 4. 22. Br. Treſpaſs, pl. 182. cites S. C.

For more of Wreck in General, See **Court of Admiralty**, and other proper Titles.

* Writ.

* A Writ is a formal Letter or Epiſtle from the King wrote in Latin on Parchment ſeal'd with his Seal, directed to ſome Judge, Officer, Miniſter, or other Subject at the Suit of the King himſelf or at the Complaint or Suit of other Subject commanding or authorizing ſomething contain'd in the ſaid Letter to be done for the Reaſon briefly in this Letter expreſſed, which is to be diſcuſſed in ſome Court of the King by the Law. Theloal's Dig. of Writs, lib. 1. cap. 1. S. 4.

(A) Writ *Neceſſary* in what Caſes. *And what muſt be done by Writ, or* may be by *Bill*, Commiſſion &c.

1. *BILL to the King inaſmuch as* the *Plaintiff and J. N. were at Iſſue* in ſuch Action, and the Defendant then *Sheriff kept them by Commandment of the Court, and he ſuffer'd them to eat and drink, by which he loſt their Verdict, ad damnum* &c. and the King ſent it to the Juſtices of Bank quod faciant rectum &c. and *Venire facias iſſued againſt the Sheriff*. Br. Bille, pl. 40. cites 24 E. 3. 4.

2. *Bill of Treſpaſs in C. B. for the King and the Party*, that where he was *coming towards the Court to make his Defence of certain Land, the Defendant met with him with his Charters the laſt Term, with others unknown, ſuch a Day and Year in D. in the County of N. and aſſaulted and beat him, and menaced him of Life and of Member, ſo that he dared not approach, but with great Force, to his exceſſive Coſts in Contemptum Regis, contra pacem & ad damnum* &c. Fiſh, demanded Judgment, if of this Treſpaſs in another County ought to be ſued by Writ, and not by Bill. Per Greene, the King is Party, and he comes by Command of the King, and ſo deſpight to the King; and bid him anſwer; Fiſh ſaid, he did no Wrong; Per Mombray, this is no Anſwer; For if others did by his Commandment

ment, you ſhall anſwer. Wherefore he ſaid, Not Guilty. Br. Bill pl. 20. cites 30 Aſſ. 14.

Note, by the Statute of * 27 E. 3. cap. 3. that where Jurors take Money to give their Verdict, the Party may have Bill againſt them immediately before the Juſtices of Niſi Prius,

3. 34 *E.* 3 *cap.* 8. *S.* 1. Enacts, *That in every Plea, whereof the Inqueſt of Aſſiſe doth paſs, if any of the Parties will ſue againſt any of the Jurors, that they have taken of his Adverſary or of him, for to give their Verdict, he ſhall be heard, and ſhall have his Plaint by Bill preſently before the Juſtices, before whom they did ſwear, and that the Juror be put to Anſwer without any Delay.*

S. 2. *And if they plead to the Country, the Inqueſt ſhall be taken preſently.*

S. 3. *And if any Man, other than the Party, ſhall ſue for the King againſt the Juror, it ſhall be heard and determined as aforeſaid.*

S. 7. *And if the Party will ſue by Writ before other Juſtices, he ſhall have the Suit in the Form aforeſaid.*

or other Juſtices; but per Thorp, they cannot award them to Priſon before Judgment. Br. Bille, pl. 46 cites 41 E. 3. 15.

* So are all the Editions of Brooke. The Year-Book does not mention the Statute. But it ſeems it ſhould be Statute of 34 E. 3. cap. 8.

Brooke ſays, ſee 26 H. 6. where it was held that it was Error and not void, but ſays, quære inde; for without Original they have no Commiſſion to hold Plea, and then they are not Judges of this Cauſe; And of this Opinion was Bromley Ch. J. H. 2. M. 1. Ibid.

4. A *Judgment, where there is no Original,* is void by the beſt Opinion. Br. Judgment, pl. 114. cites 37 Aſſ. 17.

5. Ludd. ſaid, that if the *Debtor of the King* be *found in the Exchequer,* he ſhall be compell'd to Anſwer upon his Preſence without Proceſs; Per Fitzh. John, this is *if he be Debtor of Record there,* and *not upon Suggeſtion without Record*; For upon Suggeſtion he ſhall come by Proceſs, quod non contradicitur. Br. Reſponder, pl. 49. cites 40 Aſſ. 35.

Br. Eſcape, pl. 30. cites 42 Aſſ. 11.—Br. Bill, pl. 23. cites S. C. ——S. P. Br. Eſcape, pl. 42. cites 42 Aſſ. 11. ſays, it is ill, becauſe the Statute gives Writ of Debt, and not Bill

6. *Bill of Debt* was brought *in C. B.* upon the Eſcape of a Man condemn'd in Account for 200 l. the Defendant ſaid, that the Plaintiff had a *Bill in the Exchequer of the ſame Debt*, Judgment of the Bill, & non allocatur. And the Opinion of the whole Court was, that this Suit *ought to be by Writ, and not by Bill*, by which the Plaintiff was nonſuited, and and brought Writ and recover'd. Br. Brief, pl. 306. [310.] cites * 41 Aſſ. 11.

——— * All the Editions of Brooke are as here, viz. 41 Aſſ. 11. but it ſeems to be miſprinted, and that according to Br. Eſcape, pl. 3. and pl. 42. it ſhould be 42 Aſſ. 11.

Br. Bille, pl. 3. cites S. C. dubitatur, whether it lies or not, becauſe the Statute gives the Remedy by Writ of Debt, notwithſtanding he was an Officer attendant to the Court; therefore Quære.

7. Bill of Debt was brought *againſt the Warden of the Fleet for letting Priſoners go at large,* inaſmuch as he is an Officer of the Place; but the *Statute ſpeaks of Writ, and not of Bill.* Br. Bille, pl. 38. cites 42 E. 3. 13.

As Writ ſhall *not* iſſue *to inquire of Champerty, Conſpiracy, Confederacy, and Ambodexters,* but it ought to be *by Commiſſion.* Br. Brief, pl. 307. cites 42 Aſſ. 12.

8. A *Thing cannot be done by Writ which ought to be by Commiſſion.* Br. Commiſſions, pl. 16. cites 42 Aſſ. 12.

9. Writ iſſued *to the Eſcheator* of E. *to enquire what Larceny J. N. had done to one W.* by which it was *found that the ſaid J. N. had ſtole* 20 *Gallons*

lons of Wine of the Price &c. *and another Acceſſory*, and this Indictment was ſent into Chancery, and after into B. R. and the Juſtices would not do any Thing, becauſe it was againſt Law. Br. Commiſſions, pl. 16. cites 42 Aſſ. 13.

10. If *a Juſtice of Niſi Prius takes a Verdict*, and *dies before the Day in Bank*, his *Executor ſhall certify* it by Writ, or otherwiſe it is void, Per Gaſcoigne. Br. Record, pl. 17. cites 8 H. 4. 4.

11. Warrant of *Attorney recorded by a Juſtice in the Time of one King cannot be certified by the ſame Juſtice in the Time of another King without Writ*; For their Commiſſion is determined. Br. Record, pl. 17. cites 8 H. 4. 4. per Gaſcoigne.

12. If *a Juſtice takes Conuſance of a Fine and is diſcharged*, this ſhall be certified by Writ. Br. Record, pl. 17. cites 8 H. 4. 4. per Gaſcoigne. *And* if a Juſtice takes ſuch Fine, and *the King dies*, Reſummons ſhall iſſue upon the Writ of Covenant, and Writ to the Juſtices or to his Executors, to certify the Fine. Br. Record, pl. 17. cites 8 H. 4. 4. per Gaſcoigne.

13. Note per Cheney, a Man *ſhall not have Bill in B. R.* againſt another, *unleſs the Defendant be a Priſoner to the Court at the time* &c. *or an Officer* as it ſeems; For if he be not a Priſoner he is not bound to anſwer to a Bill; but he may anſwer gratis if he will, and it is good. Br. Bill, pl. 6. cites 7 H. 6. 41.

Where a Man *takes Surety of Peace of another in B. R. by which he remains in Ward*, by which *another brings Bill againſt him, to which he appears, and* immediately *he who prays the Peace releaſes the Peace* by reaſon whereof it *is not entred that he was Priſoner to the Marſhall*, and the *Defendant in the Bill makes Default in another Term upon a Day given to him and to the Plaintiff by the Court, but no Imparlance at the Suit of the Party*; there he ſhall not be condemned becauſe the Day was given by the Court, and not prayed by the Party; therefore at the leaſt he ſhall have only Proceſs. Brooke ſays, Quære what Proceſs. Br. Bille, pl. 6. cites 7 H. 6. 41.

15. A Man is *impleaded at B. R. and at the Diſtreſs he appears*, and *immediately one affirms Bill againſt him, and prays that he may anſwer when he comes*; for *he comes out of London by Writ of Privilege in Ward of a Serjeant*; Hales ſaid, when he was removed out of London by the Privilege, he is at large as to the Suit in London; and here he is not in Ward; for it is only at the Diſtreſs. Br. Bille, pl. 7. cites 7 H. 6. 41. *And* where a Man is *let to Mainpriſe from Day to Day*, Bill lies not; for *he is not in Ward*; per Hales. *Quære of Bail*, by which the *Party upon his Oath demanded Surety of Peace of him*, and had it; *by which he was committed to the Keeping of the Marſhal, and then was awarded to anſwer to the Bill*; and ſo ſee that the *coming in Ward of a Serjeant by Writ of Privilege is no Impriſonment of B. R.* and therefore it is not ſufficient to award Bill againſt him to another. Quod nota. Ibid.

16. *Precept* by Parol *in a Court Baron* is ſufficient without Writing. Br. Proceſs, pl. 184. cites 16 H. 7. 14. per Cur.

17. *So* if the *Juſtices command the Sheriff to arreſt a Man in the Hall by Parol* and without Writ, this is good. Br. Proceſs, pl. 184. cites 16 H. 7. 14. per Cur.

18. Bill of *Maintenance* by W. *againſt J. who was preſent in Court, becauſe he maintained in the Preſence of the Juſtices one H. in a Suit between the Plaintiff and H.* Defendant demanded Judgment of the Bill; For he *does not ſay that præſens eſt in Curia.* Per Newton, the Bill is not taken becauſe he was preſent and maintained, but that ſedente Curiæ he maintained; and this appears by the Bill. Per Brown, in the Replication ſhall be made expreſs *Mention of his Appearance*, quod Paſton conceſſit. Br. Bille, pl. 10. cites 22 H. 6. 24. And per Port. in *Bill of Maintenance againſt an Attorney*, it ſhall *make mention of the Appearance of the Attorney*, and yet they are always intended to be Attendant at Court; and becauſe this Bill was of Maintenance *ſedente Curia, it ſhall be*

be intended that they have appear'd; for otherwiſe he cannot maintain Sedente Curia; per Port. And after the Bill was awarded good. Quod nota. And it ſeems there, that if the Maintenance had been done Sedente Curia, that the Plaintiff had been put to his Original Writ of Maintenance, and ſhould not have Bill thereof. Ibid.

19. Bill *againſt one in Cuſtodia Mareſcalli*, but in B. R. the Plaintiff recovered notwithſtanding that it *was alleged in Arreſt of Judgment, that there was no Record in the Court by which it may appear that the Defendant was Priſoner*, and upon Search *a Record was found, that he was let to Bail*, which is ſufficient without declaring for what Cauſe he was let to Bail, or how he became a Priſoner; for they are often committed to Ward upon Surmiſe, and let to Bail; but it was agreed, that *if no Record had been, there all had been void*, & coram non Judice; quod nota. Br. Bille, pl. 34. cites 31. H. 6. 10.

20. A Man ſhall *not have Averment againſt the Return of a Sheriff, but* ſhall have *Bill upon the Matter* againſt the Sheriff upon his Account. Br. Bille, pl. 28. cites 3 E. 4. 20.

21. A Man cannot have Bill of Debt *againſt an Executor in Cuſtodia Mareſcalli unleſs all are there*; per Brian; Quod non negatur. Br. Bille, pl. 14. cites 9 E. 4. 12.

S. P. Ibid pl. 41. cites S. C.

22. He who is *accountant in the Exchequer* may have Bill againſt his Debtor; for by this the King may be the more eaſily paid. Br. Bille, pl. 27. cites 9 E. 4. 53.

23. *Bill* of Debt was brought *againſt a Serjeant at Law* preſent in Court, and by the beſt Opinion, the Bill *does not lie*; *but* it lies *againſt an Attorney and Officer*. And per Brian, Bill lies againſt *Members of the Court*, as Officers, Attorneys &c. who are *attending in Court*; for they ſhall be demanded to do their Offices; and *if they are wanting they ſhall be fore-judged of their Offices*, but *contra of Miniſters* who are not Members, *as Sheriff* who returns Writs, Bill lies not againſt him; for his Exerciſe is in Pais in the County, and the ſame of *Ordinary* who comes to have a Clerk delivered to him, he is Miniſter to the Court; but Bill lies not againſt him; and ſeveral ſhall have Privilege, as Cook, Butler, &c. and yet Bill lies not againſt them; for it lies only againſt thoſe who ought to be attendant, as Officers and Attorneys, but a Serjeant is, not bound to be ſo attendant to any one Court, and therefore Bill lies not againſt him. Br. Bille, pl, 31. cites 11 E. 4 2.

24. The Abbot of A. entered into *Account in the Exchequer by Bailiff*, and *pending the Account N. brought Bill of Debt of 20 l. againſt him upon Obligation*, and prayed that he ſhould anſwer. Per Catesby, he has not yet appeared; Per Urſwick Ch. B. he has *appeared by Bailiff, which is his own Appearance*, and during his Account he ought to anſwer. Br. Bille, pl. 12. cites 15 E. 4. 28.

25. *Outlary in Debt, Treſpaſs*, or the like in C. B. without Original is not void but Error, for they are Judges of this Plea; per Littleton. Br. Judgment, pl. 123. cites 19 E. 4. 8.

Br. Action ſur le Stat. pl. 37. cites S. C.

26. A Man ſhall have Bill of *Premunire in B. R. by Bill againſt a Man in Cuſtodia Mareſchalli upon the Statute of Proviſion* without original Writ. Br. Bille, pl. 36. cites 2 R. 3. 17.

Raym. 233. S. C. —— Vent. 267. S. C. 3 Lev. 204

27. No *Plea of* Franktenement can be without Writ. 2 Lev. 98. 123. Hill. 25 & 26 Car. 2. B. R. Lomax v. Armorer. Canon v. Smalwood.

(B) The

(B) The ſeveral Sorts of Writs. And *what an Original and what a Judicial* Writ.

1. OF Writs ſome are *Original*, and ſome are *Judicial*. And of *Original Writs* ſome *are* form'd according to their Caſes, and *of Courſe*, and granted and approved by the Common Counſel of the whole Kingdom, which cannot be chang'd by any Means, without their Agreement and Conſent; *and* ſome of them are call'd *Brevia Magiſtralia*, and are frequently alter'd according to the Variety of Caſes, Facts, and Complaints, As Actions on the Caſe, which vary according to the Variety of every Man's Caſe, and theſe being not of Courſe, the Maſters being learned Men did make them; and Original Writs are either *Real*, *Perſonal*, or *Mixt*. Co. Litt. 73. b.

2. Prohibition is an Original, and upon it B. R. ought to grant an Attachment; quod nota. Br. Prohibition, pl. 6. cites 38 H. 6. 14. per Moil.

3. A. *recovers* againſt B. *in a Præcipe quod reddat by Default*; the *Writ of Diſceit* in this Caſe is Judicial, and iſſues out of the Common-Pleas, and the *Proceſs is Attachment* and Diſtreſs infinite, and is mention'd in the Writ; and in this Caſe *A. and the Sheriff, and the Summoners, and Veiors, are made Parties* by this Writ, that is, he who was Sheriff, and made the Return of the Summons, which by the Writ of Diſceit is alleg'd to be falſe. If the preſent Sheriff did this Diſceit, the Writ of Diſceit aforeſaid, ſhall be directed to the Coroners. Jenk. 122. pl. 46.

4. A *Scire facias* was brought *to repeal Letters Patents for the Grant of a Fair obtain'd upon falſe Suggeſtions*. It was inſiſted, that this being a Judicial Writ was abated by the Death of the Queen, and not aided by the Statute of 1 Annæ cap. 8. But the Attorney General anſwer'd, That this was not a Judicial but an original Writ; That *Judicial Writs are thoſe only that are founded upon Judgment and Judicial Proceſs*; but that this was no Conſequence of any Judicial Proceeding, or founded on the Letters Patents, but only upon the Fraud; and that there are many Scire facias's in the Regiſter among the Original Writs. [The Court ſaid nothing to this Matter.] 10 Mod. 258, 259. Mich. 1 Geo. B. R. the Queen v. Aires.

(C) *Alter'd.* The Effect thereof.

1. IT is illegal to *fill up* a Writ *after it is ſeal'd*, and whoever is arreſted by Virtue of ſuch Writ has an Advantage; Per Holt Ch. J. But the Reporter makes a Quære, if it be falſe Impriſonment, or to be relieved upon Motion. 6 Mod. 310. Mich. 3 Ann B. R. Anon.

2. A Writ *alter'd* in a Thing immaterial *after it is ſeal'd* is doing no Harm, and if it be in any Thing material *before it was ſeal'd*, yet that will not vitiate it, but the Court would not quaſh it or any Proceedings thereon; but ſaid, if the Motion had been made againſt the Clerk that raſed it, and it appear'd to be done after the Writ was ſeal'd, it is a Miſdemeanor and puniſhable. 8 Mod. 243. Paſch. 10 Geo. Crowther v. Wheat.

(D) Writ

See Tit. Waſte (B. a)

(D) Writ *General or Special.* In what Caſes. And in what Caſes the Writ ſhall be General and the *Count Special.*

So in Debt *upon Record.* Br. Count, pl. 80. cites 11 H. 4. 58.

1. DEBT *upon Recovery* the Writ ſhall be General and the Declaration Special upon the Record all in Certain, as the Writ is. Br. General Brief, pl. 17. cites 11 H. 4. 56.

2. In *every Writ founded upon the Caſe*, he ought to put the Special Matter in the Writ; for it is not ſufficient to have General Writ, and make Special Count. Theloal's Dig. lib. 9. cap. 7. S. 27. cites Trin. 7 H. 6. 47.

3. In *Account againſt a Receiver* the Writ ſhall be always General and the Count Special for Merchandize &c. Theloal's Dig. lib. 9. cap. 7. S. 17. cites Trin. 29 H. 6. Accompt 6.

So Writ of *Treſpaſs Quare Clauſum fregit* is general, and yet well; per Littleton. Br. ibid.

4. Treſpaſs upon the 5 R. 2. That the Defendant *enter'd into divers Lands and Tenements of the Plaintiff in D.* &c. And per Danby Ch. J. and Catesby, this Writ is not good, *into diverſe Lands* &c. for the *Incertainty*, tho' he *declares the Certainty in the Count.* Pigot and Comberford Prothonotary ſaid, that there are ſeveral ſuch Writs in the Chancery, and ſeveral ſuch Precedents in C. B. And after the Defendant paſſed over, and pleaded in Bar. Br. Brief, pl. 348. cites 4 E. 4. 18.

5 *So Aſſiſe* is *de libero tenemento* in the Writ, and yet the Certainty is in the Plaint, and the Plaintiff ſhall recover the Land; Per Brian. Br. Brief, pl. 348. cites 4 E. 4. 18.

6. *And Dower unde nihil habet* is uncertain, and yet well. Per Littleton. Br. Brief, pl. 348. cites 4 E. 4. 18.

7. *So* Writ of *Waſte* is, *that the Defendant did Waſte in Land, Houſes, Woods, and Gardens, in* N. which is uncertain, and the Declaration ſhews the Certainty. Br. Brief, pl. 348. cites 4 E. 4. 18. per Pigot.

8. If a Man be *bound to pay Groats and Nobles to ſuch a Value as they were of* 2 E. 4. and in Anno 9 E. 4. *at the Time of the Action brought, they are of a greater Value*, the Party ſhall have General Writ and Special Declaration. Br. Gen. Brief, pl. 27. cites 9 E. 4. 49.

9. Writ *founded upon a particular Act of Parliament ſhall make Mention of the Act*, As where it is *enacted, that the Chancellor calling to him, the Juſtices of the one Bench and the other may determine Cauſes of Diſſeiſin between A. and B. and ſhall call B. by Subpœna*, this Writ ſhall be Special and not General; By all except Littleton. And by this it ſeems that the Chancellor cannot determine Plea of Land nor Diſſeiſin without Act of Parliament. Br. Brief, pl. 487. cites 14 E. 4. 1.

10. It was *Enacted by Parliament, That G. ſhall anſwer to A. of all Riots and Treſpaſſes* to him done, *and that he ſhall have Writ with two Proclamations out of Chancery*, by which Proclamation ſhall be made at two Market-Days in the County of C. *to make him appear and anſwer to all Writs and Bills brought againſt him by A. in Pais* &c. and the *Writ was Generally to anſwer of diverſe Treſpaſſes and Riots, and ſhew'd none certainly.* And becauſe every Original ought to be certain and comprehend to what a Man ſhall anſwer, and this Writ does not comprehend any Certainty; And alſo is not warranted by the Act; Therefore by Judgment the Defendant was diſmiſſed. For *tho' the Act was General, yet the Writ to which the Defendant ſhall anſwer ſhall be certain*, as in Garniſhment in Detinue,

Detinue, the Garnithee ſhall anſwer to the Writ of Detinue, and yet the Scire facias which ſhall iſſue to warn him ſhall be certain; and *in B. R. they uſe to award Capias to anſwer to certain Treſpaſſes or Felonies*, and well; For it *is the Courſe and it is at the Common Law, but this Caſe is upona particular Statute*, and therefore ought to comprehend all certainly. Br. Brief, pl. 399. [403] cites 22 E. 4. 47.

11. If a *Statute gives ſpecial Matter contrary to the Common Law*, as the Ward of Ceſty que Uſe &c. *and does not give ſpecial Writ*, there the Writ ſhall be general as it was at Common Law, that he died in his Homage, and if the Defendant ſays in avoiding it, that his Father made a Feoffment &c. abſque hoc that he died in his Homage, and the other ſays by Replication, that the Father made the Feoffment to the Uſe of him and his Heirs, this is a good Replication in maintaining of the Action; quod nota. Br. General Brief, pl. 1. cites 27 H. 8. 3.

(E) *Variance between* the *Writ* and the *Regiſter.*

1. IF *Aſſiſe* be *monſtraverunt nobis* where it ſhould be *Queſtus eſt nobis*, or if it be Quod *diſſeiſivit eum* where it ſhould be *Injuſte diſſeiſivit eum*, or if it be Quod *diſſeiſivit eum of* 100 *Acres in D.* where it ſhould be *De libero Tenemento in D.* ſuch Writs ſhall abate becauſe they do not purſue the Form of the Regiſter; and yet the Matter is ſufficient, and all is of one Effect, and yet Writ of * Formedon which makes the Demandant Heir to his Father, and the Father Heir to the Grandfather, and the Grandfather Heir to the Great Grandfather who was Donee in Tail where the Father never held Eſtate ſuch Writ is good; for every one is made Heir to another therefore is the Demandant made Heir to him who was laſt ſeiſed, and ſo well; and the Diverſity between thoſe Caſes is, in as much as in the one Caſe the Writ appears to want Form, and in the other Caſe the Writ may be as it purports, and the Default which does not appear ſhall be diſcloſed by Exception of the Party, and therefore in the one Caſe the Writ ſhall abate, and in the other not; note the Diverſity. Br. Faux Latin, pl. 116. cites 11 H. 6. 20.

* See tit. Formedon (H) pl 25. (I) pl. 7.

2. A *Writ of Protection* was brought into Court under the Great Seal, to ſtay an Outlawry in Aſſumpſit quia ipſe (the Defendant) in Guerris noſtris in Flanderia detentus exiſtit &c. But Exception was taken to the Writ, becauſe it *had not the Words (Loquela coram Juſticiariis noſtris Itinerantibus)* according to the Regiſter. Sed non allocatur; for Iters have been diſcontinued a long time; and it is not to be intended De Itineribus circa Foreſtas. 3 Lev. 332. Trin. 4 W. & M. in C. B. Barrudale v. Lord Cutts.

For more of Writ in general, ſee **Abatement, Amendment, Formedon,** and other proper Titles.

(A) Year, Day, and Waſte.

This appears by Glanvill to be due to the King by his Ancient Prerogative.

1. 9 *H.* 3. *cap.* 22. *WE will not hold the Lands of them that be* * *convict of* ‡ *Felony but one Year and one Day, and then thoſe Lands ſhall be deliver'd to the Lords of the Fee.*

2 Inſt. 36. cites Glanvil 7. cap. 17. fol. 59.

This Chapter of Magna Chartæ doth expreſs that which doth belong to the King, viz. The Year and the Day, and omits the Waſte as not belonging to him; and this is notably explain'd by our ancient Books with an uniform Conſent. 2 Inſt. 36. cites Bracton, lib. 3. fol. 129. & 137. and Britton, cap. 5. fol 14 and Fleta, li. 1. cap. 28. and Mirror, cap. 5. S. 2. ——The Mirror, ſpeaking of this Chapter, ſaith, Le point des terres aux felons tener per un an, eſt deſuſie, car per la ou le Roy ne duiſt aver que le gaſt de droit, ou l'an in noſme de fine pur ſalver le fief de l'eſtripment preignont les miniſters le Roy ambideux. Upon all which it appears, that the King originally was to have no Benefit in this Caſe upon the Attainder of Felony, where the Free-Land was holden of a Subject but only in Deteſtation of the Crime, Ut pœna ad pauces, metus ad omnes perveniat; to proſtrate the Houſes, to extirp the Gardens, to eradicate his Woods, and to plow up the Meadows of the Felon; for ſaving whereof, & pro bono publico, the Lords, of whom the Lands were holden, were contented to yield the Lands to the King for a Year and a Day; and therefore not only the Waſte was juſtly omitted out of this Chapter of Magna Chartæ, but thereby it is enacted, That after the Year and Day the Land ſhall be render'd to the Lord of the Fee, after which no Waſte can be done. 2 Inſt. 37.——Serjeant Hawkins ſays it ſeems agreed, that by the *Common Law*, upon an Attainder of *Felony*, the King had a Right utterly to waſte the Lands holden of any but himſelf, whereof the Perſon attainted was ſeiſed of any *Eſtate of Inheritance*, either in his own or in his Wife's Right. And it is ſaid by ſome, That the King hath both this Right, and alſo a Right to hold ſuch Lands for a Year and a Day. But it is holden by others. That the Right to hold over the Lands for a Year and a Day was *given* to the King in *Lieu of the Waſte*, And it ſeems implied in *Magna Charta*, cap. 22. which ſaying, That the King ſhall not hold over the Lands of thoſe convicted of Felony but for one Year and a Day, and making no mention of the Waſte, it ſeems plainly to intimate, that at the Time of the making that Statute the King was thought to have no other Right but only to the Year and Day. 2 Hawk. Pl. C. 449. cap. 49. S. 8.——Ibid. in Marg. ſays it ſeems admitted, 8 Ed 3 Fitzh. Trav. 489. Preſcription 50. That the King was intitled to the Waſte as well as to the Year and Day ſince this Statute.

And where the Treatiſe of Prærogativa Regis, made in 17 E. 2. ſays, Et poſtquam Dominus Rex habuerit annum, diem, & vaſtum, tunc reddatur tenementum illud capitali Domino feodi illius, Niſi Prius faciat finem pro anno, die & vaſto; which is ſo to be expounded, that foraſmuch as it appears in the ſaid old Books, that the Officers and Miniſters did demand both for the Waſte and for Year and Day, that came in Lieu thereof, therefore this Treatiſe named both, not that both were due, but that a reaſonable Fine might be paid for all that which the King might lawfully claim. But if this Act of 17 E. 2. be againſt this Branch of Magna Chartæ, then is it repeal'd by the ſaid Act of 42 E. 3. cap. 1. 2 Inſt 37.——2 Hawk Pl. C. 449 cap. 49. S. 8. ſays, that the Statute de Prerogativa Regis, made in the 17 *Ed* 2. having declared the King's Right to the Year and Day, and alſo to the Waſte, it ſeems to have been the more general Opinion ſince that Time, that he hath a Right to both. Indeed if this Statute had been againſt the expreſs Purview of Magna Chartæ, it would have been clearly repeal'd by thoſe many ſubſequent Statutes, which repeal all Statutes contrary to Magna Chartæ; but being not contrary to the expreſs Words of it, but only to what is argumentively drawn from it, it may be well argued that it is ſtill in Force. 2 Hawk. Pl. C. 449. cap. 49. S. 8.

Hereby it alſo appears how neceſſary the reading ancient Authors is for underſtanding of ancient Statutes. And out of theſe old Books you may obſerve, that when any thing is given to the King in Lieu, or Satisfaction of an ancient Right of his Crown, when once he is in Poſſeſſion of the new Recompence, and the ſame in Charge, his Officers and Miniſters will many times demand the old alſo, which may turn to great Prejudice, if it be not duly and diſcreetly prevented. 2 Inſt. 37.

If there be Lord, Meſne, and Tenant, and the Meſne is attainted of Felony, the Lord Paramount ſhall have the Meſnalty preſently; For this Prerogative belonging to the King, extends only to to the Land, which might be waſted, in Lieu whereof the Year and Day was granted. 2 Inſt. 37.

And this is to be underſtood when a Tenant in Fee-ſimple is attainted; For when Tenant in Tail, or Tenant for Life is attainted, there the King ſhall have the Profits of the Lands during the Life of Tenant in Tail, or of the Tenant for Life. 2 Inſt. 37.

* Here

* Here Convicti, in a large Senſe, is taken for Attincti. For the Nature and true Senſe of both theſe Words, ſee the Firſt Part of the Inſtitutes; and likewiſe for this Word Felony there. 2 Inſt. 37.

† Muſt be underſtood of all manner of Felonies puniſh'd by Death, and not of Petit Larceny, which notwithſtanding is Felony. 2 Inſt. 38.

2. If *Lord and Tenant* are, and the *Tenant is attainted of Felony*, and the *King has Annum Diem & Vaſtum*, yet *if the Lord enters without due Proceſs, and the Writ ſued to the Eſcheator, the Land ſhall be re-ſeiſed*, and he ſhall anſwer for the meſne Iſſues and Profits. Br. Re-ſeiſer, pl. 36. cites 8 E. 2. and Fitzh. Traverſe, 48.

3. The Statute de Prerogativa Regis, cap. 15. wills, that *if a Felon has Land* tunc *Rex ſtatim illam habeat, & habeat inde Annum & vaſtum & Terra diſtruetur* &c. *& tunc reddatur capitali Domino* &c. Quære if this Word (*Statim*) ſhall be otherwiſe intended but *after Office found.* Br. Corone, pl. 209.

4. *Tenant by Copy of Court Roll by the Verge in ancient Demeſne committed Felony, and was attainted of it*, and Annum Diem & Vaſtum was awarded for the King, and the Reaſon ſeems to be, in as much as *Franktenants in ancient Demeſne have no other Evidence but Copies of Court Rolls*; for *otherwiſe* it ſeems to be *of a mere Copyholder out of ancient Demeſne* for other Franktenement. Br. Tenant per Copie &c. pl. 22. cites 3 E. 3.

5. A Man was *outlawed of Felony*, and *alien'd his Land to J. N.* by which *Scire facias iſſued* againſt him, who came and would have *traverſed the Felony*, and the Court doubted if he may traverſe it, by reaſon that he is a *Stranger to the Record*; but per Pigot by 7 E. 4. 2. he cannot traverſe it in Caſe of Felony being a Stranger to the Record, contra in Caſe of Treſpaſs; by which it was prayed for the King that Year, Day, and Waſte be adjudged for the King immediately, and ſo it was immediately from that Day till a Year and a Day next after; quod nota. Quære if the King may *take* the Year and the Day *at what time he pleaſes*, it ſeems he cannot. Br. Corone, pl. 205. cites 49 Aſſ. 2.

The King *ſhall have the firſt* Year and Day and Waſte of the Land of him who is attainted of Felony, *which comes after the Attainder, and whoſoever takes the Profits this Year ſhall anſwer* the Profits *to the King*; per Fitzherbert. But it ſeems that this is to be underſtood *after Office found, or that the Inqueſt which attaints him finds alſo what Lands he had at the Time of the Felony committed or after.* And in the Caſe above of 49 Aſſ. 2. *the Outlawry of Felony was* 8 *E.* 3. and *Writ iſſued to the Coroners to inquire of his Goods, Lands, and Tenements* 48 *E.* 3. which *return'd that he had Land, and alien'd to J. N. after the Outlawry*; and upon this *Scire Facias iſſued againſt J. N. who came and would have traverſed the Felony*, and the Year and Day was awarded to the King with the Waſte. And ſo it ſeems that the *King cannot take it, unleſs after Office, which was thirty Years after, as there.* But Quære if, upon the Office found, he who receives the Profits the firſt Year after the Felony ſhall not be charged; it ſeems he ſhall, per Fitzh. above. Quære the Experience thereof in B.R. Br. Corone, pl. 207. cites F. N. B. fo. 144.

FINIS.

FH
MVSEVM
BRITANNICVM